

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

In the Matter of )

Petition to Amend the Commission's )  
Rules Governing Practices of Video )  
Programming Vendors )  
)  
)

MB RM-11728

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To: The Commission

Federal Communications Commission  
Office of the Secretary

REPLY COMMENTS OF THE  
NATIONAL ASSOCIATION OF BROADCASTERS

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**REPLY COMMENTS OF THE  
NATIONAL ASSOCIATION OF BROADCASTERS**

**I. Introduction**

As the National Association of Broadcasters ("NAB")<sup>1</sup> explained in its Opposition,<sup>2</sup> Mediacom Communications Corporation's ("Mediacom") Petition for Rulemaking<sup>3</sup> proposes new rules affecting retransmission consent, carriage of nonbroadcast programming, and Internet content that are well beyond the scope of any Commission authority, contrary to law and harmful to the public interest. Mediacom failed to present evidence supporting its claims that it is "forced" to carry certain

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<sup>1</sup> The National Association of Broadcasters is a nonprofit trade association that advocates on behalf of local radio and television stations and broadcast networks before Congress, the Federal Communications Commission and other federal agencies, and the courts.

<sup>2</sup> Opposition of the NAB to Mediacom Petition for Rulemaking in RM-11728 (Sept. 29, 2014) ("NAB Opposition").

<sup>3</sup> Petition for Rulemaking of Mediacom Communications Corporation (Jul. 21, 2014), RM No. 11728 ("Petition" or "Mediacom Petition"); Public Notice, Consumer & Governmental Affairs Bureau Reference Information Center Petition for Rulemaking Filed, Report No. 3008 (Jul. 29, 2014).

programming or that the prices it pays for any programming are “discriminatory” or otherwise result from unlawful or anticompetitive conduct. Similarly, none of the proponents of a rulemaking to consider the Mediacom Petition or other rule changes has advanced a legal rationale or provided relevant data to support their contentions. Accordingly, NAB renews its request that the Commission dismiss the Mediacom Petition.

## **II. The Mediacom Proposals Would Unlawfully Skew Negotiations in MVPDs’ Favor to the Detriment of Consumers**

Broadcast commenters and other video content providers agree with NAB that Mediacom’s proposals are beyond the scope of the Commission’s authority and would only serve to “benefit multichannel video programming distributors (“MVPDs”) at the expense of consumers and the public interest.”<sup>4</sup> As NAB and these commenters explain, the Commission should not consider Mediacom’s proposals to regulate the terms of retransmission consent agreements because it lacks the authority to adopt such proposals,<sup>5</sup> as Congress clearly intended that the marketplace “determine the terms of retransmission consent.”<sup>6</sup> Mediacom’s proposals to give MVPDs various

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<sup>4</sup> Comments of LIN Television Corporation (“LIN”) in RM-11728 (Sept. 29, 2014) at 1 (“LIN Comments”). See also Joint Opposition of CBS Corporation, The Walt Disney Company, Time Warner, Inc., Twenty First Century Fox, Inc., and Viacom, Inc. (the “Content Companies”) in RM-11728 (Sept. 29, 2014) at 1 (“Content Companies Comments”) (the Mediacom proposals rely on “the erroneous proposition that the Commission has both the authority and the justification to tilt the distribution market in cable operators’ favor by constraining the ability of content providers to engage in commercial negotiations for the carriage of their programming”); NAB Opposition at 6-17.

<sup>5</sup> See, e.g., LIN Comments at 1-2.

<sup>6</sup> LIN Comments at 2, citing S. Rep. No. 102-92 at 36 (1991) (“*Senate Report*”); Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385 (1992), § 2(b).

regulatory advantages in retransmission consent negotiations,<sup>7</sup> regulate the channel position and tier placement of broadcast signals and other programming,<sup>8</sup> regulate prices for retransmission consent,<sup>9</sup> and limit the ability of broadcasters and MVPDs to negotiate agreements involving a mix of monetary and in-kind compensation,<sup>10</sup> would each fly in the face of Congressional intent and the plain language of the statute. And there is no question that Section 325 explicitly permits broadcasters to negotiate “individualized retransmission consent terms with different MVPDs.”<sup>11</sup> As the Content Companies observe, Mediacom concedes that such terms “may include an MVPD’s agreement to provide consideration in part through carriage of a broadcaster’s other programming.”<sup>12</sup> No commenter has provided a rationale for any other interpretation of Section 325, its legislative history, or applicable Commission precedent.

Several commenters also concur with NAB that, aside from being contrary to law, the Mediacom proposals would be harmful to the public interest.<sup>13</sup> The current retransmission consent system allows content creators and programmers, including broadcasters, to “invest in high-quality local content and innovative new ways to access

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<sup>7</sup> Mediacom Petition at 16-18.

<sup>8</sup> Mediacom Petition at 16 (“a la carte” programming option).

<sup>9</sup> Mediacom Petition at 16-17 and 24-25 (the “a la carte,” unbundling and uniform pricing proposals would all—either directly or indirectly—involve regulation of retransmission consent fees).

<sup>10</sup> Mediacom Petition at 16 (unbundling proposal).

<sup>11</sup> Content Companies Comments at 6-7, citing 47 U.S.C. § 325(b)(3)(C)(ii).

<sup>12</sup> Content Companies Comments at 6-7, citing Mediacom Petition at 33; *Implementation of the Satellite Home Viewer Improvement Act of 1999, Retransmission Consent Issues: Good Faith Negotiation and Exclusivity*, First Report and Order, 15 FCC Rcd 5445 at ¶ 56 (2000) (“*Good Faith Order*”).

<sup>13</sup> NAB Opposition at 13, 17-18.

it precisely because they have the flexibility to enter into a variety of distribution arrangements,"<sup>14</sup> ultimately leading to "expanded consumer access to programming."<sup>15</sup> Limiting the ability of broadcasters and MVPDs to reach retransmission consent agreements that suit the unique circumstances of the parties, their subscribers/viewers, the markets, content, and numerous other considerations<sup>16</sup> will impede the development and distribution of programming to consumers. Some of Mediacom's proposals would in fact automatically foreclose discussion about carriage of certain programming, particularly new programming options, contrary to longstanding policies designed to promote competition, diversity and localism.<sup>17</sup>

Like NAB,<sup>18</sup> several commenters further urge the Commission to reject Mediacom's proposal to restrict the ability of broadcasters and other video programming providers to fully control video content on their websites.<sup>19</sup> The Content Companies observe that Mediacom's proposal would require the Commission to subject programmers' content to "a new, non-statutory copyright license for online distribution"—but state that, unsurprisingly, Mediacom has identified no Commission

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<sup>14</sup> Content Companies Comments at 7-8.

<sup>15</sup> Content Companies Comments at 8.

<sup>16</sup> NAB Opposition at 11-12.

<sup>17</sup> NAB Opposition at 17-18. See *also* LIN Comments at 2, quoting Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385 (1992), § 2(b) (Mediacom's retransmission consent proposals would run exactly counter to national policies to "[p]romote the availability to the public of a diversity of views and information through cable television and other video distribution media;" to "[r]ely on the marketplace...to achieve that availability; and "[e]nsure that cable operators do not have undue market power...").

<sup>18</sup> NAB Opposition at 3-5.

<sup>19</sup> See Mediacom Petition at i-iv, 3-4, 13, 17.

authority to impose such requirements.<sup>20</sup> Indeed, no commenter supporting this proposal has offered any theory under which such a regulation could be adopted.<sup>21</sup>

### **III. Proponents Supporting the Mediacom Petition or Other Retransmission Consent Regulations Fail to Offer an Evidentiary, Legal or Policy Basis for These Proposals**

Although several MVPDs and others urge the Commission to initiate a rulemaking to consider the Mediacom proposals or other potential rules that would govern retransmission consent and other programming agreements, the record remains devoid of evidence that any broadcaster has “forced” any MVPD to purchase bundles of programming or agree to any other terms.<sup>22</sup> As LIN explains, “MVPDs are not obligated to accept terms proposed by broadcasters that elect retransmission consent. They are free to negotiate for different terms or refuse to purchase retransmission consent rights on terms that are not commercially attractive to the MVPD.”<sup>23</sup>

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<sup>20</sup> Content Companies Comments at 4. *See also* LIN Comments at 3 (FCC lacks authority to implement Mediacom Internet regulation proposal, which raises First Amendment issues).

<sup>21</sup> *See, e.g.*, Comments of Public Knowledge (“PK”) in RM-11728 (Sept. 29, 2014) at 1 (“PK Comments”) at 8-9. PK baldly asserts that the Commission should first adopt this proposal in the retransmission consent context “as a prelude to later reforms” because it should “act where its authority is clearest” but offers no explanation of how or why the retransmission consent statute could possibly authorize adoption of such a rule. *Id.*

<sup>22</sup> *See, e.g.*, Comments of Blackbelt TV in RM-11728 (Sept. 29, 2014) at 1 (claiming, but offering no evidence, that its programming is not carried because the “largest media companies” are “forcing cable operators to accept an ‘all or nothing’ bundle of networks” and urging the FCC to adopt mandatory set-asides for “independent programmers”); PK Comments at 1, 6-8 (asserting, without evidence, that large programmers “force distributors to carry their less popular programming,” and urging FCC to ban most favored nation clauses, prohibit in-kind compensation involving carriage of non-broadcast programming, cease applying statutory tier buy-through requirements, and establish an a la carte model for sports programming channels); Comments of Charter Communications, Inc. (“Charter”) in RM-11728 (Sept. 29, 2014) at 15-16 (asserting that the FCC can regulate “forced bundling” and “volume discounting” under Section 325).

<sup>23</sup> LIN Comments at 1-2.

At bottom, MVPDs clearly wish for the government to ensure that they can pay lower prices—or perhaps nothing at all—for retransmission consent.<sup>24</sup> Congress, however, determined that retransmission consent prices, terms and conditions were not to be set by Congress or the Commission, but negotiated in the marketplace, subject only to the obligation of both broadcasters and MVPDs to negotiate in good faith. If a price, term or condition is negotiated and an agreement is reached, and no party has violated the good faith standard, then those prices simply reflect the current retransmission consent marketplace.

As the Commission stated in its *Good Faith Order*, “it is not practically possible to discern objective competitive marketplace factors that broadcasters must discover and base any negotiations and offers on.”<sup>25</sup> Rather, “it is the retransmission consent negotiations that take place that are the market through which the relative benefits and costs to the broadcaster and MVPD are established.”<sup>26</sup> Commenters have offered no explanation for how the Commission can simply disregard Section 325 or the statutory basic tier requirement<sup>27</sup> to adopt proposals that would regulate the prices, terms and conditions of retransmission consent, allow for channel/tier placement inconsistent with

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<sup>24</sup> See, e.g., Comments of CenturyLink in RM-11728 (Sept. 29, 2014) at 1 (“Broadcast and regional sports programming are the most expensive programming and it is the negotiations regarding retransmission of these types of programming that warrant the greatest scrutiny and reform.”); Comments of Verizon in RM-11728 (Sept. 29, 2014) at 9 (“For the past 20-plus years, MVPDs have had to pay for carriage of over-the-air broadcast programming...”).

<sup>25</sup> *Good Faith Order* at ¶ 8.

<sup>26</sup> *Good Faith Order* at ¶ 8.

<sup>27</sup> 47 U.S.C. §543(b)(7)(A).

the statute, or restrict non-cash compensation for retransmission consent contrary to clear Congressional intent.<sup>28</sup>

Mediacom and other proponents of altering the retransmission consent regime also fail to explain how disadvantaging broadcasters and increasing MVPDs' bargaining power would benefit consumers or, indeed, will do anything other than pad MVPDs' pocketbooks. Economic scholarship continues to conclude that retransmission consent has a very significant positive impact on "the quantity and quality of broadcast programming and in broadcasters' ability to invest in improved facilities and new technologies."<sup>29</sup> A recent study of retransmission consent and the market for video content found that the monies television stations received in retransmission consent revenues in 2013 "accounted for 34 percent of their spending on programming;" in other words, "in the absence of retransmission consent compensation broadcasters would have had to reduce the amount they spend producing content by more than a third."<sup>30</sup> Neither Mediacom nor other entities proposing fundamental changes to retransmission consent have refuted evidence demonstrating the public benefits of the current retransmission consent system.

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<sup>28</sup> *Senate Report* at 35-36 (explicitly recognizing that broadcasters may negotiate other types of compensation with MVPDs, including "the right to program an additional channel on a cable system").

<sup>29</sup> NERA Economic Consulting, Jeffrey A. Eisenach, Ph.D., *Delivering for Television Viewers: Retransmission Consent and the U.S. Market for Video Content* (July 2014), at 28.

<sup>30</sup> *Id.* This study specifically concluded the "retransmission consent has led to increases in local television news" and helped broadcasters to retain rights to programming, including sports, "that would not otherwise have been available on free over-the-air television." *Id.* at 29-30.

#### IV. Conclusion

The Commission should decline to entertain yet another round of proposals to tilt retransmission consent negotiations in favor of MVPDs and otherwise penalize broadcasters, other programmers, and ultimately, consumers. None of these proposals are supported by any evidence, legal rationale, or public interest justification.

Accordingly, NAB urges the Commission to dismiss Mediacom's Petition.

Respectfully submitted,

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October 14, 2014

## CERTIFICATE OF SERVICE

I, Erin L. Dozier, Senior Vice President and Deputy General Counsel of the National Association of Broadcasters, certify that on this 14<sup>th</sup> day of October, 2014, a copy of the foregoing Opposition was sent by first-class U.S. mail, postage prepaid to the following:

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