Before the

Federal Communications Commission

Washington, D.C. 20554

In the Matter of	)	
	)	
Revision of the Commission's Program Access Rules	)	MB Docket No. 12-68
	)	
News Corporation and the DIRECTV Group, Inc., Transferors, and Liberty Media Corporation, Transferee, for Authority to Transfer Control	)	MB Docket No. 07-18
	)	
Applications for Consent to the Assignment and/or Transfer of Control of Licenses, Adelphia Communications Corporation (and subsidiaries, debtors-in-possession), Assignors, to Time Warner Cable Inc. (subsidiaries), Assignees, et al.	)	MB Docket No. 05-192

COMMENTS OF MEDIACOM COMMUNICATIONS CORPORATION

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SUMMARY

Section 628 of the Communications Act directs the Commission to implement and enforce rules to prevent "unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or prevent any multichannel video programming distributor from providing satellite cable programming…to subscribers or consumers." The stated purposes underlying Section 628 include "promot[ing] 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."

The Commission has initiated the instant rulemaking proceeding for several reasons. One reason is to consider whether certain rules mandated by Section 628 with respect to exclusive agreements between cable-operators and cable-affiliated programmers should be allowed to sunset. A second reason is to solicit comment on whether there are other aspects of the rules implementing Section 628 of the Communications Act that "should be modified, streamlined, expanded or repealed." In these comments, Mediacom Communications Corporation ("Mediacom") focuses on this second objective and, in particular, urges the Commission to revise its rules so that they more effectively address unjustified (and unjustifiable) volume discounting practices and coercive bundling tactics engaged in by video programmers (both cable-affiliated and non-cable-affiliated) to the detriment of competition and consumers.

Coercive Bundling Practices. As far back as 2003, Mediacom identified for the Commission various practices engaged in by programmers that are harming competition and consumers and contributing to the rising cost of multichannel video service. One such practice is the use of economic coercion to compel distributors to purchase and package an ever-increasing "bundle" of networks without regard for subscriber need or interest. Even when these "tying" arrangements fall short of crating an actionable case under the antitrust laws, they still impede consumer and MVPD choice, increase the wholesale and retail costs of subscription service and otherwise produce the very harms to the public interest that Section 628 is intended to prevent.

The programmers' coercive bundling practices take several forms. For example, owners of the most popular programming services often use their market power to force MPVDs to purchase and carry unwanted network by bundling them together with desired "marquee" networks at a "discounted" price. However, the actual terms of these "discounted" bundles are designed to make it uneconomical for an MVPD to do anything other than capitulate to the programmers' demands. In one instance, when Mediacom asked for an "unbundled" price for a programmer's "strong" network, the price proposal it received raised the percentage of future rate increases (which already were in the double digits) by fifty percent. As a result, even though Mediacom's subscribers had limited interest in the programmer's networks, Mediacom was effectively coerced into taking those unwanted networks.

Another one of the programmers' anti-consumer bundling tactics is to coerce distributors into placing their networks on a preferred tier. This is accomplished not only by flatly denying MVPDs the right to offer any of the programming on an *a la carte* basis, but also by setting an uneconomic price for carriage of the channel on a tier that does not achieve a specified penetration threshold. There even are instances in which programmers engage in "reverse" tying by conditioning the carriage of a weaker service on carriage of a strong service.

These practices all adversely impact competition and consumers. Competition among programmers and diversity of content is harmed because distributors are forced to favor the bundled networks at the expense of independent programming networks. Competition among distributors also suffers because smaller MVPDs lack the resources to develop service offerings that distinguish them, either based on price or content, from larger competitors. These lost opportunity costs are exacerbated as meeting the programmers' demands slows the deployment of broadband and other advanced services.

There is a growing recognition that the programmers' bundling practices are forcing MVPDs to offer, and customers to pay for, "too many networks." And while even some programmers are now admitting that the system has become "bloated," the situation continues to worsen as programmers engage in the same coercive tactics in order to dictate whether and how MVPDs can offer access to programming on Internet-connected devices or give consumers the opportunity to take advantage of technological advances that enhance their ability to time or space shift.

There is a perception that MVPDs are the ones calling the shots as to whether and how consumers can access content on various platforms, including the Internet; in fact, however, it is the programmers that are making those decisions. In order to address the imbalance in the marketplace, the Commission should adopt rules requiring programmers who offer bundled programming rates to make available their networks for purchase on an unbundled basis at prices that do not exceed the bundled price over the life of the agreement. Adoption of such a rule falls within the Commission's "broad and sweeping" power under Section 628 to prevent unfair competition and otherwise promotes the goals of that section.

Unjustified Volume Discounting. Another practice that harms competition and consumers is the establishment of "volume discounts" that discriminate in favor of larger MVPDs without any economic justification. Although Section 628 makes discriminatory pricing unlawful, it carves out an exception for volume-based discounts. Such discounts are supposed to be allowed only where they reflect "economies of scale, cost savings, or other direct and legitimate economic benefits reasonably attributable to the number of subscribers served by the distributor." Unfortunately, this limitation on when discriminatory volume based pricing is permitted has been largely negated by the FCC's amorphous definition of what constitutes a "legitimate economic benefit" and by distributors' lack of access to the rates that programmers charge individual MVPDs – information that is essential to bringing a complaint alleging a violation of the rules.

In order to restore meaning to the prohibition on discriminatory pricing, the Commission should (i) require that the net effective rate for video programming be the same for all MVPDs, regardless of distribution technology, size, or market characteristics and (ii) require that programmers waive existing confidentiality provisions and disclose the net effective rates that various MVPDs actually pay (as well as other material contract terms). To the extent that it is required by Section 628, the Commission could establish a "special relief" procedure whereby programmers may seek advance approval of specific quantity-based discounts on the basis of a rigorous accounting of the direct volume-related savings.

This proposal is consistent with the fundamental principle, enshrined in the Robinson-Patman Act, that fair competition requires businesses at the same functional level to stand on equal competitive footing with respect to input prices. No longer should the price that is charged to provide a consumer with a particular program network vary based on nothing more than the number of other customers served by the subscriber's chosen MVPD. There simply is no "direct" economic basis for such pricing discrimination. And even if the statutory reference to "direct" benefits did not in and of itself preclude the Commission from considering the "indirect" benefit that allegedly arises because of the relationship between the number of subscribers served and advertising revenues, the ability of an entity to generate more revenues and thus extract price concessions that harm the ability of smaller entities to compete is the reason for laws restraining price discrimination, not an excuse for allowing it.

Extending Rules to Programmers That are Not Vertically Integrated With Cable. The public's interest in protection from unjustified volume discounts and coercive program bundling does not vary depending on whether or not the programmers engaging in these practices are affiliated with a cable operator. Moreover, because most of the programmers engaging in these practices today are <u>not</u> affiliated with cable operators, continuing to apply pro-consumer and pro-competition rules only to cable-affiliated programmers will frustrate the accomplishment of the statutory objectives of Section 628. For these reasons, the Commission should apply the restrictions on volume discounts and bundling proposed herein to all programmers.

The programming marketplace has been radically transformed over the past 20 years. While cable-affiliated programmers were dominant in 1992, they now represent a small and declining share of the market. Today, most of the top programmers are vertically integrated with broadcasters and/or motion picture studios, not cable operators. Many of these programmers are beginning to make forays into the world of video distribution through the Internet and other platforms. The growth of robust competition among MVPDs has given these programmers, who control must-have broadcast and non-broadcast programming, the ability and incentive to use volume discounting and bundling practices in ways that harm competition and consumers.

In light of these changed circumstances, the Commission, following the lead of the court in *Cablevision II*, can and should extend the scope of the rules proposed herein so they are not limited to cable-affiliated programmers. Just as the Commission was found to have the power to extend certain of its rules under Section 628 to terrestrial programming even though the statute refers solely to "satellite" programming, so too may the Commission extend rules addressing volume discounting and bundling to all programming services notwithstanding specific references in the law to cable-affiliated services. It is not surprising that Congress was focused on cable-affiliated programmers in 1992. But fortunately, Congress had the foresight to give the

Commission "broad and sweeping" authority with respect to unfair practices in the video marketplace and to make the specified provisions a floor, not a ceiling.

Finally, the Commission's ancillary authority under Section 4(i) of the Communications Act gives it an independent jurisdictional basis for regulating anti-competitive and anti-consumer practices by programmers that are not affiliated with cable operators. The Commission's general jurisdictional grant under Title I clearly covers the regulation of the relationships between and among MVPDs, programmers, and consumers. And regulating bundling and volume discounting practices of all programmers is reasonably ancillary to the Commission's effective performance of its statutory duties under Section 628. Indeed, if the Commission continues to regulate only cable affiliated programmers, it will frustrate the accomplishment of the public interest goals that Congress sought to achieve by enacting Section 628.

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COMMENTS OF MEDIACOM COMMUNICATIONS CORPORATION

Mediacom Communications Corporation ("Mediacom") hereby submits its comments in response to the above-captioned Notice of Proposed Rulemaking ("*NPRM*").[1] In the *NPRM*, the Commission solicits comments not only on whether rules prohibiting certain exclusive agreements should be allowed to sunset, but also more generally on whether there are other modifications that the Commission should make to its rules governing the relationship between video programmers and multichannel video programming distributors ("MVPDs"). Mediacom's comments focus specifically on actions that the Commission can and should take to constrain anti-competitive bundling and volume discounting practices that are regularly engaged in by programmers (both vertically integrated and non-vertically integrated) to the detriment of competition, consumer choice, and the public interest.

[1] *Revision of the Commission's Program Access Rules*, Notice of Proposed Rulemaking, MB Docket Nos. 12-68. 07-18, and 05-192, 77 Fed. Reg. 24302 (Apr. 23, 2012).

INTRODUCTION

Section 628 of the Communications Act, commonly known as the "program access" provision, directs the Commission to implement and enforce rules aimed at preventing "unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or prevent any [MVPD] from providing satellite cable programming or satellite broadcast programming to subscribers or consumers."[2] One of the specific provisions mandated by Section 628 is a prohibition on exclusive distribution agreements between vertically integrated programmers and cable operators in areas served by a cable operator.[3] Congress expressly provided that this prohibition was to "sunset" after ten years unless extended by the Commission.[4] The Commission, having extended the sunset date of the exclusivity prohibition for five years in 2002 and again in 2007[5], has commenced the instant proceeding in part to consider whether a further extension is warranted and, if so, the terms of such extension.

However, the Commission, in the *NPRM*, did not limit the scope of this proceeding to the sunset of the exclusivity prohibition. Rather, in furtherance of its ongoing obligation to review and update its program access rules in light of changing marketplace conditions, the Commission has invited interested parties to comment on whether there are other aspects of its rules implementing Section 628 that "should be modified, streamlined, expanded, or repealed."[6]

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[2] 47 U.S.C. § 548(b). The Commission's implementing rules can be found at 47 C.F.R. §§ 76.1000-76.1004.

[3] 47 U.S.C. § 548(c)(2)(D). *See also* 47 C.F.R. § 76.1002(c)(2).

[4] 47 U.S.C. § 548(c)(5). *See also* 47 C.F.R. § 76.1002(c)(6).

[5] *Implementation of the Cable Television Consumer Protection and Competition Act of 1992 – Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act: Sunset of the Exclusive Contract Prohibition*, Report and Order, 17 FCC Rcd 12124 (2002) ("*2002 Program Access Order*"); *Implementation of the Cable Television Consumer Protection and Competition Act of 1992 – Development of Competition and Diversity in Video Programming Distribution,* Report and Order and Notice of Proposed Rulemaking, 22 FCC Rcd 17791 (2007) ("*2007 Program Access Order and NPRM*"), *aff'd sub nom. Cablevision Sys. Corp. et al. v. FCC*, 597 F.3d 1306 (D.C. Cir. 2010) ("*Cablevision I*").

[6] *NPRM* at ¶ 1. *See also id.* at ¶ 5.

Mediacom, which currently operates cable systems serving 1.1 million subscribers in 22 states, has long led the industry in sounding the alarm about the dysfunctional video programming marketplace and, in particular, its adverse impact on smaller distributors and their customers.[7] As far back as 2003, Mediacom identified for the Commission various practices engaged in by programmers that are harmful to competition and consumers and ultimately contribute to the rising cost of multichannel video service.[8] The practices cited by Mediacom specifically included (among others) the programmers' use of economic coercion to compel distributors to purchase and package an ever-increasing "bundle" of networks without regard for subscriber need or interest and their reliance on unjustified (and unjustifiable) volume discounts to support discriminatory pricing.[9]

It has been nearly ten years since Mediacom first urged the Commission to take action with respect to these practices. During this period, programming costs have continued to increase year-after-year at levels that far exceed inflation and that are insensitive to fluctuations in subscriber demand. For smaller distributors in particular, the situation has reached crisis proportions. For that reason, it is imperative that the Commission fulfill its statutory obligation to address the imbalance of power that has evolved between market participants.[10] In the

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[7] Mediacom's core constituency has always been the nation's smaller cities and towns. Mediacom provides service in around 1400 communities, over 90 percent of which have 2000 or fewer subscribers. Less than 13 percent of Mediacom's subscribers are in the top 50 Designated Market Areas.

[8] Reply Comments of Mediacom Communications Corporation, *2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, MB Docket No. 02-277 (filed February 4, 2003) at 43-63 ("*Mediacom 2002 Biennial Review Reply Comments*").

[9] *Id.*

[10] *Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 20235 (2007) at n.11 ("*2007 MDU Order*") (noting the "admonition of the U.S. Court of Appeals for the District of Columbia Circuit that the Commission 'must always stand ready to hear new argument and to reexamine the basic propositions undergirding' its policies") ("*MDU Order*"). While the original market imbalance that concerned Congress in 1992 was between incumbent cable operators (particularly those that were vertically-integrated with popular programming networks) and new entrants, *NPRM* at ¶ 6, in today's marketplace vertical integration has become the exception rather than the rule and some of the "new entrants," such as DirecTV and DISH, have substantially more power and leverage than many of the smaller "incumbent" operators with which they compete. From the standpoint

discussion that follows Mediacom will focus specifically on actions that the Commission can and should take to prevent programmers from engaging in anti-competitive and anti-consumer bundling and discounting practices.[11]

DISCUSSION

I. The Commission Can and Should Exercise Its Statutory Authority to Regulate Programmers' Unfair and Anti-competitive Bundling Practices.

It has been common practice for some time for programmers to establish wholesale rate structures that are designed for the sole purpose of compelling MVPDs to purchase and package together a "bundle" of program networks whether or not doing so would serve the interest of the MVPD's subscribers. Even when these "tying" arrangements fall short of creating an actionable case under the antitrust laws, they still impede consumer and MVPD choice, increase the wholesale and retail costs of subscription service and otherwise produce the very harms to the public interest that the Commission has acknowledged Section 628 is intended to prevent. Consequently, it is appropriate for the Commission to adopt measures to address these practices and the harms that they cause.

The coercive "bundling" practices discussed herein involve both the forced purchase and carriage of multiple commonly-owned networks and the required packaging of those networks as part of a preferred tier of service. With respect to the coerced purchase of unwanted networks, owners of the most popular programming services often use their market power to force MVPDs to purchase and carry unwanted networks (*i.e.*, networks with more limited popular appeal or

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of the consumer and the public interest, the role of the Commission remains the same: to ensure that the marketplace operates in a manner that allows competition to flourish and serves the needs and interests of the viewing public. *See* S. Rep. No 102-92 (1991) at 28.

[11] Mediacom notes that as part of the 2007 rulemaking regarding the sunset of the exclusivity rules, the Commission sought comment on issues relating to bundling of programming and the extension of rules adopted pursuant to Section 628 to non-vertically integrated programmers. *See 2007 Program Access Order and NPRM.* Those issues remain unresolved. *See Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements*, MB Docket No. 07-198, Report and Order, 25 FCC Rcd 746 (2010) at note 3. Mediacom also is submitting a copy of these comments for inclusion in the record in MB Docket No. 07-198.

that do not engender a significant degree of loyalty among subscribers) by offering them together with desired "marquee" networks at a discounted "bundled" rate. If given a meaningful choice, a significant number of MVPDs might elect not to buy some or all of these networks, particularly on the terms demanded. However, the rates offered by the programmer do not give MVPDs a meaningful choice. Instead, the programmers establish a rate structure that makes it decidedly uneconomical for an MVPD to do anything other than capitulate to the programmers' bundling demands.

For example, during affiliation agreement negotiations, one programmer offered Mediacom prices and terms for carriage of several networks, including both a "strong" network and several "weaker" networks. In Mediacom's opinion, the price demanded for the bundle of networks over the proposed contract term was too high; in addition, Mediacom objected to proposed double-digit annual price increases that would have to be paid to keep the strong network on the system. Mediacom countered with a proposal that it carry the bundle of services at the requested rate on the condition that it be permitted to offer the strong network on an *a la carte* basis. When the programmer responded that the right to offer the network *a la carte* would not be granted at any price, Mediacom asked for an "unbundled" price for the strong network without any of the other networks. The price proposal that Mediacom received raised the percentage of future rate increases (already in the double-digits) by fifty percent. As a result, the potential cost of the agreement for just the one network was millions of dollars higher the programmer had proposed for the carriage of the bundle. In short, the programmer had ensured that Mediacom would have to take the unwanted programming by making the alternative economically prohibitive.

As indicated, a tactic that is closely related to wholesale bundling is coerced packaging of networks. This includes the outright refusal to allow their networks, even at the theoretical "stand-alone" wholesale rate, to be offered by MVPDs to subscribers on an *a la carte* basis. It also includes the practice of forcing MVPDs to carry weaker networks as part of the same package as a strong network by setting an uneconomic price for carriage below a specified penetration threshold. There are even some instances in which programmers engage in reverse tying arrangements whereby carriage of a weaker service is conditioned on the MVPD's agreement to carry a more expensive "strong" service.

These various "bundling" practices all have an adverse impact on competition and consumers. Bundling limits the resources and channel capacity that MVPDs have available to carry independent networks. This harms competition among programmers, drives up prices for consumers, and results in less diversity than would otherwise be the case. It also may slow down the deployment of broadband and other advanced services requiring bandwidth that ends up being used for unwanted programming networks. Denying MVPDs the option of offering services on an *a la carte* basis or in packages tailored to meet subscriber needs and interests means that many consumers end up paying for programming that they have no desire to receive. And preventing an MVPD from selecting weaker networks without taking stronger, more expensive networks makes it more difficult for new programmers to develop less expensive substitutes for the high-priced networks – again harming both competition and consumers.

The programmers' bundling practices also adversely impact the ability of smaller MVPDs to compete with larger distributors. This is not only because bundling drives up costs for smaller MVPDs, leaving them with diminished resources to match the service offerings of large national or regional competitors, but also because it impedes the ability of smaller MVPDs to distinguish their services from their larger competitors by fashioning service offerings more responsive to local needs and interests. As the Commission has pointed out, an MVPD has two choices when faced with a tying arrangement: the MVPD can refuse the arrangement, thereby potentially depriving itself of desired and often economically vital programming, or the MVPD can accept the proffered arrangement, thereby incurring both higher programming costs (attributable to networks that its subscribers do not demand) and lost opportunity costs (attributable to the channel capacity that is not available for other uses).[12]

The simple fact is that so long as a handful of programmers who control the most popular programming services are free to dictate how an MVPD packages and prices its services, there is little that can be done to expand consumer choice through the creation of more varied packing options or to reduce prices by dropping services. Indeed, the services most likely to be dropped – or not carried in the first place – are the start-ups that provide the diversity and innovation that Congress has indicated is in the public interest. A growing number of MVPDs are joining Mediacom in expressing concern that, as a result of forced bundling, "there are too many networks."[13] Even some programmers acknowledge that the system is "bloated."[14] Yet, the situation is worsening as programmers use the same coercive tactics to dictate whether and how MVPDs can offer consumers access to programming on Internet-connected devices and whether and to what extent consumers can take advantage of advances in otherwise lawful time-shifting and space-shifting technologies. While there is a perception that MVPDs are the ones calling the shots as to whether and how consumers can access content on new platforms, it actually is the programmers that are making those decisions and doing so by playing some of the same games they have played in the past with respect to the bundling and packaging of networks.

Under the circumstances, it is necessary and appropriate for the Commission, in order to promote consumer choice and competition, to intervene. At the very least, the Commission

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[12] *2007 Program Access Order and NPRM* at ¶ 120.

[13] Alex Sherman, *Unwanted Cable Channels Bloat Customer Bills, CEO Says*, Bloomberg Businessweek, May 23, 2012 (*quoting* Glenn Britt, CEO of Time Warner Cable), available at http://www.businessweek.com/news/2012-05-23/time-warner-cable-ceo-calls-for-fewer-channels-in-pay-tv-bundles.

[14] *Id.* (*quoting* Coleman Breland, Chief Operating Officer of Turner Network Sales).

should adopt rules requiring programmers who offer bundled program rates to make available those networks for purchase on an unbundled basis at prices that do not exceed the bundled price over the life of the agreement. Some no doubt will argue that regulating programmers' bundling practices falls outside the scope of the Commission's authority. However, as the Commission is well aware, the United States Court of Appeals for the District of Columbia Circuit has twice ruled in recent years that the Commission's authority under Section 628 is not limited to regulating the specific practices and harms enumerated therein.[15] In reaching these decisions, the Court affirmed that the "broad and sweeping" language of Section 628(b) creates a "clear repository of Commission jurisdiction to adopt additional rules and take additional actions" consistent with the purpose of Section 628.[16]

In interpreting and carrying out the purpose of Section 628 – namely "to promote the public interest, convenience, and necessity by increasing competition and diversity in the [MVPD] market...and to spur the development of communications technologies"[17] – the Commission has identified a range of harmful practices that Congress expected it to address through regulations designed to ensure a fair video marketplace. These include not only practices that create barriers to new entrants in the distribution and programming marketplace, but also practices that result in the denial to consumers of access to the programming of their choice (and, relatedly, harm to programmers specializing in diverse programming oriented to niche audiences).[18] They also include practices that deter investment in broadband deployment and the introduction of advanced services that are necessary in order for smaller distributors to

[15] *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. Cir. 2011) ("*Cablevision II*").

[16] *See, e.g., Cablevision II, supra,* 649 F. 3d at 701 *citing Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992*; *Development of Competition and Diversity in Video Programming Distribution and Carriage*, First Report and Order, 8 FCC Rcd 3359 (1993) at ¶¶ 40-41.

[17] 47 U.S.C. § 548(a).

[18] *MDU Order* at ¶¶ 17-20.

compete with larger entities.[19] These, of course, are precisely the types of harms that flow from the programmers' bundling practices and are precisely the reason that the Commission has and should exercise authority under Section 628 (as well as under its ancillary authority) to adopt the corrective measures described above.[20]

II. The Commission Can and Should Adopt a Generally Applicable Rule Barring Discriminatory Volume-Based Discounts and Requiring Disclosure of Programming Rates.

Section 628(c)(2)(B) of the Communications Act directs the Commission, in implementing the general prohibition on unfair acts and practices, to adopt rules preventing discrimination by vertically integrated programmers in the prices, terms, and conditions of sale or delivery of satellite cable programming among or between MVPDs or buying groups.[21] This statutory provision goes on to carve out certain exceptions, including one that allows vertically integrated programmers to "establish different prices, terms, and conditions which take into account economies of scale, cost savings, or other direct and legitimate economic benefits reasonably attributable to the number of subscribers served by the distributor."[22]

The Commission's implementing rules codify both the prohibition on discrimination and the exception for what are commonly referred to as "volume" or "quantity"-based discounts.[23] Moreover, in implementing the volume discount exception to the prohibition on discriminatory

[19] *Id.*

[20] Although the courts have not found it necessary to go beyond Section 628 to find authority for the Commission to regulate the wholesale programming marketplace, the Commission also has determined that such regulation falls within its ancillary jurisdiction under Titles I and III of the Communications Act in advancing the purposes of both the 1992 Act and Section 706 of the 1996 Telecommunications Act. *See, e.g., 2007 MDU Order* at ¶¶ 52-54, 60. In addition, while the scope of the Commission's authority under Section 616 of the Communications Act has not yet been addressed by the courts, the plain language of that provision, which directs the Commission to "establish regulations governing program carriage agreements and related practices between cable operators or other multichannel video programming distributors and video programming vendors," arguably provides an additional statutory basis for the Commission to address the bundling practices described herein.

[21] 47 U.S.C. § 548(c)(2)(B).

[22] 47 U.S.C. § 548(c)(2)(B)(ii).

[23] 47 C.F.R. 76.1002(b)(3) and note.

prices and terms, the Commission expanded on the statutory language by stating that a programmer "may be required to demonstrate that such volume discounts are reasonably related to direct and legitimate economic benefits reasonably attributable to the number of subscribers served" should questions arise regarding the application of the discount.[24] On the other hand, the Commission effectively negated this provision by declaring that programmers "will not be required to provide a strict cost justification for the structure of such standard volume-related factors, but may also identify non-cost economic benefits related to increased viewership."[25]

In the *NPRM*, the Commission acknowledges that smaller cable operators and their representatives have expressed concern that they are being placed at a serious competitive disadvantage by volume-based pricing practices for which there is no economic justification.[26] The Commission asks for information about specific instances of "perceived volume discount discrimination" as well as comments on whether the current rules adequately address potentially discriminatory volume discounts.[27] Among other things, the Commission asks whether it should continue to consider the validity of volume discounts on a case-by-case basis, whether it should change the provision that allows programmers to rely on "non-cost economic benefits" to justify a volume discount, and whether there are "procedural tools" that it might employ in resolving discrimination complaints (such as requiring a programmer provide specific evidence of the increase in revenues that results from licensing to a larger MVPD and how such increase justifies the particular discount at issue).[28]

The short answer to the various questions posed in the *NPRM* is that, as a practical matter, the rule barring discriminatory pricing has been completely swallowed by the supposedly

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[24] *Id.*

[25] *Id.*

[26] *NPRM* at ¶¶ 98, 100.

[27] *Id.* at ¶ 100.

[28] *Id.*

limited exception for cost-based volume discounts. In order to rectify this situation and establish an effective and enforceable discrimination ban, the Commission needs to overhaul its rules (i) to require that the net effective rate for video programming is the same for all MVPDs, regardless of distribution technology, size, or market characteristics and (ii) to require that programmers waive existing confidentiality provisions and disclose the net effective rates that various MVPDs actually pay (as well as other material contract terms). To the extent required by Section 628(c)(2)(B)(ii), the Commission also should establish a special relief procedure under which a video programmer may seek the Commission's advance approval of a specific quantity-based discount, but only upon a concrete and detailed accounting of specific volume-related cost savings equal to the price differential at issue.

The factual, policy, and legal bases for adopting the revised rules described above are compelling. Under the current rules, smaller MVPDs – the very entities that are harmed by discriminatory pricing – lack access to the information needed to ascertain whether and to what extent they are paying a different rate than one or more of their competitors. And even if the necessary comparative pricing information was available to them, smaller MVPDs simply do not have the resources to pursue costly and time-consuming complaint proceedings against well-heeled programmers on a case-by-case basis, particularly in light of the Commission's amorphous description of what constitutes a valid volume discount. Greater transparency in the terms of programming agreements is thus essential to the enforcement of the statutory ban on discriminatory pricing.

Replacing the current complaint-based implementation of the discrimination ban with the prophylactic rule proposed above also will provide clear benefits to competition and consumers. The ban on discriminatory pricing reflects the fundamental principle – enshrined in the Robinson-Patman Act – that fair competition requires businesses at the same functional level to stand on equal competitive footing with respect to input prices.[29] Yet, citing industry sources, ACA has reported that smaller cable operators pay approximately 30% more for national cable programming than the largest MVPDs[30] and, in 2003, the National Cable Television Cooperative ("NCTC") estimated that programming costs for many smaller cable companies represent 35% to 45% of their budgets compared to 20% for most larger MVPDs.[31] If anything, it is likely that this disparity is even more pronounced today.

Discrimination in the prices they are charged for programming in comparison to their larger competitors puts smaller MVPDs at a distinct competitive disadvantage not only in their retail pricing but also in their ability to invest in advanced services, including broadband and voice. This is clearly not what Congress intended when it enacted Section 628. As the Commission has noted, the stated purpose of Section 628 is to "promote the public interest, convenience, and necessity by increasing competition and diversity in the [MVPD] market…and to spur the development of communications technologies."[32]

If wholesale programming rates are adjusted to eliminate volume based discounts, there would be a significant savings for consumers in markets that often are those that face the greatest economic hurdles. The following example will help illustrate the pro-consumer impact of a rule that requires prices to be set based on the service provided, not on who the distributor is or the number of subscribers it has. Assume that a programmer has the following volume-based rate schedule:

<u>Size of MVPD (in subscribers)</u>	<u>Per-Subscriber Monthly Rate</u>

[29] *See, e.g., FTC v. Sun Oil Co.*, 371 U.S. 505, 520 (1963).

[30] Comments of the American Cable Association, *Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc., to Assign and Transfer Control of FCC Licenses*, MB Docket No. 10-56 (filed June 21, 2010) at 38-39.

[31] *Mediacom 2002 Biennial Review Reply Comments* at 44 (*citing Co-op's Frank Hughes, the Little Op's Pal*, Multichannel News, July 23, 2001).

[32] *MDU Order* at n. 5. *See also* 47 U.S.C. § 548(a).

10,000,001 or more	$0.370
5,000,001 to 10,000,000	$0.389
3,000,001 to 5,000,000	$0.408
1,000,001 to 3,000,000	$0.446
Under 1,000,000	$0.485[33]

Based on published 2011 year-end industry-wide subscribership data, the weighted average monthly per subscriber rate paid under this schedule would be approximately $0.385. If that rate was applied across the board to all MVPDs, the programmers would obtain the same level of revenues and the largest MVPDs would experience a per subscriber increase of around 1.5 cents. All of the remaining MVPDs would see a decrease in per subscriber costs ranging from around 2 cents to nearly 10 cents. Multiplied over a year's time and over dozens of cable networks, the savings to subscribers would be substantial, with little or no impact on larger MVPDs and programmers.

As noted, the example presented above is a hypothetical since there is no way for Mediacom to obtain real world data reflecting the actual volume discount schedules established by programmers. However, Mediacom believes that the example accurately depicts how the programmers' volume discounting practices are forcing smaller MVPDs and their customers to subsidize larger MVPDs and their customers.

Congress never intended to allow such subsidies. Rather, Congress expected uniform rates to be the rule and for price differentials to exist only to the extent that they reflected an actual economic benefit that a programmer derived from an MVPD's size. And while the programmers broadly allege that size does matter – *i.e.*, that there are economic benefits from dealing with larger MVPDs – there has never been any concrete evidence put forward to sustain those claims, either as a general matter or in a specific case. Nor, as we now show, is it likely that such evidence could ever be produced.

[33] While this example is hypothetical, it does reflect a rate for smaller MVPDs that is approximately 30 percent higher than the rate charged the largest MVPDs, consistent with the differential reported by industry observers.

First, while the production or distribution of large quantities of a product can generate "economies of scale" in the traditional manufacturing world, the production of programming involves relatively large initial costs that do not depend on the number of viewers or distribution channels (*i.e.*, rights acquisition and production costs). Moreover, once produced and uplinked for distribution, the marginal cost of delivery to any given subscriber is identical – it costs no more to deliver programming to an MVPD with 1,000 subscribers than to an MVPD with 10 million subscribers.

Second, programmers contend that volume discounts can be justified by the administrative cost savings that they allegedly obtain when a single negotiation with a large MVPD gives them access to the same or greater number of subscribers as hundreds of negotiations with smaller distributors. In fact, however, negotiations with large MVPDs are often far more contentious, complicated, and time-consuming than negotiations with smaller MVPDs, who typically are handed standard form affiliation agreements on a "take or leave it" basis. In addition, many smaller MVPDs rely on buying groups, such as the NCTC, to negotiate jointly on their behalf. Yet, programmers routinely deny NCTC and its members equivalent discounts to those offered individual companies that have the same, or even fewer, subscribers.[34] As it stands today, volume discounting practices can and do result in wide variations in the wholesale price of programming provided to neighbors living across the street from one another – variations that occur for no other reason than the fact that the MVPD serving one of them has more subscribers nationwide than the MVPD serving the other. The absence of any true relationship between such volume discounts and administrative savings has been aptly summed up as follows:

[34] For this reason, any new rules adopted by the Commission addressing volume discounting practices must ensure that to the extent discounts can be justified, they must be available to buying groups on the basis of the number of potential subscribers that they represent.

> Transaction costs of contracting for carriage do not loom large and savings in such costs cannot account for the large discounts afforded the larger systems. Costs of satellite distribution to cable headends are largely fixed and do not depend very much on whether any particular system receives the signal. Indeed, per-subscriber marketing costs may be higher for the largest MSOs, as they typically bargain for rates, while small systems often simply pay off a rate card.[35]

Third, as an alternative to a cost-savings based justification for volume discounting, programmers, and the Commission, have looked to the revenue side of the ledger, focusing on the relationship between the size of a distributor and the advertising market. The theory is that because programmers obtain revenues through advertising and what an advertiser will pay typically increases with the number of viewers it can reach, a programmer obtains an economic benefit when it deals with a large MVPD that it does not obtain from smaller MVPDs.

While superficially appealing, this theory is fundamentally flawed. Among other things, the discounted rate does not reflect a "direct" economic benefit as expressly required by Section 628(c)(2)(b)(iii). At best, the economic benefit in question (assuming it exists at all) would be "indirect." Moreover, it goes against the grain of anti-discrimination law to justify volume discounts by saying, in effect, that whenever a retailer controls a larger share of the market and produces more revenues for a supplier than smaller retailers, the supplier should be permitted to discriminate in favor of the larger retailer. For instance, under the Robinson-Patman Act, it is not a defense to price discrimination that an entity is able to generate more revenues than a smaller company. Indeed, the fact that a large distributor creates more revenue for a supplier and thus can extract price concessions that are not cost-based and that harm the ability of smaller entities to compete is the reason for restraining price discrimination, not an excuse for allowing it.

[35] J. Haring, J. Rohlfs and H. Shooshan, *Anticompetitive Effects of the Proposed AT&T Comcast Merger*, filed with Comments of Qwest Communications International, Inc., CC Docket Nos. 01-338, 96-98, 98-147 (April 5, 2002) at 19.

What the above demonstrates is that it is far from clear that there is or ever can be any valid justification for discriminatory pricing by video programmers. To the extent that Congress in 1992 created an exception for "legitimate" volume discounts, it is a relic of a far different video marketplace than the one that exists today. The then-infant DBS companies that Section 628 was designed to help have grown into behemoths – the second and third largest MVPDs in the country. The nation's two largest incumbent telephone companies have entered the video market and have quickly become top ten MVPDs. As a result, it is now the smaller MVPDs, including many who were the first to provide broadband service to smaller and less densely populated communities, that are struggling to stay afloat.

Today, volume discounts exist simply because the largest MVPDs do not expect to pay the same rate for a programmer's networks as smaller MVPDs and they have the clout to get a better price. Indeed, while the concept of a "volume" discount implies an arrangement whereby prices are set from the "bottom up" (*i.e.*, a standard price is determined and then step discounts are allowed as customer volumes increase), what actually passes as a "volume" discount in the current marketplace is based on a "top down" approach. Negotiations with the biggest MVPDs for carriage set a floor for a network's price – everyone else will pay more. Exactly what they pay relative to each other is not the result of any discernible direct economic benefit or the application of any rational economic calculus. Instead, what smaller MVPDs pay relative to their larger competitors is entirely a function of the programmer's need to recover the discounts that it gave to those larger distributors.[36]

Given these facts, the Commission is under no obligation to recognize any volume discounting as legitimate. However, to the extent that the Commission concludes that Section

[36] The situation has been further exacerbated by consolidation in the industry: when a large MVPD acquires a smaller MVPD, the resultant reduction in the acquired company's programming costs often is cited as a public interest benefit. Of course, the programmers do not simply allow this revenue to be lost; instead, they seek to make all of the remaining smaller MVPDs pay more.

628(c)(2)(B)(ii) obligates it to leave open the possibility that differential pricing can be justified by volume-related factors, it should place the onus squarely on the programmer to make the same sort of "rigorous accounting" that is required to justify volume discounts under the Robinson-Patman Act.[37] Requiring a programmer to obtain advance approval from the Commission before it can establish volume based price differentials and to waive all confidentiality provisions relevant to the discount issue achieves this goal.

III. The Commission Can and Should Extend Its Regulations Implementing Section 628 to Cover the Discriminatory Pricing and Unfair Bundling Practices of Programmers That Are Not Vertically-Integrated With a Cable Operator.

Both the general prohibition on "unfair" acts or practices in Section 628(b) and the specific prohibition on discriminatory pricing in Section 628(c)(2)(B)(ii) expressly refer to "satellite cable programming vendor[s] in which a cable operator has an attributable interest." This language raises the question of whether the revisions to the Commission's rules that Mediacom has proposed above can and should be made applicable to programmers other than those that are vertically-integrated with a cable operator. The answer is that the extension of the rules to additional categories of programmers is necessary and appropriate as a matter of policy and as a matter of law.

First, the public's interest in protection from the effects of discriminatory volume discounts and coercive bundling of programming does not vary based on whether the programmers engaging in these practices are or are not vertically-integrated with a cable operator. The Commission itself has previously noted that "the competitive harm and adverse impact on consumers [from unfair practices by video programmers] would be the same" regardless of whether the programmer is affiliated with a cable operator, broadcaster, or non-

[37] *See, e.g.*, *Texaco v. Hasbrouck*, 496 U.S. 543, 564-65 (1990).

cable MVPD, or is a non-affiliated "independent" network.[38] Put another way, the injury to consumers and competition is no less when Disney or Viacom offers large MVPDs unjustified volume discounts or bundles its programming services than when Comcast/NBCU engages in the same behavior.

In addition, the public interest objectives of Section 628 will be frustrated if the rules implementing that provision continue to distinguish between programmers based on whether or not they are owned by a cable operator. This is because most of the programmers engaging in practices such as unjustified volume discounting and coercive bundling are not vertically integrated with cable operators. As NCTA has pointed out, the vertical integration between cable operators and program networks that existed at the time of the 1992 Act has largely disappeared[39]; today, most of the top programmers are vertically integrated with broadcasters and/or motion picture studios, not cable operators.

These non-cable affiliated programmers have both the incentive and ability to use volume discounting and bundling practices in ways that distort fair competition and harm consumers. Through their control of must-have programming (both broadcast and non-broadcast), these programmers can play competing MVPDs against one another. There is little or no risk to the programmer since concessions made to larger MVPDs can be recaptured through the imposition of discriminatory prices and unwanted packages of channels on smaller MVPDs.

In addition, the marketplace is continuing to evolve as non-cable affiliated programmers begin to make forays into the world of multichannel video distribution through the Internet and other platforms. In light of the radical changes that have occurred in the video marketplace in

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[38] *See 2007 Program Access Order and NPRM* at ¶ 120.

[39] *Comments of the National Cable & Telecommunications Ass'n,* Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, MB Docket 07-269 (filed June 8, 2011) at 13-14. NCTA points out that only two of the 25 most viewed cable networks are wholly owned by cable operators, while cable operators own small minority interests (less than 20%) in three others.

the past two decades, continuing to limit the application of rules designed to protect consumers to only one group of programmers is contrary to the public interest, not only because it will ensure that the rules will not achieve their intended effect, but also because it will exacerbate the problems caused by a programming marketplace that has become unbalanced and dysfunctional.

Second, with respect to the issue of the Commission's authority to regulate non-vertically integrated programmers, we established above that it is now settled law that Section 628's prohibition on unfair practices is "broad and sweeping" and should be given "broad, sweeping application."[40] Thus, just as the Commission has been found to have authority under Section 628 to regulate the wholesale distribution of both terrestrial and satellite programming, so too does the Commission have the authority to regulate all programming vendors, including those that are vertically integrated with broadcasters or motion picture studios as well as those in which cable operators have an attributable interest.

Any doubt concerning the Commission's authority in this regard is put to rest by the opinion of the D.C. Circuit in the *Cablevision II* case. In *Cablevision II*, the court upheld the Commission's extension of the program access rules to terrestrial program services notwithstanding the fact that the statute repeatedly refers to "satellite" programming and contains no references to terrestrial services. The court explained that Section 628(c) by its terms describes only the "[m]inimum contents of regulations" that the Commission is authorized to adopt.[41] Thus, according to the court, Section 628(c)(2) "establishes a floor rather than a ceiling."[42]

[40] *See* discussion at pages 7-9 *supra. See also Cablevision II, supra*, 649 F. 3d at 704-05, *quoting NCTA, supra*, 567 F. 3d at 664.

[41] *Cablevision II, supra,* 649 F. 3d at 705.

[42] *Id.*

Furthermore, emphasizing that Congress cannot be expected to be "clairvoyant," the court found there was "no justification for construing Congress' reference to satellite programming withholding in subsection (c)(2) as an effort to prevent the Commission from addressing similar unfair practices that – two decades later – have either the purpose or effect that subsection (b) proscribes."[43] The absence of a specific statutory reference to terrestrial services was, the court found, nothing more than a sign that "Congress was not attuned to the possibility" of anti-competitive conduct involving terrestrial programming since satellite programming was "far and away the dominant form of video programming" at the time and "thus the focus of concerns" about anti-competitive behavior. [44]

The *Cablevision II* court's analysis of the scope of the Commission's regulatory authority to regulate terrestrial programming under Section 628 applies foursquare to the issue of the Commission's authority to regulate all programmers under that statute. The fact that Section 628 highlights one particular type of programming vendor (*i.e.*, cable-affiliated) is simply another example of Congress having been focused on matters that were of immediate concern in 1992 and not "attuned" to the possibility that the video marketplace would evolve to the point where all programmers would have the ability and incentive to engage in unfair wholesale marketing practices, including unjustified volume discounting and coercive bundling. As the courts have made clear, where Congress has delegated broad authority to an agency to achieve a particular set of objectives (as is the case with Section 628), "agency action pursuant to that delegated authority may extend beyond the specific manifestations of the problem that prompted Congress to legislate in the first place."[45]

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[43] *Id.* at 706-07, *citing NCTA, supra,* 567 F. 3d at 665 ("The Commission's remedial powers…extend beyond the kinds of unfair-dealing interventions Congress specifically foresaw.").

[44] *Id.* at 706-08.

[45] *Cablevision II, supra* 649 F. 3d at 707, *quoting Consumer Elecs. Ass'n v. FCC,* 347 F.3d 291, 297-99 (D.C. Cir. 2003).

Finally, the Commission's ancillary authority under Section 4(i) of the Communications Act provides it with an additional statutory basis for extending rules restricting unfair volume discounting and coercive bundling practices to programmers that are not vertically-integrated with a cable operator. The exercise of such ancillary authority is appropriate when (the Commission's general jurisdictional grant under Title I covers the regulated subject and (2) the regulations are reasonably ancillary to the Commission's effective performance of its statutorily mandated responsibilities."[46]

Both of those conditions are met here. Regulation of the video marketplace in general, and the relationships between and among MVPDs, programmers, and consumers in particular, are clearly within the Commission's Title I jurisdiction. And, changes that have occurred in the video marketplace described above have made it necessary for the Commission to apply the same restrictions to all programmers in order to carry out Section 628's "broad and sweeping" delegation of authority to the Commission to address unfair practices such as unjustified volume discounting and coercive bundling. Indeed, limiting its regulations to cable-affiliated programmers, when those programmers represent only a small percentage of the programmers capable of engaging in these practices, would frustrate the regulatory scheme that Congress expressly directed the Commission to adopt.[47]

CONCLUSION

It is beyond dispute that the video marketplace of 2012 is far different than the video marketplace of 1992. A level of competition among distributors has emerged that few in Congress or the Commission could have imagined. Two of the top three MVPDs are DBS operators and Verizon and AT&T have quickly joined them in the top ten. Vertical integration

[46] *See, e.g., American Library Ass'n v. FCC*, 406 F. 3d 689, 691-91 (D.C. Cir. 2005).

[47] *Comcast Corporation v. FCC*, 600 F. 3d 642, 652 (D.C. Cir. 2010).

between cable operators and video programmers has become the exception rather than the rule. Retransmission consent, local broadcast consolidation and the digital transition have altered the relationship between broadcasters, MVPDs and consumers. And the significance of the evolution of the Internet into platform for video programming is only beginning to be understood.

Yet, not all of this change has been for the better. While there is greater competition among distributors, that competition has given video programmers enormous leverage. Unfair practices such as unjustified volume discounting and coercive program bundling are impeding competition among programmers and making it increasingly difficult for smaller MVPDs to keep up with much larger competitors. The consumer, of course, is the one that ultimately pays the price.

The Commission has a duty to make sure its rules evolve with changes in the marketplace. Congress has given the Commission the tools to do so. Mediacom submits that the Commission can and should adopt the measures described herein to constrain volume discounting and bundling practices that are regularly engaged in by programmers (whether vertically integrated with a cable operator or otherwise) to the detriment of competition, consumer choice, and the public interest.

Respectfully submitted,

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