

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

In the Matter of )  
 )  
Revision of the Commission's Program Access ) MB Docket No. 12-68  
Rules )  
 )

**COMMENTS OF**  
**MEDIACOM COMMUNICATIONS CORPORATION**

**MEDIACOM COMMUNICATIONS  
CORPORATION**

**EDWARDS WILDMAN PALMER LLP**  
1255 23rd Street, NW  
Eighth Floor  
Washington, DC 20037  
(202) 939-7900

December 14, 2012

Their Attorneys

## TABLE OF CONTENTS

	<u>Page</u>
SUMMARY.....	i
BACKGROUND.....	2
DISCUSSION.....	6
I. The Commission Should Clarify That It is a Violation of the Program Access Rules for a Programming Vendor to Refuse to Deal with an Existing or New Buying Group, or With an Individual Participant in a Buying Group, Based on the Size of Either the Group or the Individual Participant.....	7
II. The Commission Should Not Adopt Rules Governing a Buying Group’s Membership Decisions.....	10
III. The Commission Should Clarify That When an MVPD Joins a Buying Group, the MVPD Can Opt In to the Remaining Terms of the Buying Group’s Master Agreements Once the MVPD’s Existing Agreements Expire.....	13
IV. The Commission Should Amend Its Rules To Address Anticompetitive Behavior On the Part of Programmers That Are Not Vertically-Integrated with a Cable Operator.....	14
CONCLUSION.....	16

## SUMMARY

In the Further Notice of Proposed Rulemaking in MB Docket No. 12-68, *Revision of the Commission's Program Access Rules*, the Commission recognizes it is important "to ensure that buying groups utilized by small and medium-sized MVPDs can avail themselves of [the program access] rules" and seeks comments on several proposals to do so. Mediacom supports the Commission's efforts to fully protect buying groups under the program access rules and proposes to apply the rules to all programmers, regardless of their affiliation with a cable operator. However, Mediacom opposes the Commission's proposal to make the protections of the program access rules for buying groups contingent on the Commission finding that a buying group's membership decisions are "reasonable."

Buying groups enhance competition and promote consumer welfare. The Department of Justice and the Federal Trade Commission have voiced their support of buying groups, noting that the consolidation of smaller buyers' purchasing power to obtain lower prices for their members and consumers is procompetitive and benefits the public. Congress voiced their own support of buying groups in the cable industry in particular by including them alongside MVPDs and MSOs in the 1992 Cable Act's program access provisions.

Yet the Commission has interpreted its rules in such a way as to allow volume discounts to become commonplace, leading programmers to recoup what they discount to larger MVPDs by charging more of smaller MVPDs. While Mediacom continues to believe that the Commission can and should make changes to its rules that would give meaning to the ban on volume discounts, the Commission can begin to mitigate the anticompetitive effects of these practices by taking actions designed to grant full protection of the program access rules to buying groups.

In particular, the Commission should adopt ACA's proposed modification of the definition of the term "buying group" so that it reflects current industry practice with respect to a buying group's assumption of liability on behalf of its members; establish an express "standard of comparability" for determining when a buying group should be considered similarly situated to an individual MVPD or an MSO that offers programmers access to a comparable number of subscribers; and clarify that a programmer may not refuse to offer a buying group a master agreement specifying a schedule of non-discriminatory terms and conditions over various ranges of subscribership proposed by the buying group.

In addition, the Commission should make it absolutely clear that programmers violate the program access rules when they refuse to deal with a buying group or any particular member of a buying group based on nothing more than the size of the group or the member. Concerns with the size of buying groups and MVPDs are properly addressed by the antitrust authorities, not by unilateral action by programmers. On the other hand, the Commission should not adopt a rule that would allow it to exercise oversight with respect to a buying group's membership decisions. When making membership decisions, buying groups are already guided by and subject to oversight under the antitrust laws. Applying a vague "reasonableness" standard to membership decisions, will unavoidably lead to confusion and conflicts with the antitrust authorities and ultimately, to the detriment of competition and consumer welfare, will deter the formation of buying groups. Finally, the Commission (i) should clarify that MVPDs that join a buying group are bound by their existing carriage agreements until they expire, but upon their expiration can opt in to the remainder of the buying group's master agreements and (ii) should act affirmatively on proposals that it extend its program access protections to cover negotiations with all programmers, whether or not they are vertically-integrated with a cable operator.

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

In the Matter of	)	
	)	
Revision of the Commission's Program Access	)	MB Docket No. 12-68
Rules	)	
	)	

**COMMENTS OF MEDIACOM COMMUNICATIONS CORPORATION**

Mediacom Communications Corporation (“Mediacom”) hereby submits the following comments in response to the Further Notice of Proposed Rulemaking (“*Further Notice*”) in the above-captioned proceeding.<sup>1</sup> Mediacom’s comments focus primarily on the portion of the *Further Notice* that is concerned with the application of the Commission’s “program access” rules to “buying groups” formed by cable operators and other multichannel video programming distributors (“MVPDs”). Buying groups promote competition and consumer welfare by creating cost-saving efficiencies and consolidating their members’ purchasing power in negotiations with programmers. Enhancing the effectiveness of buying groups thus serves the public interest and Mediacom supports proposals to clarify and modify the Commission’s rules in ways that will ensure that buying groups and their members are fully protected under the program access rules (including proposals to apply those rules to all programmers). On the other hand, Mediacom opposes the *Further Notice’s* proposal to amend the program access rules so as to subject buying group membership decisions to Commission oversight. Adoption of such a rule will inevitably cause conflicts with the antitrust laws. The resulting uncertainty and confusion will inhibit the

---

<sup>1</sup> *Revision of the Commission’s Program Access Rules*, Further Notice of Proposed Rulemaking, MB Docket Nos. 12-68, 07-18, and 05-192, 77 Fed. Reg. 66052 (Oct. 31, 2012) (“*Further Notice*”).

formation and operation of buying groups and therefore will be detrimental to competition and consumers.

## BACKGROUND

“Buying group” is a term generally used to describe an association of business entities that engages in joint purchasing activity on behalf of member companies. Such organizations have existed for well over 100 years and are found in a wide variety of industries, particularly those where group members face larger or more integrated competitors.<sup>2</sup> There are various models for such organizations (which are also sometimes referred to as “purchasing cooperatives” or “group purchasing organizations”).<sup>3</sup> What these entities have in common is that they are created for the purpose of achieving cost-saving efficiencies on behalf of their members and/or obtaining lower prices from vendors by consolidating their members’ purchasing power.<sup>4</sup> While such groups are not totally immune from scrutiny under the antitrust laws, the courts, the Department of Justice, and legal commentators have all recognized that the “concerted action” engaged in by buying groups typically increases economic efficiency and renders markets more, rather than less competitive.<sup>5</sup>

---

<sup>2</sup> Michael A. Lindsay, *Antitrust and Group Purchasing*, 23 *Antitrust* 66 (2009). *See also* Robert Betz, Health Indus. Group Purchasing Ass’n, Testimony at the Federal Trade Commission’s Health Care and Competition Law and Policy Workshop at 2 (Sept. 10, 2002) (“Group purchasing organizations are not a new phenomenon” and date back to 1909).

<sup>3</sup> Lindsay, *supra* note 2, at 66.

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

<sup>5</sup> *Northwest Wholesale Stationers v. Pac. Stationery & Printing Co.*, 472 U.S. 284, 295 (1985) (buying groups are “designed to increase economic efficiency and render markets more, rather than less competitive”). There is a substantial body of legal commentary on the subject of buying groups. *See, e.g.*, Lindsay, *supra* note 2; Joyce Mazero & Suzie Loonam, *Purchasing Cooperatives: Leveraging a Supply Chain for Competitive Advantage*, 29 *Franchise L.J.* 148 (2010); Herbert Hovenkamp, *Competitive Effects of Group Purchasing Organizations’ Purchasing and Product Selection Practices in the Health Care Industry*, April 2002 (prepared for the Health Industry Group Purchasing Association, available in Betz, *supra* note 2, at app. A).

In the case of the multichannel video programming marketplace, buying groups representing cable operators and other MVPDs in negotiations with programming vendors have been an established feature for decades. The largest buying group of MVPDs is the National Cable Television Co-operative, Inc. (“NCTC”), which can trace its origins back to the early 1980s and which has been the recipient of several Business Review Letters from the Department of Justice indicating that its joint purchasing operations do not present competitive concerns.<sup>6</sup> Moreover, in Section 628 of the 1992 Cable Act, Congress signaled its approval of and support for such group purchasing organizations in the multichannel video industry by extending to them the same “program access” protection granted to individual MVPDs and MSOs. Specifically, Section 628(c)(2)(B) of the Act directed the Commission to promulgate regulations prohibiting programmers from discriminating “among or between cable systems, cable operators, or other [MVPDs], or their agents or buying groups.”<sup>7</sup>

In practice, however, the program access rules, as interpreted by the Commission, have provided little or no protection for buying groups and their members. For example, even though the program access rules allow volume-based price differentials only where they can be justified by actual “economies of scale, cost savings or other direct and legitimate economic benefits reasonably attributable to the number of subscribers served,”<sup>8</sup> the Commission has essentially abandoned any pretense of enforcing this requirement. As a result, volume discounting has become an embedded part of the multichannel video programming wholesale marketplace without any requirement that the programmers demonstrate that their “discounting” practices

---

<sup>6</sup> Lindsay, *supra* note 2, at 68-69

<sup>7</sup> 47 U.S.C. § 548(c)(2)(B).

<sup>8</sup> 47 U.S.C. § 548(c)(2)(B)(iii).

have a cost or economic basis. This has led, as Mediacom demonstrated in its comments responding to the Notice of Proposed Rulemaking that launched this proceeding, to programmers using smaller MVPDs and their customers to subsidize larger MVPDs.<sup>9</sup> While not a complete solution, changing the rules to facilitate purchasing through buying groups would allow smaller MVPDs to mitigate the adverse impact that the programmers' unjustified volume discounting practices have on competition and consumers.<sup>10</sup>

Of course, apart from the Commission's failure to give any teeth to the prohibition on unjustified volume discounts, buying groups face additional hurdles in obtaining meaningful protection under the program access rules. In particular, the Commission has adopted a definition of the term "buying group" that does not take into account how buying groups actually operate in the video marketplace. This has allowed programmers to engage in refusals to deal and other forms of discriminatory behavior with respect to buying groups and their members. Such conduct, if engaged in with respect to an individual MVPD or MSO, would clearly constitute violations of the program access rules.<sup>11</sup>

---

<sup>9</sup> Comments of Mediacom Communications Corporation, MB Docket 12-68, et al. (filed June 22, 2012) ("*Mediacom Comments*") at 12-16.

<sup>10</sup> While buying groups should be able to negotiate better prices than their members could obtain on their own, the fact remains that unless the Commission puts some teeth into the ban on discriminatory pricing, both individual MVPDs and buying groups will be vulnerable to unjustified price discrimination. Mediacom and others have urged the Commission to address this issue directly through the adoption of rules that require programmers (i) to obtain, in advance, an express waiver of the non-discrimination rule whenever they propose to differentiate among distributors in the net effective rate that they charge and (ii) to waive any contractual confidentiality provisions that would prevent distributors from learning the net effective rate(s) being charged to other MVPDs. *See, e.g., Mediacom Comments* at 9-17; Comments of Cox Communications, Inc., MB Docket 12-68, et al. (filed June 22, 2012) ("*Cox Comments*") at 4-9; Reply Comments of Charter Communications, MB Docket 12-68, et al. (filed July 23, 2012). Mediacom renews its call for the Commission to address these proposals, which were submitted in response to the Commission's request for comment on volume discounting practices. *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).

<sup>11</sup> The Commission has consistently held that refusals to deal are a form of non-price discrimination barred by the program access rules. *See, e.g., 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*

Furthermore, even if a buying group was able to structure its operations in a way that entitled it to protection under the program access rules, there are other gaps in those rules that limit their effectiveness when applied to buying groups. For example, the rules (i) do not clearly define when a buying group is similarly situated to a comparably-sized MVPD or MSO; (ii) do not expressly require that programmers respond to requests for rate schedules that vary depending on the number of subscribers participating in a buying group; and (iii) do not apply to programmers that are not vertically-integrated with a cable operator.

In comments filed earlier this year, the American Cable Association (“ACA”) urged the Commission to adopt certain modifications and clarifications to the program access rules in order to lower the barriers preventing MVPDs and their subscribers from obtaining the pro-competitive and pro-consumer benefits of group purchasing arrangements.<sup>12</sup> Specifically, ACA proposed (i) that the Commission modify its definition of the term “buying group” so that it reflects current industry practice with respect to a buying group’s assumption of liability on behalf of its members; (ii) establish standards for the right of a buying group’s members to participate in the group’s master licensing agreements; (iii) establish an express “standard of comparability” for determining when a buying group should be considered similarly situated to an individual MVPD or an MSO that offers programmers access to a comparable number of subscribers; and (iv) clarify that a programmer may not refuse to offer a buying group a master agreement specifying a schedule of non-discriminatory terms and conditions over various ranges of subscribership proposed by the buying group.<sup>13</sup> The *Further Notice* seeks comments on each of

---

*Carriage*, First Report and Order, 8 FCC Rcd 3359, 3412-13 (1993) at ¶ 116. *Accord Cellularvision of N.Y., L.P. v. Sportschannel Assocs.*, Memorandum Opinion and Order, 10 FCC Rcd 9273 (1995).

<sup>12</sup> Comments of the American Cable Association, MB Docket 12-68, et al. (filed June 22, 2012) (“*ACA Comments*”).

<sup>13</sup> *Id.* at 15.

these proposals.<sup>14</sup> It also seeks comment on a proposed revision to the buying group definition that would allow the Commission to review buying group membership decisions.<sup>15</sup>

## DISCUSSION

It is axiomatic that larger MVPDs enjoy competitive advantages over smaller MVPDs. Larger MVPDs are able to extract the best prices and terms from programming suppliers. The programming suppliers then seek to make up the difference by demanding higher prices and other concessions from smaller and mid-sized MVPDs. This puts companies such as Mediacom, which serves slightly more than one million video subscribers located primarily in smaller cities and towns, at a distinct competitive disadvantage.<sup>16</sup> Consequently, Mediacom supports the adoption of several modifications and clarifications to the program access rules that will enhance competition by facilitating the creation and operation of buying groups.

For the reasons set forth in ACA's previously filed comments, Mediacom endorses the adoption of a "standard of comparability" rule for buying groups and a rule requiring that programmers provide buying groups with a "schedule" of proposed rates.<sup>17</sup> In addition, as discussed more fully below, the Commission should expressly clarify that programming vendors may not refuse to deal with a buying group or any of its members based on size. This is because any size-based determinations regarding the status and rights of a buying group and its members should be made solely as a matter of antitrust law, not by the unilateral action of programming vendors or even by Commission rule. Similarly, a buying group's membership decisions should

---

<sup>14</sup> *Further Notice* at 66058, ¶ 32.

<sup>15</sup> *Id.*

<sup>16</sup> Mediacom's video subscribers are spread over approximately 1400 communities. In over 90 percent of these communities, Mediacom has 2000 or fewer subscribers. Moreover, fewer than 13 percent of Mediacom's subscribers reside in a top 50 Designated Market Area.

<sup>17</sup> *ACA Comments* at 29-33.

be subject to review, if at all, by the courts under the antitrust laws, not by the Commission under a vague “reasonableness” standard.

Finally, as explained below, Mediacom urges the Commission to consider two additional modifications to its rules that will promote the effectiveness of buying groups: (i) the Commission should clarify that when an MVPD and a programmer have an existing carriage agreement and the MVPD joins a buying group, the existing agreement remains in effect until such time as it expires, but thereafter the MVPD is entitled to opt in to the remaining term of the buying group’s master agreement with that programmer and (ii) the Commission should extend the protections of the program access rules to cover negotiations with all programming vendors, not just those that are vertically-integrated with a cable operator.

**I. The Commission Should Clarify That It is a Violation of the Program Access Rules for a Programming Vendor to Refuse to Deal with an Existing or New Buying Group, or With an Individual Participant in a Buying Group, Based on the Size of Either the Group or the Individual Participant.**

In the comments that it filed in response to the initial Notice of Proposed Rulemaking in this proceeding, ACA attached a sworn statement by Frank Hughes, NCTC’s Senior Vice President, Member Services, stating that NCTC’s four largest members “do not currently license substantial amounts of programming through the NCTC, often due to the insistence of the programmer and over the strong objection of NCTC.”<sup>18</sup> ACA correctly noted that unless buying group members are guaranteed recourse under the program access rules when a programming vendor refuses to deal with them based on their size, the benefits of participating in a buying group – and the program access protections that Congress intended to apply to buying groups –

---

<sup>18</sup> *Id.* at app. B, ¶ 5.

would be rendered meaningless.<sup>19</sup> The *Further Notice* seeks comment on whether and how it should address this issue.<sup>20</sup>

The answer is that the Commission should make clear in the strongest and broadest terms that programmers may not refuse to deal with a buying group or any of its members based on size. Allowing programmers to pick and choose whether and how to deal with a buying group or particular members of a buying group is inherently arbitrary and contrary to the public interest as articulated in both the anti-discrimination provisions of Section 628 and in the guidance provided by those agencies with primary responsibility over antitrust policy.

First, size alone does not and cannot provide a rational basis for drawing a distinction between an individual distributor with five million subscribers and a buying group that represents a group of distributors that collectively serve five million subscribers. And size alone does not and cannot provide a rational basis for drawing a distinction between a buying group that consists of five MVPDs each with one million subscribers and a buying group whose members include one MVPD with three million subscribers and four MVPDs each with five hundred thousand subscribers.

Second, as discussed above, it is widely recognized that buying groups enhance consumer welfare by reducing input costs and creating pro-competitive efficiencies. Reflecting the benefits that group purchasing offers, the Department of Justice and the Federal Trade Commission have articulated market share “safety zones” to help encourage buying group activity.<sup>21</sup> If a buying group passes muster under the standards used in enforcing the antitrust

---

<sup>19</sup> *Id.* at 32.

<sup>20</sup> *Further Notice* at 66062-63, ¶ 59.

<sup>21</sup> See Joint Antitrust Guidelines of the U.S. Dep’t of Justice and the Fed. Trade Comm’n for Collaborations Among Competitors at 25-26 (2000) (“2000 DOJ/FTC Buying Group Guidelines”). The agencies stressed that many buying groups and other competitor collaborations that exceed these safety zones are nonetheless procompetitive or

laws, a programmer should not be at liberty to discriminate against an MVPD by preventing it from participating in the group's master agreements based on nothing more than the size of the MVPD. Forcing an MVPD that belongs to a buying group to negotiate separately from the group not only reduces the bargaining strength of that MVPD, but also reduces the collective bargaining strength of the rest of the MVPDs that are allowed to negotiate through the buying group. The result is that the customers of all of the buying group's members are harmed.<sup>22</sup>

In all other industries, the antitrust laws are relied on to prevent buyers from using a buying group to engage in anticompetitive behavior. There is nothing so unique about the multichannel video marketplace that would justify the establishment of a regulatory regime, separate from the antitrust laws, that imposes specific caps on the size of the MVPDs that can participate in a buying group or on the size of the group as a whole. Indeed, if the third through twenty-first largest traditional cable television operators combined their purchasing power, they still would not match the size of Comcast. If the leverage that Comcast wields in programming negotiations does not threaten the public interest, why should the government stand in the way of a group of MVPDs with equivalent or fewer subscribers engaging in a practice that has been engaged in by businesses in other industries for over a century: forming a buying group.

Thus, questions relating to the size of buying groups and their members should be left to the agencies charged with interpretation and enforcement of the antitrust laws. The Commission should make clear that, for purposes of the program access rules, programmers may not prevent

---

competitively neutral. Thus, the agencies cautioned against the use of the market share safety zones to discourage the creation of competitor collaborations. *Id.* In addition, as noted above, the Department of Justice can and does issue Business Review Letters to buying groups addressing their status under the antitrust laws. Under the circumstances, the Commission should steer clear of any action that might discourage the creation of a buying group or otherwise be at odds, now or in the future, with how buying groups might be viewed by the antitrust authorities.

<sup>22</sup> In many instances, the excluded MVPD also may be disadvantaged as compared to smaller MVPDs who, even without the targeted member's participation, are able to obtain better prices and terms than the targeted MVPD.

buying groups from negotiating on behalf of all of their members nor may they prevent any particular member from participating in the buying group's master agreement with the programmer, subject only to the specific exceptions set forth in Section 628(c)(2)(B)(i)-(iv) of the Act.<sup>23</sup> Any rule that would continue to allow size-based refusals to deal with buying group members runs the risk of codifying as legitimate – and perpetuating – the unfair and discriminatory practices currently engaged in by programmers with respect to buying groups and their members.<sup>24</sup>

## **II. The Commission Should Not Adopt Rules Governing a Buying Group's Membership Decisions.**

The Commission, on its own motion, has proposed a new test for determining whether a buying group qualifies for protection under the program access rules. Specifically, the Commission has proposed to deny the protections of the program access rules to any buying group that the Commission determines has “unreasonably” refused to grant an MVPD's request for membership.<sup>25</sup> The proposed rule apparently arises out of the Commission's concern that the denial of membership in the buying group of its choice may result in an MVPD being unable to obtain terms on a par with those obtained by the buying group's members. That concern, however, does not justify the adoption of a rule that has no statutory basis and that, in practice, would be manifestly contrary to the public interest.

---

<sup>23</sup> *Further Notice* at 66056, ¶ 21.

<sup>24</sup> Thus, for example, Mediacom does not support ACA's “safe harbor” proposal for addressing size-based discrimination among buying group members (even though Mediacom itself would fall within the proposed safe harbor). Our concern is that a safe harbor approach could end up deterring MVPDs whose subscribership exceeds the safe harbor level from joining a buying group, thereby limiting the effectiveness of buying groups by artificially capping their size.

<sup>25</sup> *Further Notice* at 66055, ¶ 16.

First, as discussed previously, Section 628 grants buying groups the same protections against refusals to deal, discrimination and other unfair practices as are accorded individual MVPDs and MSOs. There is no indication in either the statutory language or its legislative history that Congress intended to give the Commission authority to narrow the rights of buying groups based on their membership decisions. Indeed, the Media Bureau has acknowledged that a buying group can be a plaintiff, but not a defendant in a complaint proceeding brought under the program access rules.<sup>26</sup> The *Further Notice*'s proposal to give the Commission authority to deny a buying group protection under the program access rules based on an assessment of the "reasonableness" of the buying group's membership decisions appears to be little more than an attempt at an end run around that decision.

Second, buying group membership decisions often require a delicate balancing of business considerations. A buying group may wish to limit its membership to entities with shared characteristics in order to maximize the cohesiveness of the group. For example, a buying group might seek for good reason to limit its membership to franchised cable operators, or to rural telco video providers. Allowing any and all MVPDs to assert a claim to membership in any and all buying groups could lead to the takeover of a buying group by entities with a different set of objectives and priorities than the original group and likely would deter the formation of new buying groups to the ultimate detriment of consumers.

Third, although the *Further Notice* suggests that, in applying the proposed rule, the Commission will take into consideration such factors as whether there were "legitimate antitrust reasons" for denying a company membership in a buying group,<sup>27</sup> the Commission's intervention

---

<sup>26</sup> *Lafayette City-Parish Consol. Gov't of Lafayette, L.A. v. Nat'l Cable Television Coop., Inc. et al.*, Order, DA 11-953 at ¶ 10 (Media Bureau May 25, 2011).

<sup>27</sup> *Further Notice* at 66055, ¶ 16.

in this area would be fraught with peril. The Supreme Court has recognized that buying groups “must establish and enforce reasonable rules in order to function effectively” and that an adverse membership decision “does not necessarily imply anticompetitive animus.”<sup>28</sup> At the same time, however, buying groups must be careful that its membership decisions do not give rise to a group boycott claim on the one hand or create an undue level of competitive overlap on the other. Decisions regarding the status of a buying group under the antitrust laws often will turn on factual questions such as whether the group “possesses market power or exclusive access to an element essential to effective competition.”<sup>29</sup>

If the Commission adopts a rule that potentially subjects every buying group membership decision to review under a vague and uncertain “reasonableness” standard, conflicts with the antitrust authorities and courts will inevitably follow, sowing confusion among buying groups and their members.<sup>30</sup> As a result, opportunities to create new, specialized buying groups will likely be lost. In other instances, buying groups may feel pressured to admit new members even when it is not in their business or legal best interest to do so. Ultimately, both competition and consumers will suffer. The Commission should stay out of buying group membership decisions.

---

<sup>28</sup> *Northwest Wholesale Stationers*, 472 U.S. at 296.

<sup>29</sup> *Id.*

<sup>30</sup> For example, in *S & S Communications v. Local Exchange Carriers Association*, 2006 WL 519651 (D. S.D.), the court granted defendant buying group’s motion for summary judgment in a Sherman Act case brought by a company that was denied membership in the group. The court indicated that, in order for the plaintiff to establish that it was the victim of an unreasonable restraint of trade, it would have to present evidence that its exclusion from membership in the group prevented it from providing service – the mere inability of the plaintiff to provide service at the same cost as the members of the buying group from which it was excluded was not sufficient. This, of course, is a much more stringent standard of competitive harm than the one typically applied by the Commission in program access cases.

**III. The Commission Should Clarify That When an MVPD Joins a Buying Group, the MVPD Can Opt In to the Remaining Terms of the Buying Group's Master Agreements Once the MVPD's Existing Agreements Expire.**

How buying groups and their members deal with varying contract expiration dates is an issue both for newly formed groups (whose members almost certainly will have existing agreements with expiration dates that do not coincide), as well as for existing buying groups seeking to add new members with current agreements that expire on different dates than the buying group's master agreement. Mediacom urges the Commission to address this issue by clarifying that when an MVPD with an existing program carriage agreement with a particular vendor joins a buying group, the MVPD remains bound by the existing agreement until it expires, but upon such expiration can opt in to the remaining term of the buying group's master agreement with that program vendor.

The clarification suggested herein will prevent confusion and minimize the risk of disputes going forward by allowing the contract terms applicable to buying group members to "sync up" with each other after a single contract cycle. It is also consistent with the "bargaining agent" conditions that the Commission has included in several of its orders approving transactions involving video programmers.<sup>31</sup>

---

<sup>31</sup> *In the Matter of General Motors Corporation and Hughes Electronics Corporation, Transferors, and The News Corporation Limited, Transferee*, Memorandum Opinion and Order, MB Docket No. 03-124, 19 FCC Rcd 473, 553 (2004); *In the Matter of Applications of Comcast Corporation, General 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, 26 FCC Rcd 4238 (2011). Under the terms of these bargaining agent conditions, the programmer is required to deal with an agent designated by smaller cable operators to collectively bargain, and if necessary arbitrate, on their behalf. The deadline for giving notice of the bargaining agent's intent to arbitrate is five days following the earliest contract expiration date among the MVPDs represented by the bargaining agent. Where an MVPD has a contract that has not expired at the time that new contract terms are set by arbitration, the new terms will become effective upon expiration of the existing agreement and remain in effect for the remaining term of the arbitrated agreement.

#### **IV. The Commission Should Amend Its Rules To Address Anticompetitive Behavior On the Part of Programmers That Are Not Vertically-Integrated with a Cable Operator.**

In comments filed in the initial phase of the instant proceeding, Mediacom pointed out that the adverse impact on MVPDs and their customers of discriminatory and other unfair acts committed by programming suppliers does not vary depending on whether or not the programmers engaging in these practices are affiliated with a cable operator.<sup>32</sup> Indeed, as the Commission itself has previously noted, “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-cable MVPD, or is a non-affiliated “independent” network.<sup>33</sup>

Moreover, unlike the situation that existed in 1992, when cable-affiliated programmers were dominant, most of the top programmers today are vertically integrated with broadcasters and/or motion picture studios, not cable operators.<sup>34</sup> 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 engage in discriminatory practices that harm competition and consumers.

---

<sup>32</sup> *Mediacom Comments* at v, 17-18. Mediacom was not alone in suggesting that the Commission can and should extend the program access rules so that they apply on an equal footing to all programmers. A similar argument was made by Cox Communications. *Cox Comments* at 4-5.

<sup>33</sup> *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 Red 17791, 17862 (2007) at ¶ 120, *aff’d sub nom. Cablevision Sys. Corp. et al. v. FCC*, 597 F.3d 1306 (D.C. Cir. 2010).

<sup>34</sup> 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.

Mediacom again urges the Commission to follow the lead of the court in *Cablevision II*, which held that Congress has given the Commission “broad and sweeping” authority to address unfair practices in the video marketplace.<sup>35</sup> Just as the specific reference to “satellite” programming in the provision at issue in *Cablevision II* was found to represent a floor, not a ceiling, the Commission, applying the same tools of statutory interpretation, can and should protect MVPDs (and buying groups of MVPDs) from anticompetitive practices committed by any programmer, notwithstanding the statute’s specific references to cable-affiliated services.

Finally, the Commission’s ancillary authority under Section 4(i) of the Communications Act gives it an independent jurisdictional basis for regulating anticompetitive and anti-consumer practices by programmers that are not affiliated with cable operators. The general grant of jurisdiction to the Commission under Title I clearly covers the regulation of the relationships between and among MVPDs, buying groups, programmers, and consumers. And regulating anticompetitive practices by all programmers is reasonably ancillary to the accomplishment of the goals 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.”<sup>36</sup> In particular, allowing all programmers except those that are affiliated with a cable operator to refuse to deal with MVPD buying groups or particular members of such groups would frustrate the pro-consumer and pro-competition objectives of the Cable Act and, in particular, of Section 628.<sup>37</sup>

---

<sup>35</sup> *Cablevision Systems Corp. v. FCC*, 649 F.3d 695, 701 (D.C. Cir. 2011) (“*Cablevision IP*”).

<sup>36</sup> 47 U.S.C. § 548(a).

<sup>37</sup> 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., 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, 20260-61, 63-64 (2007) at ¶¶ 52-54, 60. In addition,

## CONCLUSION

For the reasons stated herein, the Commission should adopt the above-described clarifications and modifications to its program access rules in order to enhance the effectiveness of those rules as applied to buying groups and their members. However, the Commission should abandon its ill-advised proposal to exercise oversight with respect to the membership decisions of buying groups.

Respectfully submitted,

**MEDIACOM COMMUNICATIONS CORPORATION**

By: 

Seth A. Davidson  
Stephen P. Murphy  
Ari Z. Moskowitz

Edwards Wildman Palmer LLP  
1255 23rd Street, NW  
Eighth Floor  
Washington, DC 20037  
(202) 939-7900

December 14, 2012  
AM 17846379.7

Their Attorneys

---

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.