BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Petition for Rulemaking to Amend the Commission's Rules Governing Practices of Video Programming Vendors	)))	MB Docket No. 14-____

PETITION FOR EXPEDITED RULEMAKING

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SUMMARY

The relationship between video programmers and multichannel video programming distributors, unchecked by either market forces or effective regulatory restraints, is broken. Control of the video programming marketplace today is largely concentrated in the hands of six "media giants" that together own, in whole or in part, well over 125 cable networks, including most of the most popular and/or highly penetrated networks, and hold significant sports programming rights. Most of these companies have interests in broadcast networks and/or movie studios. Moreover, the big companies are on a path to getting even bigger, with the pending mergers of Comcast/NBCU and Time Warner Cable and of AT&T and DirecTV and the potential merger of News Corp. and Time Warner Inc. A similar situation exists with regard to broadcast television station ownership: the biggest group owners are getting even bigger.

The policies adopted by Congress and the Commission have fostered a radical transformation of the MVPD marketplace from one dominated by cable operators to one in which the programmers (both broadcast and non-broadcast) clearly have the upper hand and are able to engage in coercive practices such as forced wholesale bundling and retail packaging of massive numbers of channels and unjustified volume discounting. Fortunately, the Commission has the statutory authority to address the problems afflicting the video programming marketplace. What it needs is the will to do so. In the instant petition, Mediacom argues for and recommends that the Commission institute, on an expedited basis, a rulemaking proceeding to consider and adopt specific rules that will restore balance to a video marketplace that currently disserves the public interest by driving up the price of video service for consumers, limiting consumer choice, and reducing competition in both the programming and distribution markets.

The principal practices that the Commission should address are: forced wholesale bundling and retail packaging; interference with consumers' access to programming otherwise freely available on the Internet and to new technologies; and unjustified volume discounting.

Wholesale bundling: Programmers can and do effectively force MVPDs and their video customers to purchase unwanted networks. They do this by various means, such as pricing options for bundles and stand-alone channels that make it uneconomic for an MVPD to take anything but the bundle. Some programmers also refuse to permit an MVPD to carry one of the programmer's weak services unless the MVPD also carries the programmer's strong network. This tactic makes it more difficult for an MVPD to offer cheaper programming that might be a closer substitute for the programmers' more expensive channels. These tactics are used by non-broadcast as well as broadcast programmers.

Tier placement. The Big Six and some other programmers also routinely include in their affiliation agreements provisions that effectively require MVPDs to package many, if not all, of their networks together on the MVPD's basic or expanded basic tier (the most highly penetrated tiers). The ways the programmers seek to accomplish this result include expressly stating in their affiliation agreements that the cable network or networks covered by the agreement must be carried only on the MVPD's first or second most highly penetrated tier. In other cases, programmers control the manner in which their networks are packaged and sold through indirect means, such as requiring the carriage of a strong network on expanded basic and using a graduated license fee schedule so that there is a significantly higher charge if a weaker network is not carried on the same tier. Setting penetration levels so that it is essentially impossible for an MVPD to offer networks on an a la carte basis or in some other way that the MVPD prefers is another technique for forcing bundling of multiple networks on expanded basic as is providing in affiliation agreements that the MVPD can never move the programmer's network to a tier with fewer subscribers than the tier on which it was carried at the time the contract was signed.

Programmers also use minimum penetration requirements to severely restrict an MVPD's ability to offer customer service options that have fewer channels and cost less than the expanded basic tier. The combination of legal restraints that force carriage of local broadcast signals on basic and contractual penetration requirements make it all but impossible for cable MVPDs to offer a service option somewhere in between the basic tier and expanded basic in terms of price and number of channels. An example drawn from among Mediacom's own systems illustrates the point: Out of a combined 78 channels on the Mason City, IA system's basic and expanded basic tiers, 66 are broadcast channels or cable networks that, with few if any exceptions, cannot be offered a la carte or on any tier other than basic or expanded basic. The net result is that, from the consumer's perspective, in order to watch any of the popular networks, he or she must buy a bundle of over 60 networks.

The newest tactic in the programmers' arsenal for forcing MVPDs to accede to their bundling, packaging and pricing demands is to interfere with consumers' access to programming on the Internet or to require MVPDs to accede to contract provisions that would force MVPDs to limit their customers enjoyment of otherwise lawful advances in technology, such as enhanced time-shifting and space-shifting services.

Finally, programmers harm competition and consumers by giving the largest distributors volume discounts that are unjustified by cost or competitive considerations. When this happens, smaller and rural consumers who are not served by the largest distributors end up paying more. Indeed, when distributors merge, the result is almost always lower wholesale prices for the combined entity even though there is no cost-based justification for the lower prices. And it is the rest of the distributors that end up having to make up the difference so that the programmer can recoup the revenues it gave up through its volume discounting.

In order to address these practices, Mediacom proposes a set of rules that the Commission clearly has the power to adopt pursuant to its authority under Sections 628, 616, 325 and 4(i) of the Communications Act (as construed by the Commission and the courts). These proposals are as follows:

> **A la carte programming option**. Give MVPDs the right to offer on an *a la carte* basis any video programming that (i) was not carried by such MVPD as of January 1, 2014; <u>or</u> (ii) has a cost to the MVPD, on a per subscriber basis, that places it within the top 20 percent, in terms of price, of the programming services carried by such MVPD on its basic or expanded tier of service; <u>or</u> (iii) institutes a price increase upon renewal or for any year in the contract term of more than the inflation rate for the most recently completed calendar year.
>
> **Unbundling option**. In the alternative, adopt a set of rules that would require programmers, on receipt of a demand from an MVPD, would be required to provide the MVPD with a standalone offer for (i) any broadcast or non-broadcast programming offered by the programmer; (ii) a bundle containing the same video programming networks as contained in the expiring agreement between the MVPD and the programmer; and/or (iii) any bundle of video programming networks or any individual network that a the programmer has offered to sell to any other MVPD in the previous twenty-four months. As an adjunct to this rule, the Commission should require a video programmer, upon request, to provide an MVPD with whom it is in carriage negotiations with a list of the different programming bundles and separate standalone carriage agreements that the programmer has offered to sell during the previous twenty-four months.
>
> **Prohibit blocking of Internet access as tactic in negotiating programming agreements and including restrictions on the connection or use of lawful devices in programming agreements.** The Commission should bar programmers from denying consumers Internet access to content that the programmer otherwise makes available online for free where the consumer's Internet service is provided by an MVPD that is negotiating for, or has reached an impasse in negotiations for, MVPD carriage of the programmers' video services. The Commission also should expressly bar the programmers from insisting that an MVPD agree, as a condition of obtaining video programming carriage rights, to refrain from providing service to any consumer based on the attachment by or on behalf of that consumer of any lawful device or refrain from activating any application or functionality available on such device.

Require programmers to seek waivers justifying volume discounts. The Commission should modify 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). 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.

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PETITION FOR EXPEDITED RULEMAKING

Pursuant to Section 1.401(a) of the Commission's rules and in furtherance of the Commission's statutory duty to "promote the public interest, convenience, and necessity by increasing competition and diversity in the multichannel video programming market" and to "spur the development of communications technologies,"[1] Mediacom Communications Corporation, by its attorneys, petitions the Commission to commence, on an expedited basis, a rulemaking proceeding to consider and adopt specific rules to prevent entities that sell video programming to multichannel video programming distributors ("MVPDs") from engaging in certain unfair and anti-competitive practices. The practices in question are (i) the programmers' use of coercive tactics to force distributors to purchase and sell an ever-increasing "bundle" of networks and (ii) the programmers' reliance on unjustified (and unjustifiable) volume discounts to support discriminatory pricing schemes. These practices contravene the statutory goals identified above by harming competition, consumer choice, and innovation. Moreover, the harm to the public interest is the same whether or not the programmer is vertically integrated with an MVPD. It is thus incumbent on the Commission to act promptly to adopt targeted changes in its rules and policies to address these practices.

[1] 47 C.F.R. § 1.401(a); 47 U.S.C. § 548(a).

INTRODUCTION

Control of the multichannel video programming market today is largely concentrated in the hands of six companies that together own, in whole or in part, well over 125 cable networks, including an overwhelming majority of the most popular and/or highly penetrated networks. Most of them, directly or through affiliates, hold significant rights to telecast major collegiate and/or professional sports events. Five of these six are media giants that are vertically integrated with an MVPD, a broadcast network, and/or a motion picture studio: The Walt Disney Company (an owner of, *inter alia*, the ABC broadcast network, the Walt Disney Studios, and the ESPN, A&E, and Disney suites of cable networks); NBCU (now part of Comcast and owner, *inter alia*, of the NBC and Telemundo broadcast networks, Universal Studio and more than two dozen cable networks); The News Corporation (owner of, *inter alia*, the Fox broadcast network, 20th Century Fox, and various cable networks); Time Warner Inc. (owner of, *inter alia*, Warner Bros. and the HBO and Turner suites of program networks and part owner of the CW broadcast network); Viacom (owner of, *inter alia*, Paramount Pictures, and the MTV, Nickelodeon, and BET suites of cable networks); and Discovery Communications, Inc. (owner of more than 200 worldwide television networks, led by Discovery Channel, TLC, Animal Planet, Investigation Discovery and Science, as well as U.S. joint venture networks OWN: Oprah Winfrey Network and the Hub Network). Viacom is effectively controlled by National Amusements, Inc., which also effectively controls CBS Corporation, owner of the CBS broadcast network, the Showtime suite of cable networks, and several other cable networks, and part owner (with Time Warner Inc.) of the CW broadcast network.

The relationship between these video programmers and distributors is broken. The reason it is broken is that the programmers, unchecked by either market forces or effective regulatory restraints, are able to take advantage of the competitive imbalance that exists between the programmers, on the one hand, and MVPDs, on the other. This imbalance manifests itself in a variety of ways, most notably the use of coercive bargaining tactics to force MVPDs and their customers to purchase bundles of programming without regard for, and often in contravention of, consumer interest or demand. Programmers also discriminate between distributors by offering the largest MVPDs "volume discounts" for which there is no competitive or cost justification. These unfair, anti-competitive, and anti-consumer practices drive up the cost of multichannel video programming service, limit the opportunities for new entrants to participate in the video marketplace, and reduce consumer choice. They are also the primary reason that retransmission consent fees have risen by nearly 8,600 percent in seven years and the wholesale cost of non-broadcast networks has increased at rates well in excess of inflation in every year for over a decade, with no end in sight.

The dysfunctional state of the relationship between programming suppliers and MVPDs is not a new development. Indeed, as far back as 2003, and then again two years ago, Mediacom described for the Commission the ways in which consumers were being adversely impacted and the public interest disserved by the programmers' use of unjustified volume discounts and economically coercive bundling strategies.[2] The only thing that has changed in the interim is that the situation has gotten worse. Emboldened by the Commission's inaction, the "Big Six" programmers have become even more aggressive. For example, when several smaller MVPDs resisted Viacom's carriage and pricing demands, Viacom responded by blocking those MVPDs'

[2] 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 55-58; Comments of Mediacom Communications Corporation, *Revision of the Commission's Program Access Rules*, MB Docket No.12-68 (filed June 22, 2012).

Internet customers from accessing Viacom online content, whether or not those Internet customers also were video service customers.[3]

As the Commission knows, the reason programmers are able to engage in such coercive and unfair practices is, ironically, because policies adopted by Congress and the Commission have fostered a radical transformation of the MVPD marketplace from one dominated by cable operators to one in which incumbent cable operators represent less than 55 percent of the market. Today, four of the top six MVPDs provide head-to-head competition to incumbent cable operators. Put another way, in virtually every instance, programmers have the ability to play competing distributors off against each other in order to force acquiescence with the programmers' desired terms and conditions.

Moreover, the MVPD marketplace is on the verge of additional changes that will further compound the problems faced by all but the very largest distributors in dealing with programmers. The Commission currently has before it a pair of proposed transactions that would result in the merger of the nation's two largest incumbent cable operators (and the largest and fourth largest MVPDs overall) and the merger of the nation's second and fifth largest MVPDs (and the largest and third largest competitors to incumbent cable operators). These combinations would exacerbate the divide between the biggest MVPDs and virtually all other distributors.

The mega-MVPDs that will be created by these mergers will enjoy greater leverage with the programmers, including the leverage to demand and obtain discriminatory "volume discounts." These discounts, however, will not come out of the pockets of the programmers.

[3] This same tactic was employed by CBS (which, as indicated above, has a common ownership link to Viacom through National Amusements, Inc.) in its retransmission consent dispute with Time Warner Cable Inc. in 2013. Mike Farrell, *Viacom Blocks Online Access to CableOne Subs,* Multichannel News (April 30, 2014), http://www.multichannel.com/news/news-articles/viacom-blocks-online-access-cableone-subs/374283 (referencing earlier CBS blackout of Time Warner Cable systems).

Rather, once the programmers cut their discounted deals with these two mega-MVPDs that will reach at least one-half of the nation's MVPD subscribers, they will be in an even stronger position to recover the cost of the discounts from the rest of the MVPD universe in the form of higher prices. The MVPDs that face these price hikes will have to pass them along to consumers in the form of higher video subscription prices or absorb them by reducing expenditures on independent programming and innovative services. If competitive conditions prevent either of those alternatives, it is possible that cable MVPDs will have to increase broadband prices or slow the expansion and improvement of their broadband services. In any of these cases, consumers, and the public interest, will be harmed.

Changes also are looming on the programming side of the marketplace.[4] The broadcast television industry is in the midst of a major transformation, with a surge in acquisition activity giving a small group of station owners an unprecedented level of control over local television stations.[5] And just last week, it was reported that News Corp. had made a bid to purchase Time Warner Inc., a transaction that, should it occur, would combine two of the "Big Six" programmers into a behemoth with control over more than three dozen cable networks.[6] It is likely that the two mega-mergers and continuing consolidation of content owners will force other distributors to sell to one of the giant MVPDs, leading to fewer consumer choices and to adverse impacts on jobs and economies in many states and localities—indeed, the need to get bigger to

[4] The consequences of this merger frenzy were the subject of a story published on the front page of this morning's New York Times' Business Day section. Emily Steel and David Gelles, *Under the Feet of Giants*, New York Times, July 21, 2014 at B1, available at http://images.burrellesluce.com/image/3584NX/3584NX_87417.

[5] *See, e.g.*, Jon Lafayette & Michael Malone, *Media General, LIN In $1.6 Billion Merger*, Broadcasting & Cable (March 21, 2014), available at http://www.broadcastingcable.com/news/local-tv/media-general-lin-16-billion-merger/129955.

[6] Andrew Ross Sorkin & Michael J. De La Merced, *Murdoch Puts Time Warner on Wish List*, New York Times, July 17, 2014, at A1.

match the market power of other behemoths on both sides of the market was one of the principle justifications cited by AT&T and DirecTV for their merger.

Fortunately, the problems afflicting the video marketplace can be addressed if the Commission has the will to do so. As discussed below, there are specific measures that the Commission can take that will restore balance to the relationship between video programming vendors and MVPDs.[7] These measures, which are clearly within the Commission's statutory authority to adopt, would not require the Commission to set the prices and terms of video programming at either the wholesale or retail level; rather, they would require only that video programming vendors forego their coercive bundling and unjustified volume discounting strategies and provide all MVPDs with economically rational and non-discriminatory options for meeting the needs and demands of consumers.

DISCUSSION

I. The Commission Should Adopt Specific Rules Addressing the Coercive Packaging and Pricing Practices of Video Programmers

In negotiating affiliation agreements, the Big Six programmers and the large owners of multiple broadcast stations effectively require MVPDs to accept provisions that give the programmers effective control over both the selection of the programming licensed by MVPDs and the manner in which that programming is sold to consumers. As a result of the programmers' policies and practices, the prices that consumers pay for MVPD service are rising at an unsustainable pace even as the ability of MVPDs to satisfy consumers' needs and interests

[7]The Commission has open proceedings in which it could address the bundling and volume discounting practices that are the subject of the instant petition. *See Implementation of the Cable Television Consumer Protection and Competition Act of 1992 – Development of Competition and Diversity in Video Programming Distribution*, Report and Order and Notice of Proposed Rulemaking, 22 FCC Rcd 17791 (2007); *Revision of the Commission's Program Access Rules*, Notice of Proposed Rulemaking, MB Docket No. 12-68, 77 Fed. Reg. 24302 (Apr. 23, 2012). The Commission has not sought comment on specific rules in either of these proceedings. Therefore, Mediacom submits that, in order to expedite the resolution of these outstanding proceedings, the Commission should issue a Notice of Proposed Rulemaking seeking comment on the specific proposals contained herein.

declines. Consumers are effectively forced to buy massive bundles of channels, including many that they would not buy if given the choice. The policies and practices on which this petition is focused include (i) the practice of effectively forcing consumers to buy massive bundles of channels, including many that they do not watch through the use of wholesale bundling strategies that condition an MVPD's ability to access on economically rational terms the programmer's most popular channels on the MVPD's purchase of the programmer's lightly viewed channels or that limit the ability of MVPDs to offer subscribers less costly service options; (ii) the practice of dictating how MVPD's must package and offer the programmers' networks to consumers; and (iii) the practice of conditioning access to programming on an MVPD's agreement not to allow consumers the benefits of lawful technological innovations. We will briefly describe each of these practices and propose a regulatory mechanism that will restore balance to the relationship between programmers and MVPDs.

A. How the Programmers Force Consumers to Take Unwanted Channels.

Wholesale bundling. Programmers such as the Big Six and the large owners of multiple broadcast stations can and do effectively force MVPDs and their video customers to purchase unwanted networks. Each of the Big Six has at least one network that is extremely "strong," either because of its broad-based popularity, the loyalty of a significant core of dedicated viewers, or its leadership within its genre. Each also has other "weaker" networks that do not have the same popular appeal or engender a comparable degree of viewer loyalty. Similarly, the owners of multiple broadcast stations affiliated with one of the "Big 4" television networks, ABC, CBS, FOX and NBC, condition the availability of retransmission consent for their popular stations on payment of retransmission consent fees for non-Big-4 stations or Big 4 stations that have low ratings in a particular market.

If given a meaningful choice, a significant number of MVPDs might elect not to pay for the weaker networks or stations, particularly at the prices currently charged by the programmers.[8] In many cases, however, they are not given that choice. This is because a common tactic employed by these programmers is to bundle their weaker channels with one or more of the strong ones.[9][10] The practical effect of this tactic is that MVPDs – and ultimately the consumers they serve – are required to pay for networks and stations they do not really want as a condition of being able to purchase the ones they do want at reasonable prices.

The programmers' wholesale bundling practices reflect carefully crafted schemes that typically seek to avoid overtly "tying" their networks or stations. Instead, they usually achieve their bundling goals through more indirect means. For example, a programmer may state that it is prepared to permit an MVPD to carry only the programmer's popular network; however, the rate that is quoted by the programmer for stand-alone carriage of that popular network is at such a high level that it is uneconomical for the MVPD not to agree instead to take the bundle that includes the unwanted services.

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[8] We henceforth use the term "programmers" to refer to either or both of the owners of broadcast networks and the owners of broadcast stations, as the context requires.

[9] *See* Comments of The Pioneer Telephone Association, Inc. d/b/a Pioneer Communications, *A La Carte and Themed Programming and Pricing Options for Programming Distribution on Cable Television and Direct Broadcast Satellite Systems* ("*A La Carte Proceeding*"), MB Docket No. 04-207 (filed July 15, 2004), at 2 ("[a]s the consolidation of media ownership has accelerated, and more and more broadcast and cable networks fall into the hands of a smaller number of conglomerates, programmers are increasingly requiring operators to purchase and carry a bundle of their networks in order to obtain licensing rights for any single network"). *See also* Comments of the National Telecommunications Cooperative Association, *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 05-255 (filed Sept. 19, 2005) ("Tying arrangements—whereby a network requires a carrier to take additional networks in order to have access to a flagship network—are rampant. ESPN and FOX are two prime examples of this practice. The end result is that the small carrier must pay a higher price in order to insure access to the desired flagship network.")

[10] The large broadcast station group owners that are not affiliated with cable networks leverage their "strong" channels to extract payment for their "weak" channels. Sinclair Broadcast Group, Inc., for example, was able to secure Mediacom's agreement to carry its stations affiliated with the MyNetwork and CW networks by refusing to negotiate separately for their stations affiliated with the far more popular ABC, CBS, FOX and NBC networks.

Another tactic employed by some programmers is to refuse to permit an MVPD to carry one of the programmer's "weak" services unless the MVPD also carries the programmer's "strong" network. Disney, for one, has admitted that it will not permit operators to carry ESPN2 unless the MVPD also carries ESPN.[11] This makes it more difficult for an MVPD to offer cheaper programming that may be a closer substitute for the programmers' more expensive programming if they want to be able to carry popular programming at economic prices or at all. Similar tactics are used by some owners of broadcast stations.

The negative impact of channel tying by programmers is exacerbated by their practice of adding new channels to their existing stable at the time of each affiliation agreement renewal. Especially egregious is the practice of migrating sports content from broadcast television or an existing MVPD network to new regional sports networks and other non-broadcast services. In addition, the regional sports networks, which used to carry all of the professional teams in a given market, are increasingly becoming focused on just one or two teams. At the instigation of or assistance of one or more the Big Six, college conferences and even college teams are launching their own RSNs. Those networks are among the most expensive channels on television, and programmers bundle them into packages with their other networks and stations. All of this means that that the vast majority of our customers must pay for these networks whether they want them or not and, moreover, now have to pay many times over for the same sports that used to be carried on another channel they already purchase.

The programmers assert that their bundling practices do not violate the antitrust laws.[12] Whether that is in fact the case remains to be seen.[13] However, the issue raised in this

[11] Comments of the Walt Disney Company, *A La Carte Proceeding* (filed July 15, 2004) at 35 n.45.

[12] *See, e.g*, Comments of the Walt Disney Company, *Review of the Commission's Program Access Rules and Examination of Program Tying Arrangements*, MB Docket No. 07-198 (filed Jan. 4, 2008) at 43-54. Jonathan

rulemaking petition is not whether the programmers' practices violate the antitrust laws; rather, the issue is whether the programmers' practices impede consumer and MVPD choice, increase the wholesale and retail costs of subscription video service, hamper innovation, and are otherwise contrary to the public interest that the Commission has been charged by Congress to protect.

Tier placement. The Big Six and some other programmers also routinely include in their affiliation agreements provisions that effectively require MVPDs to package all or many of their networks together on a "tier" of services that has the greatest or second greatest number of subscribers – usually referred to as the first or second most highly "penetrated" service tier (limited basic or expanded basic in the case of cable companies). The precise way that programmers seek to accomplish this result varies. Some programmers simply include in their affiliation agreements provisions that expressly state that the cable network or networks covered by the agreement may be carried only on an MVPD's first or second most highly penetrated tier.

In other cases, the programmer controls the manner in which its networks are packaged and sold in more indirect ways. For example, a programmer may require carriage of its strong network on expanded basic, but not dictate where weaker networks are placed; however, the programmer graduates its license fees so that there is a significantly higher charge if a weaker network is not carried on the same tier as the strong network. Charter, for example, has reported that for some networks it buys, "[t]he per subscriber fee…increases markedly as overall

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Stempel, *Viacom Loses Bid to Dismiss Cablevision Bundling Lawsuit*, Reuters (June 20, 2014), *available at* http://www.reuters.com/article/2014/06/20/us-viacom-cablevision-idUSKBN0EV2FR20140620.

[13] *See Cablevision Systems Corp. v. Viacom International Inc.*, Case No. 13-01278, Memorandum Order (S.D.N.Y. filed June 20, 2014). For a scholarly analysis of the antitrust concerns raised by the programmers' bundling practices, see Warren S. Grimes, "The Cable Television Case": Troublesome Indicia for the Making of Antitrust Law?" (2013), available at http://www.luc.edu/media/lucedu/law/centers/antitrust/pdfs/protected/grimes_march_2013.pdf.

penetration decreases...[and the] fee associated with very limited penetration is several times higher than the fee associated with broad distribution."[14]

Setting penetration levels is another technique for forcing bundling of multiple networks on the expanded basic even if the affiliation agreement does not expressly dictate that result.[15] For example, if an affiliation agreement covers network X and three affiliated networks and contains a commitment to maintain a 380% penetration rate for the four networks on a combined basis, it would be entirely accurate to say that the contract does not require that network X be carried on the expanded basic tier or in the same bundle with the other three networks nor prohibit it from being a la carte or any other way the that the operator desires. The reality, however, is that it will be impossible to achieve a 380% combined penetration rate unless all of the networks are carried on basic or expanded basic.

Another frequently employed tactic is for programmers' to provide in their affiliation agreements that the MVPD can never move the programmer's network(s) to any tier that has fewer subscribers than the tier on which MVPD carries the network(s) when the contract is signed (usually expanded basic). The effect of that restriction is to prevent the MVPD from responding to its customers' needs and interest even if a network's ratings decline, the network completely changes its programming theme, or the network begins to telecast programs that are offensive under local community standards.

Limiting the ability of MVPDs to offer smaller, less-expensive service options. Some affiliation agreements for popular MVPD networks require that the MVPD meet minimum

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[14] Comments of Charter Communications, Inc., *A La Carte Proceeding* (filed July 15, 2004) at 8-9.

[15] *See* Reply Comments of Echostar Communications Corporation, *A La Carte Proceeding* (filed August. 4, 2004) at 16-17. (Although programmers' market penetration requirements do no constitute bundling by the individual programmer, such demands effectively require that the affected channels be bundled with those on whatever tier the programmer demands for carriage of its channel").

"penetration" levels – meaning that the network must be delivered to a minimum percentage of the MVPD's video customers. For example, if a given cable network has an 80% penetration requirement, then it must be among the channels in the service tiers purchased by 80% of all of the MVPD's video service subscribers. Minimum penetration requirements can severely restrict an MVPD's ability to offer customers service options that have fewer channels and cost less than the expanded basic tier.

Part of the reason for this constraint is the Commission's mandate that cable subscribers must purchase a service tier that includes the local television broadcast stations which their cable system retransmits. Many cable MVPDs include local broadcast stations in a "limited basic" service tier that may also include a limited number of non-broadcast channels. The most popular cable networks are offered on a separate "expanded basic" service tier. While most subscribers choose to purchase both the limited basic and expanded basic tiers, a significant percentage of a cable system's video customers may subscribe only to limited basic.

Programmers' penetration requirements severely limit the ability of a cable system to offer a service option somewhere in between limited basic and expanded basic in terms of price and number of channels—for example, a tier that includes the channels in expanded basic except sports networks, which have the highest wholesale prices. That tier would be appealing to customers who are not sports fans or who are content with the sporting events available on the broadcast stations their system carries and who would welcome the opportunity for a meaningful reduction in the price they pay to watch the non-sports networks on the expanded basic tier. If, for sake of illustration, we assume that those sports networks impose an 80% penetration requirement and that the cable system's limited basic customers already represent 12% of video customers, the system can meet the penetration requirement only if no more than an additional 8%

of expanded basic customers subscribed to the new tier without the high priced sports networks. If more customers than that want the tier, the system would have to refuse to sell it to them because of the penetration requirement.

Interference with consumers' access to the Internet and new technologies. The bundling and packaging practices employed by programmers and described above increasingly are drawing the attention of, and criticism from, the public and policymakers.[16] However, even in the face of this criticism, the programmers are finding new ways to compel MVPDs to capitulate to their pricing and packaging demands. As noted above, Viacom has shamelessly blocked some Internet users' ability to view content that Viacom makes available online for free. The reason? To punish the MVPDs providing those consumers with Internet access for refusing to accede to Viacom's video service pricing and packaging demands.

In addition, in apparent contravention of the spirit, if not the letter, of the Commission's rule permitting MVPD customers to use any compatible navigation device that is lawful and does not harm the MVPD network (and the decades-old *Carterphone* "right-to-attach" principle on which that rule is based), some programmers are insisting that MVPDs seeking affiliation agreements accede to contract provisions that would force MVPDs to limit their customers' enjoyment of otherwise lawful advances in technology, such as enhanced time-shifting and space-shifting services.[17]

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[16] *See, e.g.* Television Consumer Freedom Act of 2013, S.912 113th Cong. (2013); *see also* Alex Sherman, *Unwanted Cable Channels Bloat Customer Bills, CEO Says,* Bloomberg News.com, May 23, 2012 (quoting cable industry executives statements that "there are too many networks" and that "the system is bloated") available at http://www.bloomberg.com/news/2012-05-23/time-warner-cable-ceo-calls-for-fewer-channels-in-pay-tv-bundles.html.

[17] *See Use of the Carterfone Device in Message Toll Service*, 13 FCC 2d 420 (1968); *see also* 47 C.F.R.§ 76.1201; Meg James, "*Disney, Dish Network Reach Truce on Ad-Skipping AutoHop*," Los Angeles Times, March 3, 2014, *available at* http://www.latimes.com/entertainment/envelope/cotown/la-et-ct-disney-dish-network-truce-autohop-20140303-story.html ("Walt Disney Co. and satellite TV provider Dish Network have signed a new long-term distribution deal that includes an agreement for Dish to disable its controversial ad-skipping feature for ABC network shows.").

B. How the Programmers' Forced Bundling and Packaging Practices Adversely Impact Consumers.

The programmers' various techniques for forcing unwanted channels on MVPDs and their customers at price levels that do not reflect actual demand all have an adverse impact on competition and consumers. Indeed, as a practical matter, when the owners of the popular cable networks all resort to such tactics, the outcome from the perspective of the MVPD and its customers is no different than if all of the programmers had collectively required the MVPD to place all of their channels on a single tier.

To illustrate this point, Mediacom analyzed the channel line-up of its cable system serving Mason City, Iowa, best known for being the hometown of playwright Meredith Willson and the inspiration for the mythical "River City" in his play, *The Music Man.* According to census data,[18] Mason City has a population of about 28,000, of whom 17.1% are over 65 and 16.6% are below the poverty line. The estimated median household income is $46,284, or 13% below the national average.[19]

In Mason City, Mediacom's limited basic tier of service has 27 channels, consisting of 8 commercial broadcast stations; 4 public broadcasting stations; a public access channel; 5 religious networks; 3 C-Span channels; 3 home-shopping services; the WGN "superstation;" and the Mediacom Connections Channel, a local origination channel that Mediacom operates. The commercial television and public broadcasting stations are carried under the must-carriage or retransmission consent provisions of the Communications Act, which may dictate that they be included on the limited basic tier. Carriage of the PEG channel on limited basic is required under Federal law. While Mediacom could carry the shopping, C-Span and religious networks on other tiers or eliminate them altogether when existing contracts expire, they have no or a negligible wholesale cost so we include them in the basic tier as a public service. *WGN* is

[18] http://quickfacts.census.gov/qfd/states/19/1950160.html.

[19] http://www.muninetguide.com/states/iowa/mason-city/.

carried under an agreement or pursuant to legal requirements that effectively mandates placement on the basic tier.

Our second most widely subscribed video service in Mason City is our "family" or "expanded basic" tier, comprised of an Iowa State University network and 52 additional cable networks that are owned or controlled as set forth in the following table:

Owned or Controlled By:	Number of Cable Networks:
NBC or NBC/Universal[20]	11
Disney or Hearst/Disney	9
Turner (Time-Warner)	7
Viacom	7
Fox[21]	6
Discovery	4
AMC	3
Scripps[22]	3
Crown Media (Hallmark)	1
Ion	1

The contracts for all or virtually all of these networks contain provisions that, in one way or another, prevent them from being made available to subscribers in any manner except as part of the basic or expanded basic tier.

To summarize, Mediacom's limited basic and expanded basic tiers in Mason City contain a combined 78 channels. If we exclude the network that we own and that we include in basic at no charge to subscribers and the C-Span, religious, shopping and ISU channels, that leaves 66 channels consisting of all of the broadcast stations in the market and all of the most popular cable

[20] With one or more partners in the case of two of the networks.

[21] With one or more partners in the case of two of the networks.

[22] With one or more partners in the case of two of the networks.

networks. With few, if any, exceptions, those stations and networks cannot be offered *a la carte* or on any tier other than basic or expanded basic without potentially causing us to violate the Communications Act, breach our contracts with programmers or trigger substantial financial penalties under those contracts. From the perspective of the consumer, this means that in order for a resident of Mason City to watch any one of the popular cable networks, he must buy a bundle of over 60 stations and networks.

C. Proposed Rules.

In order to promote expeditious action by the Commission, Mediacom presents the following self-explanatory proposals on which the Commission should seek comment in a Notice of Proposed Rulemaking.[23]

A la carte programming option. Mediacom proposes that the Commission confront the programmers' coercive bundling and pricing practices – the primary cause of increases in retail rates – by requiring that programmers provide MVPDs with the right to offer on an *a la carte* basis any video programming that (i) was not carried by such MVPD as of January 1, 2014; or (ii) has a cost to the MVPD, on a per subscriber basis, that places it within the top 20 percent, in terms of price, of the programming services carried by such MVPD on its basic or expanded tier of service; or (iii) institutes a price increase upon renewal or for any year in the contract term of more than the inflation rate for the most recently completed calendar year.

Unbundling option. As an alternative to the *a la carte* approach described above, the Commission should also seek comment on a set of rules that would require programmers to comply with requirements that build on the program access conditions imposed on the

[23] Mediacom acknowledges that the programmers will, as they have in the past, argue forcefully that the Commission has no authority to adopt any of these proposals. Mediacom disagrees and explains the bases for that disagreement in Section III of this Petition.

Comcast/NBCU merger.[24] Specifically, on receipt of a demand from an MVPD, a video programming vendor would be required to provide the MVPD with a standalone offer for (i) any broadcast or non-broadcast programming offered by the programmer; (ii) a bundle containing the same video programming networks as contained in the expiring agreement between the MVPD and the programmer; and/or (iii) any bundle of video programming networks or any individual network that a the programmer has offered to sell to any other MVPD in the previous twenty-four months. As an adjunct to this rule, the Commission should require a video programmer, upon request, to provide an MVPD with whom it is in carriage negotiations with a list of the different programming bundles and separate standalone carriage agreements that the programmer has offered to sell during the previous twenty-four months.

Prohibition against blocking of Internet access as a tactic in negotiating programming agreements. The Commission should put a stop to the tactic, most recently employed by Viacom, of denying consumers Internet access to content that the programmer otherwise makes available online for free where the consumer's Internet service is provided by an MVPD that is negotiating for, or has reached an impasse in negotiations for, MVPD carriage of the programmers' video services.

Prohibition against including restrictions on connection or use of lawful devices in programming agreements. The Commission also should expressly bar the programmers' from insisting that an MVPD agree, as a condition of obtaining video programming carriage rights, to refrain from providing service to any consumer based on the attachment by or on behalf of that consumer of any lawful device or refrain from activating any application or functionality on such device. As noted above, demands of this sort are inconsistent with the "right to attach" principle

[24] *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, 4358-63 (2011).

that was first articulated by the Commission in the *Carterphone* decision and is currently embedded in section 76.1201 of the Commission's rules.

II. The Commission Should Adopt Rules Barring Discriminatory Volume-Based Discounts in Programming Carriage Agreements and Requiring Video Programmers to Disclose Their Programming Rates.

A. The Current Ineffective Rule Governing Discriminatory Pricing.

Under Section 628(c)(2)(B) of the Communications Act, it is *per se* unlawful for a video programmer that is vertically integrated with a cable system to discriminate between MVPDs with respect to the prices, terms, and conditions of sale of satellite cable programming.[25] However, this statutory prohibition is subject to certain express exceptions, including one that allows "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."[26]

The Commission's rules implementing what is commonly referred to as the exception for "volume" or "quantity"-based discounts expand 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.[27] However, what the Commission giveth, it apparently can take away. In this instance, the Commission has effectively negated the requirement that programmers demonstrate that the discounts that they give to distributors are cost-justified by declaring that programmers "will not be required to

[25] 47 U.S.C. § 548(c)(2)(B).

[26] 47 U.S.C. § 548(c)(2)(B)(ii).

[27] 47 C.F.R. 76.1002(b)(3) and note.