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."[28]

Mediacom has previously commented on the Commission's interpretation of the volume-based pricing exception, expressing concern that the Commission has placed smaller cable operators at a serious competitive disadvantage not only with respect to their retail pricing, but also in their ability to invest in advanced services, including broadband and voice.[29] 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."[30]

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.[31] But there is substantial evidence that smaller cable operators pay significantly more for national cable programming than the largest MVPDs. The reason for this disparity can be traced directly to the Commission's ill-advised decision to permit programmers to establish a discriminatory pricing structure for which there neither is nor can be any economic justification.[32]

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[28] *Id.*

[29] Comments of Mediacom Communications Corporation, *Revision of the Commission's Program Access Rules*, MB Docket No. 12-68 (filed June 22, 2012) at 9-17.

[30] *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, MB Docket No. 07-51, 22 FCC Rcd 20235, 20236 n. 5 (Nov. 13, 2007) ("*MDU Order*"). *See also* 47 U.S.C. § 548(a).

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

[32] 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; Reply Comments of Mediacom Communications Corp., *2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the*

Congress never intended to allow programmers to employ discriminatory pricing strategies that force smaller MVPDs and their customers to subsidize larger MVPDs and their customers. 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 is it likely that such evidence could ever be produced.

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 National Cable

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Telecommunications Act of 1996, MB Docket No. 02-277, at 44 (*citing Co-op's Frank Hughes, the Little Op's Pal*, Multichannel News, July 23, 2001). If anything, it is likely that this disparity is even more pronounced today.

Television Cooperative ("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.[33] As a result, volume discounting practices can and do produce 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:

> 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.[34]

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

[33] 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.

[34] 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.

"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, the fact that one entity is able to generate more revenues than another is not a defense to price discrimination in favor of the larger entity. Indeed, the ability of a large distributor to create more revenue for a supplier and thus 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.

Volume discounts exist 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. 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.[35]

[35] The situation is 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.

The injustice of this practice is especially apparent when a large MVPD acquires another MVPD of any significant size. That increase in size allows the combined company to extract even larger volume discounts from programmers than either could obtain on its own. That, by itself, exacerbates the price disparity between large and small distributors. To make matters even worse, however, programmers look to smaller distributors in order to recoup the concessions they make to the acquiring MVPD.

Some indication of the magnitude of the impact can be found in the merger of the Comcast and AT&T Broadband systems in 2002. Before the merger, reliable sources estimated that the merged company would initially save $250 million to $600 million a year in programming costs under existing programming agreements and, as those agreements were renewed, the combined company expected to be able to achieve even greater volume discounts. Naturally, the programmers lose a dollar of revenue for every dollar of programming costs that Comcast saves. Rather than see their financial results take a beating to the tune of hundreds of millions of dollars, the programmers seek to recover the lost revenues by raising their wholesale prices for other MVPDs. Comparable pricing distortions occur when an MVPD buys systems from a significantly larger MVPD – the wholesale programming costs for the acquired system will increase simply because the new owner does not enjoy as great a volume discount as the seller. In both cases, merely because of the change in ownership of the systems, programmers demand significant price increases, even though their costs of providing service did not change by even a penny.

In short, the result of volume discounting is a massive transfer of wealth from subscribers in rural and small markets to giant distributors and 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 Congress was focused on 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. The upshot is that today it is 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 and that require protection against the programmers' unjustified volume discounting practices.

B. Proposed Rules.

For the reasons stated above, the Commission is under no obligation to recognize any volume discounting as legitimate. However, to the extent that the Commission concludes that Section 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.[36]

More specifically, 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

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

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 replacing the current complaint-based implementation of the discrimination ban with the prophylactic rule proposed 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. In contrast, the proposed rule will provide clear benefits to competition and consumers while preserving for programmers the ability to cost-justify specific discounts on a case-by-case basis.

III. The Commission Has the Authority to Adopt the Proposed Rules and to Apply Them to All Video Programming Vendors.

Without doubt, the programmers will do everything in their power to smother this Petition for Rulemaking in its crib. They will do so, among other things, by arguing loudly and strenuously that the Commission lacks the authority to adopt the rules proposed herein. But the programmers will be wrong. The Commission's authority to adopt the proposed rules is clear from the face of several relevant statutory provisions, from the Commission's own decisions, and from the decisions of the courts.

Section 628. The first source of authority on which the Commission can rely is Section 628 of the Communications Act. In interpreting and exercising its authority under Section 628, the Commission has not limited itself to the specific rules that, at minimum, the statute directed it to adopt. For example, the Commission has relied on Section 628 in adopting rules prohibiting cable operators and the owners of apartments and other multiple dwelling unit buildings from entering into "exclusive" agreements for the provision of multichannel video programming service.[37] And the Commission relied on Section 628 in extending the prohibition against exclusive programming agreements to terrestrial programming, notwithstanding specific references in the statute to "satellite cable programming."[38] These decisions were both affirmed by the United States Court of Appeals for the D.C. Circuit, which emphasized the "broad and sweeping" language of Section 628(b) and ratified the Commission's conclusion that Congress intended to create a "clear repository of Commission jurisdiction to adopt additional rules and take additional actions" consistent with the stated purposes of Section 628.[39]

The expressly stated purposes of Section 628 are to "promote the public interest, convenience and necessity by increasing competition and diversity in the multichannel video programming market, to increase the availability of satellite cable programming and satellite broadcast programming to persons in rural areas, and to spur the development of communications technologies."[40] 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

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[37] *National Cable Telecommunications Ass'n v. FCC*, 567 F. 3d 659 (D.C. Cir. 2009) ("*NCTA*").

[38] *Cablevision Systems Corp. v. FCC*, 649 F. 3d 695 (D.C. Cir. 2011) ("*Cablevision II*").

[39] *See 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. *See also NCTA, supra,* 567 F.3d at 664, *citing Consumer Elecs. Ass'n v. FCC,* 347 F.3d 291, 299 (D.C.Cir.2003) ("statutes written in broad, sweeping language should be given broad, sweeping application").

[40] 47 U.S.C. 548(a).

specializing in diverse programming oriented to niche audiences).[41] 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 compete with larger entities. These, of course, are precisely the types of harms that flow from the programmers' bundling and volume discounting practices and are precisely the types of harms that the proposed rules are designed to address.

Thus, it is both necessary and appropriate for the Commission, pursuant to the authority granted it under Section 628, to fulfill the goals stated in that section through the adoption of the proposed rules. Furthermore, it is necessary and appropriate for the Commission to apply those rules to all programmers, not just programmers that are vertically-integrated with an MVPD.

First, the public's interest in protection from the effects of discriminatory volume discounts and coercive bundling and pricing practices does not vary based on whether the programmers engaging in these practices are or are not vertically-integrated with an MVPD. 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 or a broadcaster or is not affiliated with either a broadcaster or cable MVPD.[42] 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.

Second, the public interest objectives of Section 628 will be frustrated if the proposed rules distinguish between programmers based on whether or not they are owned by an MVPD. This is because most of the programmers engaging in practices such as unjustified volume

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[41] *MDU Order*, 22 FCC Rcd at 20244-46, ¶ 17-20.

[42] *See 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) at ¶ 120.

discounting and coercive bundling are not vertically integrated with MVPDs. The vertical integration between cable operators and program networks that existed at the time of the 1992 Act has largely disappeared[43]; today, most of the top programmers are vertically integrated with broadcasters and/or motion picture studios, not MVPDs.

Programmers that control must-have programming (both broadcast and non-broadcast) have both the incentive and ability to use volume discounting and bundling practices in ways that distort fair competition and harm consumers. These programmers can play competing MVPDs against one another with little or no risk 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 the media giants that control most of the popular cable networks begin to make forays into the world of multichannel video distribution through the Internet and other platforms. Given the radical changes that have occurred in the video marketplace over the past twenty-plus years, 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.

Third, as established above, it is settled law that Section 628's prohibition on unfair practices is "broad and sweeping" and should be given "broad, sweeping application."[44] Thus,

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[43] 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 14-16 (filed March 21, 2014) at 10-11. NCTA points out that only three of the 25 most viewed cable networks are wholly owned by cable operators and that the percentage of cable owned networks had dropped to around 11% in 2012 from over 52% in 1994.

[44] *See also Cablevision II, supra*, 649 F. 3d at 704-05, *quoting NCTA, supra*, 567 F. 3d at 664.

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.

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.[45] Thus, according to the court, Section 628(c)(2) "establishes a floor rather than a ceiling."[46]

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."[47] 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. [48]

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

[46] *Id.*

[47] *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.").

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

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 adopt the proposed rules. 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."[49]

Section 616. Independent of its authority under Section 628, the Commission may rely on Section 616 in adopting the rules proposed herein. Section 616 on its face empowers the Commission to adopt "regulations governing program carriage agreements and related practices between cable operators or other multichannel video programming distributors and video programming vendors."[50] That language is no less "broad and sweeping" than the language of Section 628 and, like the language of Section 628, can be relied upon by the Commission in adopting rules that are designed to address provisions in "programming carriage agreements and related practices" – including unfair and coercive bundling practices and volume discount

[49] *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).

[50] The second sentence of Section 616 lists specific items that the regulations must "include" or "contain," but there is nothing in the text of the Section that restricts the Commission's authority to just those matters.

provisions – that reduce competition and choice, impede innovation and otherwise are contrary to the public interest.

It is noteworthy that the Commission has recognized in the past that Congress "routinely treated Sections 616 and 628 in concert" and that "the legislative history shows that Section 616, like Section 628, was designed by Congress to prohibit unfair or anticompetitive actions without precluding legitimate business practices common to a competitive marketplace."[51] While Congress was at the time primarily concerned about the risk to independent programmers from vertically-integrated cable operators, the statute was written expansively. The reasoning underlying the *Cablevision II* court's analysis of the scope of the Commission's regulatory authority under Section 628 applies equally to the issue of the Commission's authority under Section 616. Thus, as discussed above with respect to Section 628, the Commission may – indeed, must – consider how the marketplace has changed and adopt rules to fit the current competitive landscape. That landscape is one in which programmers, many of them media giants, have the incentive and ability to employ tactics in negotiating program carriage agreements that harm competition and consumers and otherwise disserve the public interest as described above.

Section 325. Section 325 is the primary source of the Commission's regulatory authority over retransmission consent agreements for the carriage of broadcast stations (including agreements that include bundling and packaging requirements for multiple broadcast stations and/or bundling and packaging requirements for a combination of broadcast and non-broadcast

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[51] *Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Development of Competition and Diversity in Video Programming Distribution and Carriage*, Memorandum Opinion and Order, 9 FCC Rcd 4415 (1993) at para. 27. In the Memorandum Opinion and Order, the FCC ruled that independent programmers are not the only entities with standing to bring a complaint alleging a violation of Section 616 and the rules adopted thereunder; competing MVPDs harmed by Section 616 violations also have standing to bring a complaint.

services). The scope of the Commission's authority under Section 325 has been hotly debated in the pending retransmission consent reform rulemaking.[52] However, it is indisputable that Section 325 expressly confers on the Commission the authority to adopt regulations "to govern the exercise by television broadcast stations of the right to grant retransmission consent."[53] This grant of the authority, the Commission has found, constitutes a grant by Congress to the Commission of "broad discretion to adopt rules implementing Section 325.[54]

From the outset, the Commission has recognized that this grant of authority includes the right to regulate not just the procedural aspects of retransmission consent negotiations, but the substance of those negotiations.[55] Furthermore, the application of the rules proposed herein to agreements for the carriage of broadcast programming is not constrained by the statutory provision allowing a station to enter into retransmission consent agreements with different MVPDs that contain different terms and conditions, including price terms and the Commission's fourteen-year old statement that it is not a violation of the "good faith" negotiation rules for a station to condition its grant of retransmission consent on carriage of other broadcast or non-broadcast stations.[56]

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[52] Mediacom has previously provided the Commission with a detailed and thorough rebuttal of the broadcasters' contention that the Commission only has limited authority to adopt "procedural" regulations concerning retransmission consent, *See* Joint Reply Comments of Mediacom Communications Corporation and Cequel Communications LLC d/b/a Suddenlink Communications, *Petition for Rulemaking to Amend the Commission's Rules Governing Retransmission Consent*, MB Docket No. 10-71 (filed June 3, 2010) at 32-46.

[53] 47 U.S.C. § 325(b)(3)(A).

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

[55] *See Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Broadcast Signal Carriage Issues*, Report and Order, 8 FCC Rcd 2695 (1993) (adopting substantive regulations governing retransmission consent including, *inter alia*, a prohibition on exclusive retransmission consent agreements; a requirement that retransmission consent agreements cover a station's "entire program day"; and a provision holding that the refusal of a network affiliate to grant retransmission consent in certain circumstances may be deemed "unreasonable").

[56] 47 U.S.C. § 325(b)(3)(C); *Implementation of the Satellite Home Viewer Improvement Act of 1999; Retransmission Consent Issues: Good Faith Negotiation and Exclusivity*, 15 FCC Rcd 5445, CS Docket No. 99-363 (2000) at ¶ 56.

In the case of discriminatory volume discounts, Section 325 makes clear that such practices must be "based on competitive marketplace considerations."[57] However, as demonstrated above, the current marketplace for the sale of video programming in which programmers operate is anything but competitive when it comes to the practices at issue. And to the extent that the Commission indicated (but did not codify into a regulation) that bundling a broadcast station with "an affiliated cable programming service" or "another broadcast station" reaches the massive multiple channel bundles that the programmers now force upon MVPDs and their subscribers, the Commission has a statutory duty to reconsider that conclusion in light of the changes that have occurred in the marketplace.[58]

Section 4(i). Finally, the Commission's ancillary authority under Section 4(i) of the Communications Act provides it with an additional statutory basis for adopting the proposed rules restricting all programmers from engaging in unfair volume discounting and coercive bundling practices. The exercise of such ancillary authority is appropriate when two conditions are met: (1) 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."[59]

Both of those conditions are met here. First, 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. Second, changes that have

[57] 47 U.S.C. § 325(b)(3)(C).

[58] The Congress expected the Commission to monitor the broadcasters' exercise of their retransmission consent rights and to update its rules when necessary to ensure that the broadcasters' practices are consistent with and serve the public interest in having broadcast television programming available to MVPD subscribers on reasonable terms and conditions. *See* 138 Cong. Rec. S643 (Jan. 30, 1992); *see also Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements*, 25 FCC Rcd 746, 752 n.23 (2010).

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

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 the "broad and sweeping" delegations of authority to the Commission in Sections 616 and 628. Indeed, limiting its regulations to MVPD-affiliated programmers, when those programmers represent only a small percentage of the programmers capable of engaging in the practices that are at odds with the public interest goals articulated by Congress, would frustrate the regulatory scheme that Congress expressly directed the Commission to adopt.[60]

CONCLUSION

For the reasons stated above, the Commission should commence an expedited rulemaking proceeding to consider and adopts specific rules addressing the programmers' anti-competitive and anti-consumer bundling and volume discounting practices, as described herein.

Respectfully submitted,

MEDIACOM COMMUNICATIONS CORPORATION

By: ______________________

Seth A. Davidson
Ari Z. Moskowitz

Edwards Wildman Palmer LLP
1255 23rd Street, NW
Eighth Floor
Washington, DC 20037
(202) 478-7370
Their Attorneys

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