Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Mediacom Communications Corporation	)	RM 11728
Petition for Rulemaking to Amend the	)	
Commission's Rules Governing	)	
Practices of Video Programming	)	
Vendors	)	
	)	

COMMENTS OF ITTA

Genevieve Morelli
Micah M. Caldwell
1101 Vermont Ave., NW
Suite 501
Washington, DC 20005

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TABLE OF CONTENTS

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ITTA – The Voice of Mid-Size Communications Companies hereby respectfully submits its comments in response to the Petition for Rulemaking filed by Mediacom Communications Corporation urging the Commission to exercise its authority under the Communications Act to prohibit certain coercive and anticompetitive practices by video programmers, such as wholesale tying, forced tier placement, and discriminatory pricing, that lead to less marketplace competition and higher prices for consumers of video services.[1]

I. INTRODUCTION AND SUMMARY

As a result of increased industry consolidation among programmers (both broadcast and non-broadcast) and an outdated regulatory framework that favors programmers over distributors of video programming, the video marketplace has become one which provides programmers with undue bargaining leverage and the incentive and ability to engage in coercive and

[1] Mediacom Communications Corporation Petition for Rulemaking to Amend the Commission's Rules Governing Practices of Video Programming Vendors (filed July 21, 2014) ("Mediacom Petition").

anticompetitive practices in programming negotiations with multichannel video programming distributors ("MVPDs").

Ownership of much of the most popular cable network programming, including marquee and sports programing, is concentrated in the hands of six media companies. Together, these media conglomerates own, in whole or in part, well over 125 cable networks, and often have interests in broadcast networks and/or movie studios as well. Moreover, some of the largest owners of video programming are vying to get even larger, such as with the pending merger involving Comcast, Time Warner Cable, and Charter Communications. A similar trend of consolidation is occurring in the broadcast sector, where the biggest owners are acquiring more and more television stations.

When this concentration of media ownership is coupled with a regulatory and policy framework that provides unfair advantages to owners of programming, the balance of power shifts even further away from MVPDs. As the record in multiple Commission proceedings makes clear, the video marketplace has undergone sweeping changes since Congress enacted the 1992 Cable Act. The outdated retransmission consent rules and weakened program access protections do not reflect current marketplace realities and have produced an environment in which MVPDs, particularly new entrants like ITTA member companies, have little to no bargaining power in comparison to owners of video programming.

The Mediacom Petition highlights a number of problems MVPDs encounter in negotiating agreements for carriage of programming in light of these market realities. Programmers often force MVPDs and their customers to take unwanted channels by engaging in wholesale tying and and/or forced tier placement. Programmers also routinely offer larger MVPDs volume discounts that have no correlation to the actual cost of video programming, place smaller MVPDs at a competitive disadvantage, and lead to higher prices and fewer choices for consumers. Programmers also have begun to force MVPDs to accede to their unreasonable demands by limiting consumers' access to programming on the Internet and interfering with consumers' ability to enhance their viewing experience through use of lawful devices and technologies that enable time-shifting and space-shifting of video programming services. ITTA agrees that the Commission should exercise its legal authority to expeditiously adopt rules addressing such practices in order to restore balance to the video marketplace and promote retail video competition and the interests of consumers.

II. THE COMMISSION SHOULD ADOPT RULES TO ADDRESS COERCIVE TYING AND TIER PLACEMENT REQUIREMENTS

Programmers force MVPDs and their video customers to purchase unwanted networks in a variety of ways. Often, programmers price options for bundles and stand-alone channels in a manner that makes it uneconomic for an MVPD to purchase anything but the bundle. Some programmers also force MVPDs to carry less popular programming by tying such programming to the purchase of marquee channels.

In addition to wholesale tying strategies, many programmers routinely dictate how MVPDs must package programming in their retail offerings to consumers by including in affiliation agreements provisions that effectively require MVPDs to bundle many, if not all, of the programmers' networks together on the basic or expanded basic tier (the most highly-penetrated tiers). Sometimes this entails a contract provision that expressly requires carriage on either the first or second most highly-penetrated tier. In other cases, programmers achieve the same result indirectly by incorporating a graduated license fee schedule that imposes a significantly higher charge if a weaker network is not carried on the same tier as a more popular channel. By employing these and other practices that tie tier placement to subscriber penetration and related metrics, programmers make it impossible for an MVPD to offer networks on a stand-alone basis, on a separate tier, at a certain retail price, or in whatever other manner the MVPD or its subscribers would prefer.

To address these issues, Mediacom urges the Commission to permit MVPDs to carry programming networks on an *a la carte* basis, or alternatively, to require programmers to allow MVPDs to purchase programming networks on a stand-alone basis.

Under Mediacom's *a la carte* proposal, the Commission would give MVPDs the right to offer on an *a la carte* basis video programming:

- That was not carried by the MVPD as of January 1, 2014;
- Whose cost on a per subscriber basis places it in the top 20% of programming services carried by the MVPD on its basic or expanded basic tier; or
- That institutes a price increase upon renewal or during the contract term of more than the rate of inflation for the most recent calendar year.

Under Mediacom's unbundling proposal, programmers would be required to provide a stand-alone offer for any or all of the following upon receipt of a demand by an MVPD:

- Any broadcast or non-broadcast programming offered by the programmer;
- A bundle containing the same video programming networks as contained in the expiring agreement between the MVPD and the programmer; and/or
- Any bundle of video programming networks or any individual network that the programmer has offered to sell to any other MVPD in the previous 24 months.

ITTA has been a longstanding advocate of wholesale unbundling and other remedies that would enable MVPDs to provide greater choice and flexibility to their customers in the purchase of video programming. It is unfair for MVPDs and their customers to be forced to buy massive bundles of channels, including networks that MVPDs would not carry and that consumers would not pay for or watch if given the choice. We urge the Commission to give serious consideration to the proposals suggested by Mediacom and to quickly move forward to restore balance to video programming negotiations and ensure that the selection of programming licensed by MVPDs and the manner in which that programming is sold to consumers is not controlled by video programmers.

III. THE COMMISION SHOULD ADOPT RULES BARRING DISCRIMINATORY PRICING PRACTICES

It is well settled that programmers charge larger MVPDs less for programming on a per-subscriber basis than smaller MVPDs through volume discounts, which are based on the number of subscribers the MVPD serves. One study indicates that "small and medium-sized MVPDs pay per-subscriber fees for national cable network programming that are approximately 30% higher than the fees paid by the major MSOs."[2] In the experience of ITTA member companies, fees paid for RSN programming in particular are as much as 50% higher for smaller MVPDs than for larger providers. However, program production and acquisition costs are sunk, and the transmission and administrative costs associated with delivery of programming are the same for all MVPDs, regardless of size. Thus, volume discounts or other pricing methods that favor larger providers are not reflective of the costs of programming, placing smaller retail video providers at an unreasonable competitive disadvantage vis-à-vis their larger rivals.

Further industry consolidation, such as the proposed Comcast/Time Warner Cable/Charter transaction, will only exacerbate the already significant competitive disparities between larger providers and competing MVPDs. According to SNL Kagan, Comcast already

[2] *See* Comments of the American Cable Association, MB Docket No. 07-269 (June 8, 2011), at 9.

has lower programming costs than other large cable operators.[3] The increased scale, scope, and unprecedented negotiating power Comcast would possess as a result of the proposed merger would only serve to enable Comcast to drive down these costs even further. The cost savings Comcast would enjoy with its dominant purchasing power will have to be made up elsewhere. Competing MVPDs will be forced to bear the cost, which will dramatically reduce the ability of smaller rivals, and especially new entrants, to provide meaningful competition. The result will be decreased competition in the video programming industry and higher prices for consumers.

The Commission's rules contemplate that an MVPD may file a program access complaint challenging volume-based pricing in certain circumstances.[4] However, the Commission's existing program access complaint process, which is inadequate even for large, well-financed MVPDs, is virtually unusable for smaller and new entrant MVPDs who cannot devote the substantial time and resources required to pursue such relief.[5] Although the Commission established a six-month timeframe for resolution of program access complaints,[6] this action did

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[3] Robin Flynn, "U.S. Multichannel Subscriber Update and Programming Cost Analysis," SNL Kagan (June 2013), *available at*: http://go.snl.com/rs/snlfinanciallc/images/SNL-Kagan-US-Multichannel-Subscriber-Update-Programming-Cost-Analysis.pdf (last visited: Aug. 19, 2014).

[4] 47 U.S.C. § 548(c)(2)(B)(iii).

[5] *See, e.g.*, Reply Comments of the Independent Telephone & Telecommunications Alliance, the National Telecommunications Cooperative Association, the Organization for the Promotion and Advancement of Small Telecommunications Companies, the Rural Independent Competitive Alliance, and the Western Telecommunications Alliance, MB Docket No. 11-128 (Sept. 26, 2011), at 3.

[6] *In the Matter of Revision of the Commission's Program Access Rules; News Corporation and the DIRECTV Group, Inc., Transferors, and Liberty Media Corporation, Transferee, for Authority to Transfer Control; Applications for Consent to the Assignment and/or Transfer of Control of Licenses, Adelphia Communications Corporation (and subsidiaries, debtors-in-possession), Assignors, to Time Warner Cable Inc. (subsidiaries), Assignees, et al., Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act: Sunset of Exclusive Contract Prohibition*, MB Docket

not make the complaint process any more helpful to smaller or new entrant MVPDs. For such providers, the time and financial burden involved in bringing a program access complaint to remedy the immediate harm from lack of access to programming make pursuing such relief infeasible.[7]

More specifically, any relief to which smaller and new entrant MVPDs may be entitled at the end of the current program access complaint process would come too late to be meaningful or effective. After six months, the damage in terms of subscriber losses, decreased market share, and other harms would already be done. Given that the Commission's existing case-by-case approach effectively leaves smaller and new entrant MVPDs with no practical remedy to ensure that they have reasonable access to programming they must carry to compete, the Commission must take action to address this issue in a manner that would provide such providers meaningful relief.

Mediacom urges the Commission to address the competitive and consumer harms caused by discriminatory volume discounts by modifying FCC rules to:

- Ensure the net effective rate for video programming is the same for all MVPDs;
- Require programmers to waive existing confidentiality provisions and disclose the net effective rates various MVPDs pay (along with other material contract terms); and
- Establish a special relief procedure under which a programmer may seek Commission approval of quantity-based discounts on a case-by-case basis based on a demonstration of the direct and legitimate economic benefits associated with such arrangements.

(footnote cont'd.)
Nos. 12-68, 07-18, 05-192, 07-29, Report and Order, Further Notice of Proposed Rulemaking, and Order on Reconsideration, FCC 12-123, ¶ 63 (rel. Oct. 5, 2012).

[7] *See* Comments of the Independent Telephone & Telecommunications Alliance, MB Docket Nos. 12-68, 07-18, 05-192 (filed June 22, 2012), at 9-10.

ITTA supports these proposals as potential solutions to address the anticompetitive harms associated with volume discounts. As explained above, volume discounts that give larger MVPDs lower rates for video programming are not justified by cost considerations and are detrimental to the public interest. When programmers utilize unreasonably discriminatory volume-based pricing, consumers who are not served by larger MVPDs are forced to bear the cost. This burden becomes even more disproportionate when larger providers are allowed to merge because smaller MVPDs and their customers have to make up the difference so that programmers can recoup revenues they give up through volume discounting. The Commission must move expeditiously to address the harms such discriminatory volume discount practices cause for competition and consumers.

ITTA also urges the Commission to take appropriate steps to address situations where a vertically-integrated programming distributor uses uniform price increases to gain a competitive advantage over its smaller rivals by charging all distributors, including itself, a higher rate for affiliated programming than it would normally charge. While the vertically-integrated programming distributor can treat that higher price as an internal transfer it can disregard when setting its own retail prices, competing MVPDs are forced to pay more for that programming and pass on the increase to their subscribers, or forgo purchasing the programming altogether.

Thus, while a uniform price increase may appear facially neutral in that it applies to all MVPDs equally, this practice clearly constitutes discrimination that is actionable under the Communications Act because it has a disparate impact on MVPDs that are not affiliated with the vertically-integrated MVPD.[8] Alternatively, it qualifies as an "unfair act" that significantly

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[8] *See* 47 U.S.C. § 548(c)(2)(B).

hinders or prevents a competing MVPD from providing programming to consumers.[9] As with volume discounts, the Commission must take action to address uniform price increases in a manner that would provide non-vertically-integrated MVPDs a meaningful avenue to seek relief from such conduct.

Without non-discriminatory access to programming content under reasonable terms and conditions, smaller and new entrant MVPDs face a competitive disadvantage that will impede their ability to compete or deter them from entering new video markets altogether. The Commission must address discriminatory pricing tactics such as volume discounts and uniform price increases to ensure that smaller and new entrant MVPDs can compete effectively in the video distribution marketplace and provide an affordable competitive alternative for video programming subscribers.

IV. THE COMMISSION SHOULD ADOPT RULES PROHIBITING INTERFERENCE WITH CONSUMERS' ACCESS TO PROGRAMMING VIA THE INTERNET AND LAWFUL DEVICES

The newest tactics programmers are using to coerce MVPDs to agree to their unreasonable demands during negotiations include interfering with consumers' access to programming on the Internet and requiring contractual provisions in programming agreements that force MVPDs to limit their customers' use of lawful technologies, such as devices that provide time-shifting and space-shifting services to enhance the viewer experience. Another strong arm tactic that has begun to be employed by some programmers is broadband tying, where programmers require MVPDs to pay per-subscriber fees for broadband customers, regardless of whether the customers subscribe to video service or access the programmers' content online.

[9] *See* 47 U.S.C. § 548(b).

Not only do such practices potentially violate existing laws (i.e., the Commission's navigation device rules), they are a source of increasing criticism from and frustration for consumers. For example, when CBS and Time Warner Cable reached an impasse in negotiations for carriage of CBS and Showtime programming in eight markets last year, CBS compelled the MVPD to capitulate to its demands by blocking *all* Time Warner Cable Internet customers from access to CBS programming that was available to consumers for free online.[10] Similarly, in order for Dish Network to reach an agreement for carriage of ABC and affiliated Disney programming last spring, the MVPD was forced to disable the ad-skipping feature of its Hopper DVR service for ABC network shows despite the popularity of the service among Dish Network subscribers.[11]

ITTA agrees that the Commission should tackle such anti-consumer behavior by prohibiting programmers from blocking Internet access to video programming as a tactic in negotiations and from placing restrictions on consumers' connection or use of lawful devices to access video programming from MVPDs. The Commission also should address broadband tying, a practice driven primarily by programmers' desire to maximize their profits at the expense of consumers. Programmers should not be allowed to use consumers as pawns in the negotiation process to extort higher fees from MVPDs. The public interest dictates that such practices be curtailed immediately.

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[10] *See, e.g.*, Jeff Baumgartner, "CBS Blocks TWC Broadband Subs from Accessing Full Episodes Online," *Multichannel News* (Aug. 4, 2013), *available at*: http://www.multichannel.com/distribution/cbs-blocks-twc-broadband-subs-accessing-full-episodes-online/144786.

[11] Meg James, "Disney, Dish Network Reach Truce on Ad-Skipping AutoHop," *Los Angeles Times*, Mar. 3, 2014, *available at*: http://www.latimes.com/entertainment/envelope/cotown/la-et-ct-disney-dish-network-truce-autohop-20140303-story.html.

V. THE COMMISSION HAS AMPLE LEGAL AUTHORITY TO PROVIDE THE REQUESTED RELIEF

The Commission has clear legal authority under various provisions of the Communications Act to adopt the above-described remedies or other changes that address the unfair, anti-competitive, and anti-consumer behavior in which programmers routinely engage during programming negotiations. The Mediacom Petition provides a detailed examination of several of these statutory provisions, and ITTA does not repeat that discussion here.[12]

ITTA does wish to emphasize, however, that adopting such changes "would not require the Commission to set prices and terms of video programming at either the wholesale or retail level; rather, [it] would require only that video programming vendors forego their coercive [tying and discriminatory pricing] strategies and provide all MVPDs with economically rational and non-discriminatory options for meeting the needs and demands of consumers."[13] Therefore, the Commission should move forward expeditiously to remedy the harms to consumers and competition that result from such behavior.

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[12] In addition to the statutory provisions cited in the Mediacom Petition, it also is likely that the Commission has ancillary authority under Section 706 of the Telecommunications Act of 1996 Act to reform its video rules in the manner requested to ensure that lack of access to video programming at reasonable rates does not act as a barrier to broadband investment.

[13] Mediacom Petition at 6.

VI. CONCLUSION

ITTA supports the Mediacom Petition and urges the Commission to give serious consideration to these and other changes to address unfair and coercive programmer practices, such as wholesale tying, forced tier placement, and discriminatory pricing, that impede consumer choice, increase the wholesale and retail costs of subscription video services, and are contrary to the public interest that the Commission has been charged by Congress to protect.

Respectfully submitted,

ITTA – THE VOICE OF MID-SIZE COMMUNICATIONS COMPANIES
By: */s/ Genevieve Morelli*
Genevieve Morelli
Micah M. Caldwell
1101 Vermont Ave., NW
Suite 501
Washington, DC 20005
(202) 898-1520
gmorelli@itta.us
mcaldwell@itta.us

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