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

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| In the Matter of<br><br>Petition to Amend the Commission's Rules Governing Practices of Video Programming Vendors | ) ) ) ) ) ) ) | MB RM-11728 |

ACCEPTED/FILED

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Federal Communications Commission
Office of the Secretary

To: The Commission

**OPPOSITION OF THE**
**NATIONAL ASSOCIATION OF BROADCASTERS**
**TO PETITION FOR RULEMAKING**


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## I. Introduction and Summary

The National Association of Broadcasters ("NAB")[1] opposes the request of Mediacom Communications Corporation ("Mediacom")[2] that the Commission initiate a rulemaking proceeding to adopt new rules affecting a wide range of issues including retransmission consent, carriage of other programming, and Internet content. Mediacom's proposals are well beyond the scope of any Commission authority and contrary to law. Even if they were lawful, the proposals should be rejected as harmful to the public interest.

[1] The National Association of Broadcasters is a nonprofit trade association that advocates on behalf of local radio and television stations and broadcast networks before Congress, the Federal Communications Commission and other federal agencies, and the courts.

[2] Petition for Rulemaking of Mediacom Communications Corporation (Jul. 21, 2014), RM No. 11728 ("Petition" or "Mediacom Petition"); Public Notice, Consumer & Governmental Affairs Bureau Reference Information Center Petition for Rulemaking Filed, Report No. 3008 (Jul. 29, 2014).

Mediacom claims that rule changes are needed because programmers, including broadcasters,[3] are engaged in "coercive bargaining tactics to force MVPDs and their customers to purchase bundles of programming...."[4] Thirty-four pages of bald assertions later, Mediacom presents not one shred of evidence supporting its allegations that it or any other multichannel video programming distributor ("MVPD") is being "forced" to carry any programming. To the contrary, as broadcasters have explained on countless prior occasions, MVPDs are presented in retransmission consent negotiations with the option of carrying broadcast stations alone or with other programming, such as other broadcast stations, additional broadcast programming streams, and nonbroadcast programming.[5]

Mediacom also claims that MVPDs are "forced" to place certain programming on certain tiers, either by Commission policies or programmers. However, the so-called "Commission policies" effectuate statutory provisions that the Commission is without authority to modify. The placement of other programming on tiers is properly and lawfully the subject of arms-length negotiations between program providers, including broadcasters, and MVPDs.

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[3] Mediacom in particular complains about the so-called "big six" programmers, which it identifies as: The Walt Disney Company, NBCU, The News Corporation, Time Warner Inc., Viacom, and Discovery Communications. Mediacom contends that, although Viacom and CBS Corporation ("CBS") are separately owned, they are both "effectively controlled" by the same corporation, so it also considers CBS to be among these "big six" entities. Beyond the broadcast entities specifically named in the Petition, many other television broadcasters could potentially be affected by Mediacom's proposals.

[4] Mediacom Petition at 3.

[5] *See, e.g.,* Reply Comments of NAB in MB Docket No. 10-71 (Jul. 24, 2014) at 36-38; Reply Comments of NAB, MB Docket Nos. 07-29 and 07-198 (Feb. 12, 2008) at 5-14; Comments of NAB, MB Docket Nos. 07-29, 07-198 (Jan. 4, 2008) at 2-3, 17.

Despite Mediacom's opposition in other contexts to FCC regulation of the Internet, Mediacom here urges the Commission to mandate or otherwise regulate broadcasters' and other programmers' provision of Internet content. The Petition points to no authority permitting the Commission to adopt constitutionally questionable rules to compel video providers to offer online content.

Mediacom additionally seeks government intervention merely because certain negotiations involve MVPDs with fewer subscribers. But the reality of any market-based system of negotiations is that sometimes smaller entities will be engaged in negotiations with larger ones. To wit, most broadcasters are engaged in negotiations with MVPDs that outsize them by multiple indicators, including local market share and national scale and scope.[6] In spite of these disparities, the retransmission consent system overwhelmingly results in successful negotiations between broadcasters and MVPDs of all types and sizes.

Thus, not only are Mediacom's proposals an unlawful solution in search of a problem, they would, if adopted, harm the viewing public, particularly by impeding the creation and distribution of new programming. Accordingly, the Petition should be dismissed with prejudice.

## II. The Commission Does Not Have Authority to Mandate or Otherwise Regulate Broadcaster Provision of Internet Content

Mediacom asserts that the Commission should adopt a new regulation limiting local stations' and other video programming providers' ability to fully control video

[6] *See, e.g.,* NAB Comments in MB No. 14-16 (Mar. 21, 2014) at 13-27 (providing data to show how broadcasting is a highly competitive segment of the video marketplace in comparison to the more consolidated MVPD industry).

content on their websites.[7] This is a remarkable request, given Mediacom's views regarding government regulation of the Internet as potentially applied to it. As Mediacom President and CEO Rocco Commisso explained, "….what we're saying is we've made an investment, and I don't think the government should be coming and telling us how we can work that infrastructure, simple as that."[8] It is highly hypocritical for Mediacom and other MVPDs to urge the Commission to regulate broadcasters' ability to control their online content.[9] Many in fact have devoted extensive resources to limiting the FCC's authority to regulate their Internet operations.[10]

As NAB has explained in connection with similar MVPD proposals raised in other proceedings, video content on websites operated by video content providers is not—and should not be—regulated by the Commission or any other entity.[11] No content

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[7] *See* Mediacom Petition at i-iv, 3-4, 13, 17.

[8] Anne Broache, *Smaller Cable Firms Take Aim at Net Neutrality Fans,* CNET (Sept. 8, 2006), available at: http://news.cnet.com/Smaller-cable-firms-take-aim-at-Net-neutrality-fans/2100-1028_3-6069873.html. Mr. Commisso added, "Why don't they go and tell the oil companies what they should charge for their damn gas?"

[9] *See* Time Warner Cable Inc. (TWC) Comments in MB Docket No. 10-71 (June 26, 2014) at 22; Verizon Comments in MB Docket No. 10-71 (June 26, 2014) at 10-11; DIRECTV/DISH Joint Comments in MB Docket No. 10-71 (June 26, 2014) at 7; Joint Cablevision/Charter Comments in MB Docket No. 10-71 (June 26, 2014) at 16-18; USTA Comments in MB Docket No. 10-71 (June 26, 2014) at 11; NTCA Comments in MB Docket No. 10-71 (June 26, 2014) at 9-10. *See also* Letter from Marc Lawrence-Apfelbaum of TWC to Marlene H. Dortch, FCC Secretary, MB No. 10-71 (Oct. 17, 2013); Verizon Comments in MB Docket No. 14-16 (Mar. 21, 2014) at 12.

[10] *See, e.g.,* Comments of Verizon, GN No. 09-191 (Jan. 14, 2010), at 86; Reply Comments of Verizon, GN No. 09-191 (Apr. 26, 2010), at 81. Indeed, Verizon appealed the FCC's *2010 Open Internet Order* to the U.S. Court of Appeals for the D.C. Circuit, which led to vactur and remand of several aspects of the Order. *See Verizon v. F.C.C.*, 740 F.3d 623 (D.C. Cir. 2014). *See also* Comments of TWC, GN No. 09-191 and WC No. 07-52 (Jan. 14, 2010); Reply Comments of TWC, GN No. 09-191 and WC No. 07-52 (Apr. 26, 2010).

[11] *See* NAB Reply Comments in MB Docket No. 10-71 (July 24, 2014) at 44-45; NAB Reply Comments in MB No. 14-16 (Apr. 21, 2014) at 7-8; Ex Parte Letter of NAB, MB No. 10-71 (Nov. 15, 2013).

provider is under any legal or regulatory obligation to offer online content—and the Commission lacks statutory authority to compel any video provider, including broadcasters, to do so. Significant First Amendment considerations also would be raised by any government regulation compelling online video offerings.[12] Unsurprisingly, Mediacom has cited no authority for the proposition that the Commission can force video programmers to provide content online. Offering online content allows many broadcasters to connect with their local communities and individual viewers in unique and varied ways.[13] But MVPDs' contention that broadcasters and other video programming providers should be penalized for seeking to control their digital rights is simply wrong on its face.[14]

As a related matter, Mediacom's suggestion that negotiations between an MVPD and a broadcaster (or other video program provider) implicate Section 76.1201 of the Commission's rules, or *Carterfone* "right to attach" principles, is entirely misplaced.[15]

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[12] The Supreme Court has declined to apply the lesser standard of First Amendment scrutiny imposed on broadcast speech to regulation of the Internet. *See, e.g. Reno v. American Civil Liberties Union,* 521 U.S. 844, 867–868, 117 S.Ct. 2329, 138 L.Ed.2d 874 (1997).

[13] *See, e.g.,* NAB Comments in MB No. 14-16 (Mar. 21, 2014) at 10-11.

[14] We note that previous MVPD proposals in this area would have applied only to broadcasters. Obviously, there is no basis for the disparate disadvantageous treatment of broadcasters' online content alone.

[15] *See* Mediacom Petition at iv, 13, 17-18. In attempting to justify regulation in this area, Mediacom cites news coverage of a recent agreement involving The Walt Disney Company and DISH Network, in which DISH reportedly agreed to disable the ad-skipping feature of its own set-top boxes for certain Disney programming in exchange for a variety of unique concessions. Mediacom Petition at 13, citing 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. According to the news story, the agreement: (i) ended a lawsuit, (ii) granted DISH "new rights that will allow it to launch an Internet-delivered 'over the top' subscription service" and "digital streaming rights for programming on ESPN, ESPN2, ABC Family, Disney Channel and … ABC TV stations," and (iii) allowed Dish customers "to access Disney-branded video-on-demand products, including the Watch ESPN and Watch ABC

This intent of this rule—and the very essence of the *Carterfone* decision itself—is that *consumers* must have the ability to connect devices that *are not* manufactured or provided by an MVPD to the MVPD's network.[16] There is no relationship between the factual scenario Mediacom cites and the Commission's rules, or the underlying "right to attach" principle. Both of these are intended to protect the rights of *consumers* to access competitively developed equipment and connect it to the MVPD network—not to bolster the already unbridled negotiating power of MVPDs by barring program providers from even making certain types of proposals in negotiations.

## III. The Commission Cannot Lawfully Restrict the Ability of Broadcasters and MVPDs to Negotiate Prices, Terms and Conditions of Retransmission Consent in the Manner Proposed by Mediacom

Mediacom's proposed new rules affecting retransmission consent negotiations would contravene statutory provisions and ban practices that the Commission has explicitly and repeatedly held are "presumptively consistent" with good faith

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applications, in their homes and on mobile devices." *Id.* Mediacom considers this free market agreement a "problem" that should be solved through government intervention.

[16] The cited rule reads: "Rights of subscribers to use or attach navigation devices. No multichannel video programming distributor shall prevent the connection or use of navigation devices to or with its multichannel video programming system, except in those circumstances where electronic or physical harm would be caused by the attachment or operation of such devices or such devices may be used to assist or are intended or designed to assist in the unauthorized receipt of service." 47 C.F.R. § 76.1201. The rule was adopted to implement the statutory requirement of alternative sources of navigation devices in Section 629 of the Telecommunications Act of 1996. *See* 47 U.S.C. § 549(a) (directing the FCC to "adopt regulations to assure the commercial availability, to consumers ... of ... equipment used ... to access multichannel video programming and other services offered over multichannel video programming systems, from manufacturers, retailers, and other vendors not affiliated with any multichannel video programming distributor"). *See also Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices*, 13 FCC Rcd 14775 (1998) *("Navigation Devices Order"),* Order on Reconsideration, 14 FCC Rcd 7596 (1999). The rule "makes clear to subscribers that an MVPD is not the exclusive purveyor of navigation devices for its system" and "leads to a broader market for equipment used with MVPD systems." *Navigation Devices Order* at ¶ 29.

negotiations. They are contrary to law, harmful to the public interest, and should be summarily rejected.

### A. The So-Called "A La Carte" Programming Option is Contrary to Law and Harmful to the Public Interest

Mediacom proposes that the Commission provide MVPDs with the "right" to offer on an "a la carte" basis any video programming that was: (i) 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 basic 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.[17]

This proposal is unlawful for multiple reasons. First, as discussed further below, it would be unlawful for the Commission to even involve itself in any of the three "triggering" criteria—carriage of any particular programming in the past versus new programming, relative prices paid for retransmission consent, or changes in retransmission consent fees. Congress chose to leave to all these matters to the retransmission consent marketplace.

Second, even if any of these triggers were lawful subjects for Commission evaluation under the retransmission consent system, the proposed "remedy" would be unlawful. As best NAB can determine from the Petition, by seeking to offer programming "a la carte," Mediacom wishes to place that programming on any tier it desires, or perhaps to offer it on a standalone basis at a cost to subscribers. Certain

[17] Mediacom Petition at 16.

programming, however, simply cannot be offered on such a basis by every MVPD—it is required by statute to be made available on the basic tier.[18] Mediacom neither cites the basic tier provision of the Communications Act in its Petition, nor explains how the Commission can adopt a regulation that directly contravene this provision. To the extent that Mediacom's proposal is intended to encompass "all" video programming, including television broadcast signals, this proposal would be unlawful.

If Mediacom wishes to negotiate with a programming provider *not* required to be placed on the basic tier about having its programming placed on some other tier, or offered on a standalone basis, Mediacom is free to negotiate such a term with any programmer now. No new FCC rule would be required. But Mediacom has no basis for asking the Commission to grant all MVPDs the "right" to automatically place programming on the tier of the MVPD's unfettered choice, with the program provider having no opportunity to even negotiate for placement.

As explained below and in numerous previous submissions,[19] the terms and conditions of retransmission consent—including the placement of programming, the carriage of other programming (such as secondary broadcast streams or nonbroadcast programming), and certainly the prices relating to that programming—are to be freely

[18] *See* 47 U.S.C. §543(b)(7)(A). A cable operator's basic tier must include "(i) All signals carried in fulfillment of the requirements of sections 534 and 535 of this title; (ii) Any public, educational, and governmental access programming required by the franchise of the cable system to be provided to subscribers; (iii) Any signal of any television broadcast station that is provided by the cable operator to any subscriber, except a signal which is secondarily transmitted by a satellite carrier beyond the local service area of such station." *Id*.

[19] *See, e.g.,* Reply Comments of NAB, MB Docket No. 10-71 (June 27, 2011); Comments of NAB, MB Docket No. 10-71 (May 27, 2011); Reply Comments of the Broadcaster Associations, MB Docket No. 10-71 (June 3, 2010); Opposition of the Broadcaster Associations, MB Docket No. 10-71 (May 18, 2010); Reply Comments of NAB, MB Docket Nos. 07-29 and 07-198 (Feb. 12, 2008); Comments of NAB, MB Docket Nos. 07-29, 07-198 (Jan. 4, 2008).

negotiated by MVPDs and broadcasters. Imposition of rules, such as Mediacom's proposed "a la carte" "right," would prevent broadcasters from even negotiating about important terms and conditions of retransmission consent, in direct contravention of the entire system of retransmission consent established by Congress.

When creating the retransmission consent regime, Congress intended to establish a free "marketplace for the disposition of the rights to retransmit broadcast signals" where the government would not "dictate the outcome of the ensuing marketplace negotiations."[20] Based upon the clear language and legislative history of Section 325(b), the Commission has consistently and correctly concluded that "Congress did not intend that the Commission should intrude in the negotiation of retransmission consent,"[21] as the substantive terms and conditions of carriage are to be negotiated privately by broadcasters and MVPDs, subject only to a mutual obligation to negotiate in good faith.

In its *Good Faith Order*, the Commission carefully examined the language and legislative history of Section 325(b)(3)(C), the good faith provision.[22] It correctly concluded that Congress did not intend for the good faith requirement to subject

[20] S. Rep. No. 102-92 at 36 (1991) ("*Senate Report*").

[21] *Implementation of Satellite Home Viewer Improvement Act of 1999, Retransmission Consent Issues: Good Faith Negotiation and Exclusivity*, First Report and Order, 15 FCC Rcd 5445 at ¶ 14 (2000) ("*Good Faith Order*"); *Accord Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, Report and Order, 8 FCC Rcd 2965 (1993) ("*Consumer Protection Order*"); *see also Mediacom Communications Corp. v. Sinclair Broadcast Group*, *Inc*., Memorandum Opinion and Order, 22 FCC Rcd 35 (MB 2007) ("*Mediacom/Sinclair Order*").

[22] The Satellite Home Viewer Improvement Act of 1999 added Section 325(b)(3)(C) to the Communications Act, requiring the Commission to revise its regulations so that they shall "prohibit a television broadcast station that provides retransmission consent from . . . failing to negotiate in good faith." 47 U.S.C. § 325(b)(3)(C)(ii). This Section of the Act was later amended to require good faith negotiations by MVPDs as well. 47 U.S.C. § 325(b)(3)(C)(iii).

retransmission consent to "detailed substantive oversight by the Commission"[23] or to result in the Commission "assum[ing] a substantive role in the negotiation of the terms and conditions of retransmission consent."[24] Indeed, the Commission expressly concluded "that it is not practically possible to discern objective competitive marketplace factors that broadcasters must discover and base any negotiations and offers on."[25] Rather, "it is the retransmission consent negotiations that take place that are the market through which the relative benefits and costs to the broadcaster and MVPD are established."[26]

With regard to the specific question of tier placement, the Commission has found "carriage conditioned on a broadcaster obtaining channel positioning or tier placement rights" to be presumptively consistent with good faith negotiation obligations.[27] Thus, removing the ability of broadcasters and MVPDs to negotiate this term and granting an automatic right to MVPDs to place the primary broadcast channel, or other programming that may be the subject of retransmission consent negotiations, into an "a la carte" offering, is fundamentally inconsistent with the Commission's interpretation of statutory provisions governing retransmission consent and Congressional intent.[28]

With regard to the price and related compensation involved in retransmission consent negotiations, Congress explicitly affords both broadcasters and MVPDs wide

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[23] *Good Faith Order* at ¶ 6.

[24] *Id*. at ¶ 14.

[25] *Good Faith Order* at ¶ 8.

[26] *Good Faith Order* at ¶ 8.

[27] *Good Faith Order* at ¶ 56.

[28] *See Senate Report* at 35-36 (recognizing that broadcasters may want to negotiate numerous issues with MVPDs as part of retransmission consent).

latitude to negotiate varying fees, terms, and conditions. The plain language of Section 325(b)(3)(C) expressly allows broadcast stations to enter into retransmission agreements "containing different terms and conditions, including price terms, with different multichannel video programming distributors if such different terms and conditions are based on competitive marketplace considerations."[29] A reciprocal provision applies with regard to the ability of MVPDs to enter into differing agreements with different broadcasters.[30] Clearly, Congress intended to rely on marketplace forces to determine the rates, terms and conditions offered, and ultimately agreed upon, by negotiating parties. A rule that would penalize broadcasters and entitle MVPDs to automatic benefits in the negotiating process – particularly when those benefits are triggered by such marketplace factors as the newness of programming, the relative price of the programming, or changes in price – is anathema to the system Congress established.[31]

As a practical matter, moreover, variations in retransmission consent compensation depend upon a wide range of factors. It must be recognized that a monetary "per subscriber" figure is only one of the terms that may be part of

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[29] 47 U.S.C. § 325(b)(3)(C)(ii).

[30] 47 U.S.C. § 325(b)(3)(C)(iii).

[31] In its previous evaluations of issues relating to relative retransmission consent fees and fee increases, the FCC has properly recognized the latitude parties have under Section 325(b)(3)(C). In one case, for example, the FCC found it "reasonable that the fair market value of any source of programming would be based in large part on the measured popularity of such programming. Therefore, seeking compensation commensurate with that paid to other programmers of equal, or lower, ratings is not *per se* inconsistent with competitive marketplace considerations." *Mediacom/Sinclair Order* at ¶18. But, because program ratings are not the sole determinant of retransmission consent fees, the FCC also has concluded that a broadcaster proposal "for compensation above that agreed to with other MVPDs in the same market" is "presumptively . . . consistent with competitive marketplace considerations and the good faith negotiation requirement." *Good Faith Order* at ¶ 56.

negotiations. As broadcasters have repeatedly shown, retransmission consent negotiations involve many complex and multifaceted issues such as: "video on demand, the purchase of broadcast advertising by the MVPD, the purchase of MVPD advertising by the broadcast station, broadcast station promotion by the MVPD, MVPD promotion by the broadcast station, fiber connectivity between the station's studio or transmitter and the MVPD's headend or local receive facility, channel position and tier placement, digital and multicast channel carriage, system expansion options, studio/personnel/equipment sharing, electronic program guide placement, news insertion options, carriage of non-broadcast programming, duration of the term of the agreement, technical standards, after-acquired system provisions, after-acquired station provisions, non-discrimination clauses, indemnity provisions, venue, jurisdiction, and manner of dispute resolution, to list but a few."[32] Even if Mediacom's "a la carte" proposal were lawful, given the complexity of these agreements, it is unclear how one could determine whether a particular broadcast station meets the triggering criteria in terms of retransmission consent fee changes or relative fees.

Given the latitude Congress afforded parties in retransmission consent negotiations to negotiate over terms and conditions, including price specifically, Mediacom's additional proposal to "require that the net effective rate for video programming" be the "same for all MVPDs, regardless of distribution technology, size, or market characteristics"[33] cannot lawfully apply to broadcaster/MVPD negotiations for retransmission consent. Although it is unclear whether Mediacom even intends its price

[32] Opposition of the Broadcaster Associations, MB Docket No. 10-71 (May 18, 2010) at 76-77.

[33] Mediacom Petition at 24.

regulation and related disclosure proposals to cover retransmission consent negotiations,[34] the Commission does not have the authority to limit compensation negotiations in a manner that directly contravenes Section 325 of the Act.

Even absent statutory limitations and Commission precedent regarding retransmission consent, adoption of the so-called "a la carte" proposal would be harmful to the public interest. The proposal deters the development of new programming offerings by explicitly allowing MVPDs to discriminate against new programming services. It effectively establishes arbitrary caps on the prices programmers can seek from MVPDs without facing the various penalty options—which can, in turn, harm the ability of programmers, including local broadcasters, to produce or purchase quality content. And incredibly, the proposal would grant a windfall of negotiating leverage to MVPDs with absolutely no concomitant obligations for MVPDs to pass along any savings to their subscribers, who most certainly would appreciate some "options" to increase their bargaining leverage as their MVPD service rates jump by "more than the inflation rate" year after year.[35]

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[34] Mediacom's discussion of this proposal appears primarily focused on Section 628 of the Communications Act, which concerns video programming, but not retransmission consent or carriage of television broadcast stations.

[35] Petition at 16. We note that Mediacom has a long history of making proposals to the FCC that would benefit its bottom line under the guise of concern for consumers. *See, e.g.*, Letter from Joseph Young, Senior Vice President & General Counsel, Mediacom, to Ruth Milkman, Chief of Staff, FCC, MB Docket Nos. 10-71, 09-182 and 07-294 (Dec. 2, 2013); Letter from Joseph Young, Senior Vice President, General Counsel & Secretary, Mediacom, to P. Michelle Ellison, Chief of Staff, FCC, MB Docket No. 10-71 (Aug. 12, 2013). As NAB has previously explained, cable's long record of increasing subscriber fees well beyond the rate of inflation pre-dates by many years the emergence of cash compensation for operators' retransmission of broadcast signals. *See, e.g.,* Letter from Jane E. Mago of NAB to Marlene H. Dortch, Secretary, FCC, in MB Docket No. 10-71 (Dec. 5, 2013) at 4; Supplemental Comments of NAB, MB Docket No. 10-71 (May 29, 2013) at ii-iv, 18-19. The repeated protestations by cable operators that they want the Commission to intervene in the retransmission consent marketplace to protect consumers – rather than their own pocketbooks – thus ring hollow.

In short, the clear language of Section 325, the legislative history of the statute, and Commission precedent make clear that broadcasters and MVPDs are expected to freely negotiate a wide range of terms, including potentially disparate retransmission consent fees based on marketplace forces. Accordingly, the Commission lacks authority to adopt a rule that would limit the flexibility of broadcasters and MVPDs to reach agreements that satisfy their mutual interests, especially one that would tilt the playing field so dramatically in favor of MVPDs.

### B. The "Unbundling" Proposal Would Unlawfully Create "Options" Only For MVPDs and Hinder Development and Provision of Diverse Programming to the Public

Mediacom also proposes that, upon 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; (iii) any bundle of video programming networks or any individual network that the programmer has offered to sell any with MVPD in the previous 24 months; and (iv) a list of parties the programmer has negotiated within the previous 24 months (including programming packages/standalone programming offered).[36] This proposal, apparently an embellished version of a condition adopted in the unique context of a merger, is entirely misplaced as a potential rule of general applicability to govern the relationship of all video programmers (including broadcasters) and all MVPDs. Applying this to retransmission consent

[36] Mediacom Petition at 16-17.

negotiations, the Commission cannot and should not involve itself in retransmission consent in this manner, as such intervention would violate the statute, Congressional intent, and Commission precedent.

Like the "a la carte" proposal, this proposal involves a level of government interference in retransmission consent negotiations entirely inconsistent with the statutory regime established by Congress. Aside from Congress' overall intent to establish a "marketplace for the disposition of the rights to retransmit broadcast signals," where the government would not "dictate the outcome" of the "marketplace negotiations" between broadcasters and MVPDs, there is also specific legislative history relating to non-cash compensation in the form of carriage of additional programming.[37] Congress explicitly anticipated that some broadcasters would seek "the right to program an additional channel on a cable system" as a form of compensation for MVPDs' retransmission and resale of local stations' signals.[38] In light of such an unambiguous expression of Congressional intent, the Commission has properly concluded that seeking carriage of an additional channel or program service is "presumptively consistent" with broadcasters' obligation to negotiate retransmission consent in good faith.[39] Regulation of the process by which broadcasters and MVPDs decide what

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[37] *Senate Report* at 36 (finding "the right to program an additional channel on a cable system" an appropriate form of consideration).

[38] *Senate Report* at 36.

[39] *Carriage of Digital Television Broadcast Signals*, First Report and Order and Further Notice of Proposed Rule Making, 16 FCC Rcd 2598 at ¶35 (2001); *accord Good Faith Order* at ¶ 56. Given its multiple prior decisions, the Commission would be particularly challenged to justify a dramatic change in its rules to now prohibit broadcasters from negotiating for particular forms of compensation, such as carriage of additional programming. *See, e.g., Verizon Telephone Companies v. FCC,* 570 F.3d 294, 304 (2009)(finding FCC acted arbitrarily and capriciously in changing course without providing "a satisfactory explanation" but only making "conclusory statements"). In addition, the Commission would need to offer "a more detailed explanation" for changing course to the extent any new policy in this area "rests upon factual

particular mix of monetary and other compensation is appropriate in a particular negotiation, particularly a one-sided rule that allows MVPDs—and only MVPDs—to select the best deal from any previous negotiation a broadcaster has been involved in over the past two years, is entirely inconsistent with Congressional intent, the plain language of the statute, and the Commission's decisions interpreting Section 325.

Broadcasters often offer a menu of "consideration" options in retransmission consent negotiations, including carriage of nonbroadcast programming or secondary programming streams. In fact, MVPDs historically have encouraged and favored such non-cash forms of consideration in retransmission consent negotiations.[40] Consistent with existing Commission rules, broadcasters, to NAB's knowledge, do not engage in "take it or leave it" bargaining tactics by insisting upon the carriage of affiliated non-broadcast programming. Indeed, Commission rules already state clearly that such bargaining tactics are a *per se* violation of the FCC's good faith negotiation requirement.[41] And, the Commission has never found a single example of a "take it or leave it" retransmission proposal by a broadcast station that unconditionally required carriage of additional programming. Mediacom has presented no such evidence here.

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findings that contradict those which underlay its prior policy" or impacts broadcasters' "serious reliance interests." *FCC v. Fox Television Stations*, 556 U.S. 502, 515 (2009).

[40] *See, e.g.,* FCC*, Retransmission Consent and Exclusivity Rules: Report to Congress Pursuant to Section 208 of the Satellite Home Viewer Extension and Reauthorization Act of 2004* (Sept. 8, 2005) at ¶ 10 (although broadcasters initially sought cash compensation during the first round of retransmission consent negotiations, most cable operators were "unwilling to enter into agreements for cash, and instead sought to compensate broadcasters through the purchase of advertising time, cross-promotions, and carriage of affiliated channels. . . . Twelve years later, cash still has not emerged as a principal form of consideration for retransmission consent.").

[41] *See* 47 C.F.R. § 76.65(b)(1)(iv).

Finally, as with the previous proposal, this so-called "unbundling" proposal, even if it were lawful, would harm the public interest. Among other things, rather than "unbundling" anything, the proposal could actually cement existing bundles and foreclose carriage of new programming indefinitely. Mandating that programmers make available the exact same bundle as was offered in the "expiring agreement" allows an MVPD to avoid even discussing carriage of new programming that may not have existed at the time the last agreement was negotiated. Retransmission consent agreements often last for five years. Between 2012 and 2014 alone, nearly 1,000 new multicast channels were launched.[42] This provision would effectively foreclose even a conversation between a broadcaster and an MVPD about carriage of these new subchannels, many of which carry programming focused on niche audiences and address unique needs within their local markets.[43] The "unbundling" proposal would likewise foreclose negotiations for carriage of new nonbroadcast programming created by broadcasters or any other "video programming vendors." The proposal thus reduces the potential development of new and diverse networks and enhances the ability of MVPDs to discriminate against new programming options that may compete against

[42] NAB Comments in MB No. 14-16 (Mar. 21, 2014) at 11 (as of March 2014, the total number of live over-the-air broadcast channels aired by full-power, Class A and low power television stations was an estimated 5,511 channels – up from 4,552 channels in 2012, and only 2,518 channels at year-end 2010).

[43] *See, e.g.,* NAB Comments in MB No. 14-16 (Mar. 21, 2014) at 11-12 (discussing the development of niche networks on over-the-air multicast channels, including Bounce TV, designed to appeal to African-American audiences; Spanish-language programming networks like V-ME, LATV, Estrella and MundoFox; and networks focused on Asian-American audiences).

their own affiliated programming. This runs counter to longstanding policy goals of both Congress and the Commission.[44]

## IV. Conclusion

Mediacom's latest "wish list" of proposals to tilt retransmission negotiations in favor of MVPDs and otherwise penalize broadcasters and other video programming providers should be dismissed with prejudice. Similar to previous Mediacom proposals,[45] the Petition lacks any form of evidentiary or legal support. The proposals would involve the government in nearly every aspect of retransmission consent negotiations from monetary compensation to in-kind compensation to channel placement. Other Mediacom proposals would limit aspects of broadcaster operations entirely unrelated to retransmission consent, and impede broadcasters' and other video programming providers' lawful right to control their provision of content over the Internet. Even if any of these proposals were lawful, they would be entirely contrary to the public

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[44] Multiple provisions of the Cable Television Competition and Consumer Protection Act of 1992 were designed to ensure that consumers had access to a wide range of content over cable systems and that cable operators did not discriminate against unaffiliated content providers or otherwise take anticompetitive actions against them. *See, e.g.,* Pub. L. No. 102-385 (1992), § 2(a)(4)(finding that cable industry consolidation established barriers to entry for new programmers); § 2(a)(5)(finding that vertical integration gives cable operators the incentive and ability to favor affiliated programming); § 2(a)(19)(finding that cable systems had obtained "great benefits" from carrying local broadcast signals "without the consent of the broadcaster or any copyright liability," which had resulted in "an effective subsidy of the development of cable systems by local broadcasters" and which was remedied through adoption of retransmission consent); 47 U.S.C. § 533(f) (directing FCC to adopt cable horizontal and vertical ownership limits and consider limits on program production); 47 U.S.C. § 536 (directing FCC to adopt program carriage rules to prevent MVPDs from engaging in various anticompetitive and/or discriminatory practices vis-à-vis video programming vendors).

[45] *See, e.g.,* Joint Comments of Mediacom, Cequel Communications and Insight Communications Company, Inc. in MB Docket No. 10-71 at 27-28 (May 27, 2011) (broadcasters alone should be required to place unredacted copies of retransmission consent agreements in their public files); *id.* at 28-29 (the FCC should establish uniform retransmission consent agreement expiration dates); *id.* at 29-30 (disagreeing with FCC that it lacks authority to impose mandatory interim carriage and mandatory binding arbitration).

interest, strengthening the unconstrained power of MVPDs at the bargaining table and harming consumers. For all of these reasons, NAB urges the Commission to dismiss Mediacom's Petition.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I, Erin L. Dozier, Senior Vice President and Deputy General Counsel of the National Association of Broadcasters, certify that on this 29th day of September, 2014, a copy of the foregoing Opposition was sent by first-class U.S. mail, postage prepaid to the following:

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