

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

In the Matter of)	
)	
Revision of the Commission’s Program Access Rules)	MB Docket No. 12-68
)	
News Corporation and The DIRECTV Group, Inc., Transferors, and Liberty Media Corporation, Transferee, for Authority to Transfer Control)	MB Docket No. 07-18
)	
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.)	MB Docket No. 05-192
)	
To: The Secretary’s Office		
Attn: The Media Bureau		

COMMENTS OF COX COMMUNICATIONS, INC.

Cox Communications, Inc. (“Cox”), by its attorneys and pursuant to 47 C.F.R. § 1.415(b), hereby files these comments in response to the Commission’s *Notice of Proposed Rulemaking* in the above-referenced proceeding.¹ This proceeding raises important questions about whether the cable programming market is functioning in a way that promotes competition and protects consumers. Cox applauds the Commission for beginning to ask the hard questions on program exclusivity and volume discounting practices. Most cable operators, including Cox, are considerably smaller than the four largest multichannel video programming distributors (“MVPDs”) and face an increasingly difficult and expensive programming market. As described

¹ Revision of the Commission’s Program Access Rules, *Notice of Proposed Rulemaking*, 27 FCC Rcd 3413 (2012) (the “*NPRM*”); Media Bureau Announces Comment and Reply Comment Deadlines for the Notice of Proposed Rulemaking Regarding Revision of the Commission’s Program Access Rule, MB Docket Nos. 12-68, 07-18, and 05-192, DA 12-627 (Med. Bur. rel. Apr. 23, 2012).

below, Cox strongly encourages the Commission to address unfair programming practices in a way that balances respect for the normal market forces that shape programming prices with protection for consumers and competitors from discriminatory and unjustifiable market behavior. In particular, Cox urges the Commission to examine volume discounting practices carefully to clarify what types of behavior are acceptable and to ensure that viable remedies exist for discriminatory pricing practices that violate Section 628 of the Act.

I. INTRODUCTION

The Commission seeks comment on, among other issues, (1) whether to retain, sunset, or relax the cable-affiliated program exclusivity rules; and (2) potential revisions of the program access rules to more effectively address violations, including discriminatory volume discounts.² The question underlying both issues is whether programming is being made available to all MVPDs (and, by extension, all consumers) at fair and reasonable rates in a well-functioning market. The Commission's goal in addressing these and other issues should be to adopt policies that address the availability of programming evenly among like competitors, and ultimately require programmers to offer fair and non-discriminatory prices for distribution of the same content by all MVPDs. Programming costs are rising quickly, and competition suffers when programmers insulate the largest distributors from a fair share of these increases while disproportionately burdening other distributors.

Cox appreciates that the Commission has set itself a hard task in seeking to balance its regulatory mandate to assure fair access to programming with a respect for the benefits of a freely-functioning marketplace. Arms-length negotiations among market actors are and should remain the primary means of establishing market-rate programming arrangements. At the same time, Section 628 of the Communications Act gives the FCC a legitimate and important role to play in investigating the programming market and, if necessary, in developing rules to ensure that programmers do not use their market power to extract unreasonable or discriminatory

² *NPRM* at ¶¶ 21-96, 98-101.

programming rates from smaller and mid-sized distributors like Cox.³ Thus, the Commission's goal must be to fashion rules that protect the free market, competition, and consumers.

With these principles as background, Cox's experience indicates that exclusive contracts for cable-affiliated programming are relatively rare and are not a major factor in market distortions or cost increases for video distributors or their customers at this time.⁴ Arguably, the exclusivity deal causing the most significant market distortion today is DirecTV's *Sunday Ticket* package, which gives DirecTV exclusive rights to highly popular NFL games on a nationwide basis. Permitting the sunset of the exclusivity rules, which relate only to cable operators, will not affect the problems created by this arrangement. There is no longer any basis for asymmetrical regulation between cable operators and their very large competitors, such as DirecTV (an MVPD over four times the size of Cox), which is also generally covered by Section 628.⁵

The role of volume discounts in program pricing requires the Commission's attention and further investigation. While volume discounts can be legitimate and nondiscriminatory when they are based on the economies of scale realized through mass distribution, they are not appropriate when they are based on non-economic factors and when they function primarily to shift costs from larger to smaller MVPDs. The Commission should use this proceeding to clarify that programmers are required to provide their programming to all MVPDs at rates that reflect the true costs of creation, sale, and delivery of programming and that any volume discounts must have a *bona fide* and quantifiable economic rationale. The Commission also should explore any

³ 47 U.S.C. § 548.

⁴ By far, the greater force driving MVPDs' programming cost increases and accompanying consumer rate increases is the excessive demand for rate increases for virtually all programming, whether offered by vertically integrated or non-vertically integrated programmers.

⁵ It certainly defies logic that the Commission's concerns about access to regional sports networks owned by cable operators much smaller than DirecTV would not extend to the control exercised by DirecTV over one of sports' most popular properties, NFL Sunday Ticket, when the Commission has the opportunity to apply its regulations evenly. *See Ex Parte* letter from David J. Wittenstein, Counsel for Cox Communications, Inc., to Marlene H. Dortch, Secretary, FCC, MB Docket Nos. 07-29, 07-198, and 07-51 (filed Feb. 17, 2010).

options it may have for prohibiting non-economic volume discounts provided by non-vertically integrated cable programming providers.

II. THE COMMISSION'S FOCUS IN THIS PROCEEDING SHOULD BE DEVELOPING RULES THAT ENSURE ALL DISTRIBUTORS HAVE ACCESS TO PROGRAMMING AT FAIR AND NON-DISCRIMINATORY RATES.

As a mid-sized MVPD with only a few modest interests in affiliated programming networks, Cox has a strong interest in ensuring that cable television programming is available on fair and nondiscriminatory terms. While Cox is the third largest cable operator and fifth largest MVPD in the United States, it is less than half the size of the next largest MVPD and only about one-fifth the size of the largest. Cox is large enough to benefit from some of the economies of scale that allow it to offer its customers a level of quality and reliability that at least matches any other distributor, but unlike the largest MVPDs, Cox lacks the leverage to command optimal rates and terms from programmers.⁶ Thus, for Cox to secure programming at rates that permit it to offer customers an attractive multichannel video service, Cox depends on programmers' obligations to provide programming at non-discriminatory rates and terms.

Competition among MVPDs should be driven by innovation, quality of service, and reliability of customer service, not on whether a company is so large that programmers provide it with non-economic programming rates based on its size. While the cost of programming may reasonably reflect some economies of scale, program pricing should be based on justifiable economic factors – not on pricing decisions that reflect control over a critical wholesale input to the provision of video service. Unfortunately the size and program holdings of the largest MVPDs give them a significant competitive advantage in their ability to obtain substantial programming discounts unavailable to other MVPDs.

To ensure their customers do not pay artificially high rates that effectively subsidize larger MVPDs, Cox and other mid-sized or smaller MVPDs should have access to programming

⁶ The largest MVPDs, on the other hand, now have a strong position in the programming market by virtue of their size. The numerous remaining distributors lack the leverage to affect program pricing, either individually or collectively, that all of the four largest MVPDs possess.

at prices reasonably comparable to those available to larger MVPDs. Section 628 of the Act can play a constructive role in making sure that is the case. The Commission long has recognized that non-economic pricing can violate Section 628 of the Act and be the basis for a complaint under the existing rules.⁷ While the Act permits the practice of discounting their prices based on volume, the Commission has made clear that such discounts must be based on economic factors such as cost or the economic benefits realized from selling programming to a larger MVPD.⁸ In *Turner Vision*, for example, the Commission recognized that economically justifiable programming discounts are appropriate, but it nevertheless found that CNN had violated its rules by charging discounts that it could not economically justify.⁹

The Commission notes that it has not received any program access complaints alleging that volume discounts violate Section 628.¹⁰ However, as noted above, the Commission has in fact adjudicated price discrimination cases that, while they did not use the phrase “volume discount,” did involve the provision of lower programming rates to larger, established MVPDs than the complainants allegedly were offered.¹¹ Moreover, other price discrimination complaints have been filed that have been settled before they were decided.¹² The existing rules, however, have not been enough to secure fair rates for small and mid-sized MVPDs, and the Commission’s recognition that this may be a problem is a good first step towards fairer rates.¹³

⁷ Implementation of Section 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 3405-12 (1993) (“*Program Access Order*”); *Turner Vision, Inc. v. Cable News Network, Inc.*, 13 FCC Rcd 12610 (Med. Bur. 1998) (“*Turner Vision*”); *Corporate Media Partners v. Rainbow Programming Holdings, Inc.*, 12 FCC Rcd 15209 (Cable Services Bur. 1997).

⁸ 47 U.S.C. § 548(c)(2)(B)(iii); 47 C.F.R. § 76.1002(b)(3); *Program Access Order*, 8 FCC Rcd at 3407-08.

⁹ *Turner Vision*, 13 FCC Rcd at 12639-40.

¹⁰ *NPRM* at ¶ 100.

¹¹ *See supra* cases cited in note 7.

¹² *See, e.g., National Rural Telecommunications Cooperative v. EMI Communications Corporation*, CSR-4308-P (Cab. Serv. Bur. 1995) (complaint dismissed pursuant to joint stipulation of the parties).

¹³ *NPRM* at ¶¶ 98-101.

To the extent there have been relatively few price discrimination cases involving volume discounts, that does not imply that there is no price discrimination problem arising from volume discounts. Numerous factors deter small and mid-sized cable operators from filing complaints. For example, cable operators and programmers develop long-term “buyer/seller” relationships that involve recurring negotiations. Filing complaints creates real risk of straining those relationships. The risk of damaging relationships with large programmers by filing complaints may well have deterred mid-sized and smaller operators from seeking to vindicate their rights under Section 628. Moreover, given the confidential nature of programming network affiliation agreements, it is difficult to know the rates applicable to other MVPDs.¹⁴ Finally, even in the proceedings adjudicating these complaints, the FCC has struggled with evaluating nebulous “non-cost” based factors that have been allowed consideration in these cases.

Cox and other mid-sized and small cable operators nonetheless have raised the issue of unfair and non-economic volume discounts before the Commission, and the time has come for the Commission to address these concerns.¹⁵ Cox does not expect the Commission to strictly prohibit price differentials in the rates charged by programmers, but the Commission should consider reforms to its rules to make it easier to file and prosecute complaints related to unfair video pricing.

¹⁴ In addition, the program access rules relate only to vertically integrated programmers. Some of the most powerful programmers are not vertically integrated and therefore are not subject to the rules. But the pricing practices of these powerful non-vertically integrated programmers, including their volume discount practices, are also a source of great concern and should be examined by the Commission.

¹⁵ *See, e.g.*, Comments of Cox Communications, Inc., MB Docket No. 11-131, at 7 (filed Nov. 28, 2011); Comments of the American Cable Association, MB Docket No. 11-128, at 8-9 (filed Sept. 9, 2011); Comments of American Cable Association, MB Docket No. 10-56, at 38-41 (filed June 21, 2010); Letter from L. Elise Deitrich, counsel for RCN Corporation, to Marlene H. Dortch, MB Docket No. 05-192 (filed Oct. 28, 2005) (submitting Testimony of Peter D. Aquino, President & CEO at 11-13).

III. CONCLUSION

For the foregoing reasons, Cox urges the Commission to address discriminatory volume discounts and consider changes to the Commission's rules designed to promote competition and protect consumers.

Respectfully submitted,

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June 22, 2012