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

REPLY COMMENTS OF MEDIACOM COMMUNICATIONS CORPORATION

In its initial comments in this proceeding, Mediacom Communications Corporation ("Mediacom") urged the Commission to amend the rules implementing Section 628 of the Communications Act so as to more effectively address certain unfair and unjustified bundling and volume discounting practices that are regularly engaged in by programmers (both cable-affiliated and non-cable-affiliated) to the detriment of competition, consumer choice, and the public interest. Several other commenters, including representatives of a number of small multichannel video programming distributors ("MVPDs") as well as of the third largest cable operator in the country, expressed some of the same concerns noted by Mediacom. On the other hand, a few programmers have submitted comments arguing that there is no need to expand the scope of the current rules. As demonstrated below, those comments supporting maintenance of

the *status quo* rely on arguments that mischaracterize the relevant law and facts and ultimately lend support to Mediacom's position.

DISCUSSION

In its Notice of Proposed Rulemaking ("*NPRM*") in this proceeding, the Commission invited interested parties to comment on whether the existing rules implementing Section 628 of the Communications Act should be expanded.[1] In response, Mediacom described how programmers routinely engage in unjustified and unfair volume discounting and bundling practices that injure competition and consumers and are inconsistent with the letter and spirit of Section 628.[2] Mediacom also noted that these practices are not limited to cable-affiliated programmers and that it was therefore necessary and appropriate for the Commission to extend its rules governing discrimination and unfair practices to all programmers. Mediacom pointed out that it first raised concerns about these practices nearly a decade ago and that the Commission currently has at least one other proceeding open in which it has been asked to revise its rules to address these practices.[3]

A number of other parties responding to the *NPRM* expressed similar concerns, focusing in particular on the failure of the Commission's rules to adequately enforce the prohibition on unjustified volume-based price differentials.[4] These comments echo Mediacom's point: namely that, as currently implemented by the Commission, the exception to that allows programmers to engage in volume-based price discrimination where they can show that the differential terms and

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[1] *NPRM* at ¶ 5.

[2] Comments of Mediacom Communications Corporation, MB Docket No. 12-68, filed June 22, 2012 ("*Mediacom Comments*"). All comments cited herein were filed in MB Docket No. 12-68.

[3] *Id.* at 3 and note 11.

[4] *See* Comments of the American Cable Association ("ACA Comments"); Comments of the Independent Telephone & Telecommunications Alliance ("ITTA Comments"); Comments of Cox Communications ("Cox Comments"); Joint Comments of Interstate Communications, et al. ("Joint Comments"); Comments of OPASTCO and NTCA.

conditions reflect economies of scale, cost savings, or other quantifiable "direct and legitimate" economic benefits reasonably attributable to the number of subscribers served has been allowed to completely swallow up the prohibition against unjustified volume-based price discrimination. No programmer is ever required to establish that there is a fact-based justification for its specific differential pricing practices. And no MVPD can challenge the programmers' pricing practices because the lack of transparency in programming agreements makes enforcement of the rule impossible. As a result, despite the absence of any empirical evidence that there are any measurable, "direct and legitimate" economic benefits that accrue to a programmer when it provides programming to a larger MVPD or that the prices charged to larger MVPDs accurately reflect the magnitude of such benefits if they do exist, the Commission's rules fail to prevent programmers from engaging in unjustified price discrimination.

The Commission should take particular note that the parties urging it to address volume discounting and other unfair practices are not just the smaller MVPDs (and their representatives) that have historically expressed concern about the programmers' unfair and anticompetitive tactics. Cox Communications, the nation's third largest cable operator (and fifth largest MSO) also filed comments urging the Commission to consider ways of improving its rules so that they better protect consumers and competitors from discriminatory and unjustifiable market behavior on the part of programmers, whether or not affiliated with a cable operator.[5] When a company with the size and resources of Cox goes on record that the Commission's current rules are allowing programmers to engage in volume-based pricing without offering a "*bona fide* and

[5] Cox Comments at 4-6. *See also* Joe Flint, *DirecTV Gets Support From Cox in Fight With Viacom*, latimes.com (July 11, 2012) (*quoting* Cox executive Bob Wilson regarding the "unbalanced multichannel video business model" that is producing "continued significant increases in the cost of programming that are the main driver of rising cable and satellite TV service bills") *available at* http://www.latimes.com/entertainment/envelope/cotown/la-et-ct-cox-20120711,0,6434127.story.

quantifiable economic rationale" for such discrimination, it is a clear indication that the current rules are not operating in the manner that Congress intended.[6]

Perhaps anticipating the arguments made by Mediacom, Cox and others, a few programmers (Comcast/NBCU; Madison Square Garden Company; Discovery Communications) included in their comments a defense of the Commission's current rules governing price discrimination and, in particular, volume discounts.[7] However, the programmer-commenters' defense of the *status quo* actually provides support for the argument that changes to the current rules are necessary.

The programmer-commenters contend that the Commission lacks the authority to amend its rules to more effectively address volume-based pricing practices because such practices are "[i]n all events, not discriminatory"[8] and, indeed, are "expressly permitted by statute."[9] These assertions mischaracterize Section 628's language and its legislative history. Any time a programmer charges buyers different prices for the same product, the programmer is engaging in price discrimination, which is a *per se* violation of Section 628 (*i.e.*, the complainant does not have to separately prove that the purpose or effect of the pricing differential was to harm competition).[10] The only question is whether the price discrimination falls within one of the narrowly stated exceptions in the statute. As the Commission itself stated in implementing the price discrimination provision, "discrimination under Section 628 exists when essentially the

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[6] Cox Comments at 3.

[7] Comments of Comcast Corporation and NBCUniversal Media, LLC ("Comcast/NBCU Comments"); Comments of Discovery Communications, LLC ("Discovery Comments"); Comments of Madison Square Company ("MSG Comments").

[8] Comcast/NBCU Comments at 17.

[9] *Id.* at 15. *See also* Discovery Comments at 11-12 (proposals to more effectively address unjustified volume discounts are based on the "faulty premise that such volume discounts are 'discriminatory'").

[10] 47 U.S.C. § 628(c)(2)(B).

same programming service is sold to competing distributors at different prices."[11] Such discrimination, the Commission explained – including discrimination between MVPDs based on their size – "is prohibited if not justified [by the programmer] under one or more of the specific factors enumerated in the statute."[12]

There is no dispute that there are certain factors identified in the statute that programmers can rely on to justify on to justify volume-based price discrimination. But to the extent the programmers are suggesting that the statute gives blanket approval to all "volume discounts," they are simply wrong. Indeed, a version of Section 628 that would have generally allowed all "volume discounts" was replaced in the enacted law with language that sets the bar much higher: volume-based discounts are permitted, but only when the programmer can establish that the pricing differentials accurately reflect "economies of scale, cost savings, or other direct and legitimate economic benefits reasonably attributable" to the size of the distributor.[13] As Mediacom and others pointed out in their comments, under the Commission's current rules programmers are effectively insulated from ever having to make the showing that is specifically required by the statute to justify their volume-based prices.

In addition to mischaracterizing the statute, the programmer-commenters rely heavily on an argument that is nothing more than a red herring. According to the programmer-commenters,

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[11] *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 ¶ 95 ("*1993 Program Access Order*") (emphasis added).

[12] *Id.* Part of the reason for the programmers' confusion as to whether volume-based discounts are discriminatory may be attributable to the *NPRM* having somewhat inartfully asked parties to comment on whether the current rules adequately address "potentially discriminatory volume discounts." *NPRM* at ¶ 98. The more accurate (and appropriate) phrasing of the issue is whether the current rules adequately prevent programmers from engaging in unjustified and, thus, unlawful, volume-based discrimination. The answer, as Mediacom and others have shown, is no, the current rules do not effectively prevent programmers from engaging in the unjustified volume-based price discrimination that Congress sought to prohibit.

[13] *See* H.R. Rep. No. 102-862, at 92-93 (1992). Comcast/NBCU cites this legislative history and the enacted provision, but omits the somewhat inconvenient (for Comcast/NBCU) words "direct and legitimate" from its restatement of Section 628(c)(2)(B)(iii). *See* Comcast/NBCU Comments at 17 n.52.

modifying the current rules (through the adoption of a rebuttable presumption, for example), would be improper because the statutory provision allows volume-based price discrimination not only where it is based on "cost savings," but also where it reflects other, presumably non-cost related, "economic benefits."[14]

The problem with this argument is that neither Mediacom nor any of the other commenters urging the Commission to revise it rules has denied that the statute provides an exception where the programmer makes the requisite showing of "other" economic benefits. Rather, what Mediacom and others have pointed out is that a programmer relying on a non-cost based "economic benefit" to justify its volume-based discriminatory prices still is required to establish that those economic benefits are "direct and legitimate" and are "reasonably attributable" to the size of the distributor.[15] The Commission made this point clear in its original order implementing Section 628, stating that it is the responsibility of the programmer not only to justify the "legitimacy" of the economic benefits on which the volume-based price discrimination is based, but also to justify the "magnitude" of the price differences allegedly based on those benefits.[16] In short, contrary to what the programmer-commenters suggest, the law does not presume the existence of "other direct and legitimate economic benefits" justifying volume discounts – the programmer bears the burden of establishing and quantifying such benefits.

The programmer-commenters' other arguments against modifying the current rules governing volume-based price discrimination fare no better than their misplaced contention that the Commission lacks the authority to more effectively implement the prohibition on unjustified

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[14] Comcast/NBCU Comments at 15-18; Discovery Comments at 11-14; MSG Comments at 30-33.

[15] Mediacom Comments at 13-17; Cox Comments at 4-5.

[16] *1993 Program Access Order* at ¶ 105.

volume discounts. In particular, the programmer-commenters assert that the lack of complaints challenging volume discounts establishes that there is no need to change the current rules and that adopting provisions designed to enhance the effectiveness of the prohibition against unjustified volume discounts (such as enhanced transparency requirements and/or a rebuttable presumption) would upset programmers' past reliance on the Commission's lack of enforcement of the rule and would disadvantage cable-affiliated programmers *vis-à-vis* non-cable-affiliated programmers.[17]

The fact that MVPDs have not brought complaints based on the programmers' volume discounting practices is in no way evidence that the programmers are in compliance with the statutory prohibition against unjustified volume-based price discrimination. As Mediacom and others have pointed out, the utter lack of transparency in programming agreements creates an all but insurmountable barrier to distributors who believe that they are the victims of unlawful volume discounts.[18]

Moreover, the admission by the programmer-commenters that volume-based pricing is widespread in the industry suggests that the current rules are considered to be an open invitation to engage in volume-based discrimination without fear of having to justify the specific pricing scheme. The programmers' reliance on their ability to escape scrutiny is hardly a reason to perpetuate such an approach. And Mediacom fully agrees that it would be unjust for the prohibition against unjustified volume-based price discrimination to be effectively enforced only

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[17] *See* Comcast/NBCU Comments at 19-20; MSG Comments at 29-30, 32. Comcast/NBCU also suggests that smaller MVPDs are not disadvantaged by the Commission's current regulatory approach because they can form buying groups in order to qualify for their own volume discounts. Comcast/NBCU Comments at 17. However, the problem is that the current rules do not provide buying groups the protection that Congress intended. Programmers can, and do, refuse to deal with buying groups. Mediacom supports ACA's proposed changes in the buying group definition in the Commission's rules. ACA Comments at 15-27. In addition, Mediacom submits that the Commission should adopt an express rule prohibiting programmers from refusing to deal with a buying group based on the size of the group or any of its members.

[18] *See, e.g.*, *Mediacom* Comments at 9-10; Cox Comments at 6; Joint Comments at 6.

against cable-affiliated programmers since non-cable affiliated programmers also engage in such discrimination. Mediacom fully agrees with the programmer-commenters that enforcing the statutory provision only against cable-affiliated programmers would frustrate the regulatory scheme that Congress directed the Commission to adopt. Accordingly, the Commission can and should exercise its ancillary jurisdiction (as well as its direct authority under Section 628) to prevent all programmers from employing volume discounts without having to justify them under one of the statutory factors.[19]

In its initial comments, Mediacom also urged the Commission to exercise its authority under Section 628 to address unfair and anti-consumer bundling practices that drive up the cost of MVPD service and frustrate consumer choice.[20] Given that the *NPRM* did not expressly raise the issue of bundling, Mediacom acknowledges that the Commission may deem it appropriate to seek comment on this particular issue through the issuance of a further notice of proposed rulemaking. If the Commission does issue such a further notice, it also should consider therein other practices that programmers have begun to employ that are driving up prices and frustrating consumer choice and control.

For example, programmers are increasingly taking steps to control the ability of consumers to lawfully "time-shift" and "space-shift" programming and to view programming on lawful devices of their own choosing (such as smart phones and devices) as well as the ability of distributors to lawfully deploy new technologies (such as remote DVR services, integrated television and Web browser devices and other substantially non-infringing consumer electronics equipment). Their actions are stifling consumer-friendly innovation and impeding competition

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[19] Mediacom Comments at 21.

[20] *Id.* at 4-9. There have been suggestions that Viacom's bundling practices played a significant role in triggering its recent decision to deny access to more than a dozen of its networks to roughly 20 million DirecTV households (and to stop offering certain online content to anyone as part of an effort to put more pressure on DirecTV).

in ways that are plainly inconsistent with a variety of public interest goals set forth in the Act and the Commission's rules.[21] Therefore, Mediacom urges the Commission to craft a rule that explicitly acknowledges consumers' right to watch programming they lawfully purchase when, where, and how they want and prohibits contractual restrictions on the provision, activation, or use of CableLabs-certified devices to receive, record, and play back such programming.

Finally, ACA has raised several issues relating to the status of "buying groups" for purposes of Section 628. Mediacom, which is a member of the National Cable Television Cooperative, Inc. ("NCTC"), the largest purchasing organization representing cable operators, has a direct and significant interest in these issues. Mediacom agrees with ACA that the current rules do not provide buying groups the protection that Congress intended.

In particular, programmers can, and do, refuse to deal fairly with buying groups and their members despite the fact that there is nothing in Section 628 that would give programmers license to treat a buying group differently from an individual MVPD. Mediacom supports ACA's recommendation that the Commission update its buying group definition so that it more closely reflects the financial relationship that has evolved between buying groups and programmers.[22] Mediacom also endorses ACA's recommendation that the Commission expressly clarify that, to the extent a programmer has volume-based pricing scheme that otherwise passes muster under the statutory standard, the same discounted rates available to an

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[21] The FCC has a history of prohibiting restrictions on consumers' use of lawful devices on communications facilities. *See, e.g.*, *Use of the Carterfone Device in Message Toll Telephone Service*, 13 FCC 2d 420, 423 (1968) (invaliding a tariff that prevent use of interconnecting devices that did not adversely affect the telephone system); *Implementation of Section 304 of the Telecommunications Act of* 1996, 18 FCC Rcd 20885 (2003) (adopting rules to facilitate the compatibility of third party equipment with cable systems).

[22] Specifically, under the current rules, a buying group either must take certain steps to accept financial liability for fees due pursuant to a master agreement or its members must agree to joint and several liability. 47 C.F.R. § 76.1000(c). As ACA explains, buying groups such as NCTC in practice typically are required merely to forward to the programmer all payments due and received from its members. The programmer is protected from a defaulting member because the buying group can terminate that company's membership. ACA Comments at 23-27.

individual MVPD of a certain size must be made available to members of a buying group that represents a comparable number of subscribers in the aggregate.

CONCLUSION

For the reasons set forth above and in Mediacom's initial comments, the Commission should adopt rules (and, insofar as is necessary, commence a further rulemaking proceeding) to give meaning to the prohibition on unjustified volume-based price discrimination and to otherwise address unfair practices that restrict consumer choice and increase the price of video service.

Respectfully submitted,

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