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 CHARTER COMMUNICATIONS, INC.

Charter Communications, Inc. ("Charter" or the "Company") hereby submits these brief Reply Comments in response to the discussion of "volume discounting" included in the Comments already filed in the above-captioned proceeding. Charter recommends that the Commission's rules implementing Section 628 of the Communications Act be revised to better address the "volume discounting" practices of major video programmers -- practices that are increasingly threatening "competition and diversity in the multichannel video programming market" and the "development of communications technology." Charter agrees with those Comments urging the Commission to reevaluate its rules in light of current market conditions. In particular, Charter supports the Comments submitted last month by Mediacom Communications Corporation ("Mediacom").

In its comments, Mediacom calls for an end to "coercive bundling practices" and "unjustified volume discounting." It recommends a regulatory solution to these problems strikingly similar to the solution that Cablevision advanced (and Charter expressly endorsed) a year ago in the context of Retransmission Consent reform.[1] Charter's preferred regulatory solution is predicated on **non-discriminatory pricing, transparency, and no tying**. While these principles will not resolve every business and consumer challenge associated with rapidly increasingly programming prices, Charter respectfully suggests that adopting these three principles in this proceeding would promote the public interest generally and the express objectives of Section 628 specifically.

I. THE COMMISSION SHOULD ADOPT A GENERALLY-APPLICABLE (BUT WAIVABLE) PROHIBITION AGAINST VOLUME DISCOUNTING.

The Commission's *NPRM* in this proceeding seeks comment on whether its program access rules "adequately address potentially discriminatory volume discounts and, if not, how these rules should be revised to address these concerns."[2] Mediacom properly responds in its Comments:

> The short answer to the various questions posed in the *NPRM* is that, as a practical matter, the rule barring discriminatory pricing has been completely swallowed by the supposedly limited exception…. In order to rectify this situation and establish an effective and enforceable discrimination ban, the Commission needs to overhaul its rules….[3]

Charter Communications – the fourth largest cable MSO (and seventh largest MVPD) with more than 4 million video customers – is not inherently hostile to volume discounts. It agrees with Mediacom however, that market conditions in the programming arena now require a revised regulatory approach.

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[1] *See* Reply Comments of Charter Communications, Inc., MB Docket No. 1071 (filed June 27, 2011).

[2] *NPRM* at ¶ 98.

[3] Mediacom Comments at 10-11.

In today's highly competitive video distribution marketplace, programmers have increasing leverage in their negotiations with MVPDs, as reflected in the dramatic escalation that MVPDs have experienced in programming affiliation fees. On a practical level, it is awkward for an MVPD trying to foster a positive relationship with a programmer to file a formal complaint at the FCC challenging the programmer's affiliation practices. This is particularly true in an era when major programmers control multiple programming networks of potential interest to MVPD customers. Moreover, programmers invariably insist that the economic terms of their affiliation contracts be kept confidential – effectively precluding operators from gaining knowledge of a programmer's volume discounting and evaluating the legitimacy of those discounts.

Under these circumstances, it is difficult for any MVPD, even one as large as Charter, to challenge the volume discounting practices of a given programmer. That difficulty is exacerbated by the time and cost burdens associated with the Commission's existing complaint process, as well as the uncertainty surrounding the Commission's evidentiary expectations regarding volume discounting. The Commission has not, after all, clearly articulated the scope and magnitude of the "non-cost economic benefits" that might justify a particular volume discount. In response to the Commission's inquiry, "Do our current program access rules and procedures prevent or discourage the filing of legitimate complaints pertaining to this issue?"[4] Charter must answer in the affirmative.

Like Mediacom, Charter believes it is now time for the Commission to revise its historic regulatory approach to volume discounting to ensure non-discriminatory pricing. Rather than placing the burden on MVPDs to challenge a programmer's volume discounting, the initial

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[4] *NPRM* at ¶ 100.

burden should be placed instead on the programmer to justify its discounting practices. In short, the Commission's rules should prohibit all volume-based discounts -- subject to a waiver mechanism through which a programmer could secure Commission pre-approval for a proposed discount based on an appropriate economic justification. This approach ultimately would not preclude volume discounting, but it would much more effectively ensure that those discounts are economically justified. This new approach would better serve Section 628's non-discrimination mandate.

Under the current regulatory framework, the Commission has no basis to assume that existing volume discount practices are based on legitimate economic considerations. As a result, smaller MVPDs (and their subscribers) may now be subsidizing larger MVPDs – directly at odds with the pro-competition objectives underlying Section 628. As Mediacom notes, "Congress never intended to allow such subsidies. Rather, Congress expected uniform rates to be the rule and for price differentials to exist only to the extent they reflected an actual economic benefit that a programmer derived from an MVPD's size."[5]

Charter is not asking in the confines of this proceeding for the Commission to put an absolute cap on programming fees. It is asking, however, that the Commission preclude programmers from imposing different programming fees on different MVPDs without first justifying that differential on rational economic grounds.

[5] Mediacom Comments at 13.

II. THE COMMISSION SHOULD REQUIRE PRICING TRANSPARENCY IN PROGRAMMING AGREEMENTS.

Any prohibition on discriminatory pricing accomplishes little if a programmer's actual pricing structure is not readily available to interested MVPDs. As Mediacom explains in its comments:

> Under the current rules, smaller MVPDs – the very entities that are harmed by discriminatory pricing – lack access to the information needed to ascertain whether and to what extent they are paying a different rate than one or more of their competitors…. Greater transparency in the terms of programming agreements is thus essential to the enforcement of the statutory ban on discriminatory pricing.[6]

Accordingly, the Commission should revise its rules in this proceeding to require that each programmer adhere to a *published* rate schedule (whether that schedule is limited to a single "default" figure applicable to all MVPDs or includes graduated rates based on a Commission-approved waiver petition). This transparency would further the objectives of Section 628 by enabling MVPDs to streamline otherwise burdensome negotiations and determine immediately whether a programmer's proposed rate is permissible or unreasonably discriminatory.

III. THE COMMISSION SHOULD PROHIBIT "TYING" OF MULTIPLE PROGRAMMING SERVICES.

Mediacom's Comments make a compelling case that current programmer practices lead to "bloated" service offerings.[7] Mediacom properly emphasizes, "There is a growing recognition that the programmers' bundling practices are forcing MVPDs to offer, and customers to pay for, 'too many networks.'"[8] The proposed ban on tying would benefit consumers who are not necessarily interested in paying for every video service offered by a particular programmer. The

[6] Mediacom Comments at 11.

[7] Mediacom Comments at iii.

[8] *Id.*

ban would also potentially enhance programming diversity. Most importantly for the purposes of this proceeding, unbundling would facilitate meaningful enforcement of Section 628's non-discrimination requirement by simplifying programming prices and avoiding the hidden fees otherwise associated with tying arrangements.

Significantly, prohibiting program tying would *not* preclude a particular programmer from offering multiple programming services; nor would it preclude a programmer from offering a particular service on favorable terms to expand distribution. The prohibition would simply ensure that a distributor has the opportunity to make a truly independent decision about each programming service without regard to the other services offered by a particular programmer.

IV. THE COMMISSION SHOULD APPLY THE RULES ADOPTED IN THIS PROCEEDING TO NON-VERTICALLY-INTEGRATED PROGRAMMERS.

Although the Commission historically limited its program access regulations to vertically-integrated programming services, that limitation lacks both a legal and logical justification in the context of volume discounting. Section 628 does include certain restrictions expressly applicable to vertically-integrated programmers, but the D.C. Circuit (in upholding the Commission's expansion of the exclusivity prohibition to terrestrially-delivered services) has made it very clear that the specific restrictions set forth in the statute represent Congress' *minimum* requirements, and the Commission is free to impose additional regulations.[9] Not only does the Commission have "broad and sweeping" legal authority to address the practices of non-vertically integrated programmers, but excluding non-vertically integrated programmers from discrimination restrictions would be illogical.

[9] *See Cablevision Systems Corp. v. FCC,* 649 F.3d 695 (D.C. Cir. 2011). *See also Cablevision Systems Corp. v. FCC,* 597 F.3d 1306, 1308 (D.C. Cir. 2010).

As Mediacom explains, "[T]he public's interest in protection from the effects of discriminatory volume discounts and coercive bundling of programming does not vary based on whether the programmers engaged in these practices are or are not vertically-integrated with a cable operator.[10]" In the two decades that have transpired since Congress adopted Section 628, cable programming has become increasingly dominated by entities that are *not* cable-affiliated. Charter is not aware of any fundamental difference in the volume discount practices among programmers depending on whether they are vertically integrated. For the reasons set forth above, the Commission should extend the proposed regulations addressing unjustified volume discounting and coercive bundling to *all* programmers, regardless of whether they are vertically integrated.

At the very least, the Commission should apply the principles of non-discriminatory pricing, transparency, and no tying to regional and national sports network programming, regardless of whether the programmers are vertically integrated. These safeguards are particularly important with respect to sports programming, because it represents "must have" programming to MVPD subscribers, for which there is no substitute.

The Commission has, in fact, clearly recognized the importance of sports programming and its unique impact on MVPD competition. In the recent Order closing the "terrestrial loophole," for example, the Commission proceeded based on its understanding of regional sports network programming as "very likely to be non-replicable and highly valued by consumers."[11]

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[10] Mediacom Comments at 17.

[11] *See Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements,* 25 FCC Rcd. 746, ¶ 52 (2010)("*2010 Program Access Order*").

Indeed, the Commission has repeatedly acknowledged that regional sports networks are "non-replicable" and therefore play a critical role in the competitive marketplace.[12]

Although the Commission's recent program access activity has focused on regional sports networks, the sports programming delivered by national networks is as popular and unique as the sports programming offered by regional networks. Given the popularity, high cost, and non-replicable nature of sports programming, sports networks (regardless of whether they are regional or national in scope) clearly warrant special regulatory attention.[13] If the Commission declines to adopt Mediacom's proposal for *all* programming networks, it should at least do so for regional and national sports networks.

CONCLUSION

Discriminatory pricing practices are unlawful under Section 628 of the Commissions Act and contrary to the public interest. For the reasons stated above, the Commission should directly address unjustified volume discounts offered by any programmer – regardless of whether that

[12] *See, e.g., Adelphia Communications Corp. – Time Warner Cable, Inc. Transfer,* 21 FCC Rcd. 8203, ¶ 189 (2006) ("the programming provided by RSNs is unique because it is particularly desirable and cannot be duplicated."); *General Motors Corp. and Hughes Electronics Corp., Transfer of Control to News Corp.*, 19 FCC Rcd. 473, ¶ 133 ("The basis for the lack of adequate substitutes for regional sports programming lies in the unique nature of its core component: regional sports networks ("RSNs") typically purchase exclusive rights to show sporting events, and sports fans believe that there is no good substitute for watching their local and/or favorite team play and important game.").

[13] Charter suggests that the content description used by the Commission to define regional sports networks, *see 2010 Program Access Order* at ¶ 53, could easily be modified to define *national* sports networks.

programmer has ownership ties to a cable operator. In fashioning new regulations in this proceeding, the Commission should be guided by the principles of non-discriminatory pricing, transparency, and no tying.

Respectfully submitted,

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