

**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		

REPLY COMMENTS OF COX COMMUNICATIONS, INC.

Cox Communications, Inc., by its attorneys and pursuant to Section 1.415(c) of the Commission’s rules, 47 C.F.R. § 1.415(c), hereby files these reply comments in the above-captioned proceeding.¹

I. INTRODUCTION

The Comments in this proceeding confirm that programmers’ practice of offering substantial volume discounts to the largest multichannel video programming distributors (“MVPDs”) creates a market imbalance and harms competition. The numerous mid-sized and smaller MVPDs that filed comments on their own behalf or through representative organizations

¹ Revision of the Commission’s Program Access Rules, *Notice of Proposed Rulemaking*, 27 FCC Rcd 3413(2012) (the “*NPRM*”).

unanimously identified inappropriate volume discounts and other unfair programmer pricing practices as a growing problem that is leading to higher video rates to consumers and unfair competitive advantages for the largest MVPDs.² The Commission now has more than enough evidence to initiate further a proceeding to take an in-depth look at programmer pricing practices, determine whether those practices are consistent with the Communications Act and the public interest, and adopt appropriate remedies.

II. THE COMMISSION SHOULD INSTITUTE A FURTHER PROCEEDING TO CONSIDER RULES LIMITING VOLUME DISCOUNT DIFFERENTIALS.

Cox supports the wide array of small and mid-sized cable operators and small and rural telecommunications video providers that offered evidence that they are charged unfairly inflated prices for programming as compared to the largest MVPDs.³ Commenters cited evidence showing that small and mid-sized operators may pay rates 30% higher than those paid by the largest MVPDs for the same national programming.⁴ None of the parties supporting programmers' current practices disputed this figure, and the comments suggest that the problem might actually be worse because small and mid-sized MVPDs lack knowledge of the prices charged to other operators in the marketplace due to ubiquitous confidentiality provisions that prohibit disclosure of rates.⁵ The comments demonstrate that volume discounting and accompanying discriminatory pricing are a problem, and further show that the Commission's

² See Comments of Mediacom Communications Corporation at 9-17 ("Mediacom Comments"); Comments of the Organization for the Promotion and Advancement of Small Telecommunications Companies and the National Telecommunications Cooperative Association at 11-13 ("OPATSCO Comments"); Comments of the Independent Telephone & Telecommunications Alliance at 10-12 ("ITTA Comments"); Joint Comments of Interstate Telecommunications, *et al.* at 5-8 ("IT Comments"); Comments of Blooston Rural Video Service Providers at 3-4. See also Comments of American Cable Association at 25-34 ("ACA Comments").

³ *Id.*

⁴ Mediacom Comments at 11-12 (citing Comments of the American Cable Association, MB Docket No. 10-56, filed June 21, 2010, at 38-39); IT at 5-6.

⁵ *Id.* at 17; IT Comments at 7; OPATSCO Comments at 13; see also Cox Comments at 6.

current rules and processes are inadequate to remedy that problem.⁶ A further proceeding is necessary to investigate the scope of the problem and how best to address it. The Commission should commence such a proceeding without delay.

The parties opposing Commission action to address volume discounts offer no facts or evidence to rebut the small and mid-sized operators' showing that volume discounts are unduly large and are causing competitive harm and damage to consumers. Instead they offer various ideological and purported legal reasons why the Commission should refrain from further investigation of volume discount practices.⁷ Each of these reasons lacks merit. Some programmers argue that the Commission should let the market solve any problems with programmer pricing practices.⁸ But the problem with volume discounts is that the largest MVPDs control so much of the market that they can obtain far better pricing than smaller and mid-sized companies. Congress anticipated the market distortions that could result from substantial size disparity among MVPDs, requiring the Commission to adopt rules specified in Section 628(c)(2) of the Act and giving the Commission authority to adopt additional rules as necessary to remedy those problems. But the mechanisms adopted thus far are not working. For example, ACA provides evidence that programmers are circumventing the buying group protections built into the Act and the Commission's rules by refusing to offer groups representing large numbers of MVPDs the same discounts they offer to individual MVPDs with the same number of or fewer customers.⁹ Cox agrees with ACA that the Commission should confirm that such practices presumptively violate the Act.¹⁰ Equally important, such conduct by

⁶ OPATSCO Comments at 7-8, 8-9, 11; ITTA Comments at 9-10; IT Comments at 6.

⁷ *E.g.*, Comments of Madison Square Garden Company at 29-33 ("MSG Comments"); Comments of Discovery Communications LLC at 11-14 ("Discovery Comments").

⁸ MSG Comments at 30-31; Discovery Comments at 13-14.

⁹ ACA Comments at 30-34.

¹⁰ *Id.* Cox also agrees with ACA's requests for reform of the rules governing buying groups to make such groups more useful to smaller and mid-sized operators. *Id.* at 11-27. Cox has first-hand experience with programmers refusing to permit it to opt into agreements despite Cox's membership in the National Cable Television Cooperative. Cox agrees with ACA that the Commission should confirm such conduct violates the Act. ACA Comments at 27-29.

programmers shows that the Commission needs additional tools tailored to a market that has evolved over the past twenty years and is not functioning properly at this time.

Nor should the Commission be distracted by the straw man some programmers have constructed that parties opposing discriminatory volume discounts oppose all volume-based price differentials.¹¹ No commenters dispute that programmers are permitted to offer volume discounts to the largest MVPDs. But the record suggests that the volume discounts currently being extended to the largest MVPDs may not be justified by legitimate factors, could harm competition and consumers, and might be discriminatory. Cox agrees that the Commission needs further information to determine the full scope of the problem and any appropriate rule changes to address it. Such changes presumably will include greater clarity regarding the factors to be considered when determining the boundary between legitimate volume discounts and discriminatory prices. The only way to get the necessary information is to initiate a proceeding to closely examine current volume discount practices.

Some vertically integrated programmers paradoxically argue that the Commission should not engage in further investigation or consider clarifying the rules because such action would have the effect of equalizing rates for all MVPDs.¹² This argument asks for far too much trust from the Commission in the face of significant evidence of discriminatory pricing – if programmers are offering nothing more than legitimate volume discounts, then they should have no objection to an investigation that would presumably exonerate their conduct. If, on the other hand, their current practices cannot be justified under the Act, then of course they should be required to change those practices.

The Commission unquestionably has jurisdiction to address the problem of discriminatory volume discounts by all programmers. In recent years, the Commission has very broadly construed its authority under Section 628(b) of the Act to police anti-competitive conduct in the video programming marketplace, and the Commission's interpretation of that

¹¹ Discovery Comments at 11-12; MSG comments at 31-32.

¹² MSG Comments at 32; Discovery Comments at 14.

authority has been upheld by the courts.¹³ The competitive imbalances and potential consumer harms created by discriminatory volume discounts appear to be at least as severe and widespread as the problems that motivated the Commission to act in the cases of exclusive contracts for MDUs and terrestrially-delivered RSNs. Each of those issues received exhaustive Commission attention and resulted in new Commission rules. The volume discount issue calls for the same Commission attention and action.

Moreover, as Cox demonstrated in its comments, the problem with discriminatory volume discounts extends beyond transactions involving vertically integrated programmers and includes the entire satellite-delivered programming market.¹⁴ While the *NPRM* sought data and argument only regarding transactions involving vertically-integrated programmers, expanding the scope of a future volume discount inquiry to include programming agreements between MVPDs and non-vertically integrated programmers is necessary to address all of the potential anti-competitive and anti-consumer effects caused by discriminatory volume discounts. Because Section 628(b) has been interpreted to give the Commission wide authority over MVPDs, the Commission may use that authority to regulate unfair and anti-competitive contracts entered into between an MVPD and any programmer, regardless of whether the programmer is vertically integrated.¹⁵ In Cox's experience, the volume pricing practices of non-affiliated programmers do not differ significantly from those of vertically-integrated networks, and the conduct of

¹³ Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments, *Report and Order and Further Notice of Proposed Rulemaking*, 22 FCC Red 20235 (2007) (the "*MDU Order*"), *aff'd*, *NCTA v. FCC*, 567 F.3d 659 (D.C. Cir. 2009) (multiple dwelling unit ("MDU") exclusive contract); Review of the Commission's Program Access Rules & Examination of Program Tying Arrangements, *First Report and Order*, 25 FCC Rcd 746 (2010), *aff'd*, *Cablevision Systems Corp. v. FCC*, 649 F.3d 695 (2011) (terrestrial regional sports network ("RSN") exclusivity).

¹⁴ See Cox Comments at n.14.

¹⁵ The Commission found in the *MDU Order* that its authority over MVPDs under Section 628(b) allows it to reach two-party MVPD transactions involving parties that are not covered by the Communications Act. In that case the Commission found it was appropriate to prohibit cable operators from entering into exclusive contracts with building owners that were not directly subject to the Act.

unaffiliated programmers has at least as much effect on the ability of small and mid-sized operators to provide cable programming. If the evidence in the Commission's further proceeding shows other MVPDs' experience is consistent with Cox's, the Commission should prohibit MVPDs from entering into contracts involving discriminatory volume discounts with any programmer, regardless of whether the programmer is vertically integrated with a cable operator.¹⁶

In its further proceeding addressing volume discounts, the Commission should consider procedural reforms to make the complaint process more streamlined and easier to access as well as substantive rules that would presumptively limit the size of lawful volume discounts. The Commission received ample commentary indicating that the current complaint process is too time-consuming and uncertain to provide meaningful relief to MVPDs that believe they are being subjected to unfair volume discounts.¹⁷ Given the importance of preserving access to programming for consumers, any pricing disputes must be resolved quickly and efficiently, and the Commission should adopt procedural rules that encourage speedy resolution. In addition to these procedural changes, Cox would support the Commission's adoption of a rule establishing the size of reasonable volume discounts and a presumption that discounts above that level are unfair absent a specific, quantifiable showing that the discount is justifiable under the Act.¹⁸ In addition, Cox would strongly encourage the Commission to closely examine and refine the

¹⁶ As Cox noted in its comments and has demonstrated in the past, Section 628(b) gives the Commission direct authority over each of the largest MVPDs, including, for example, DirecTV. Cox Comments at 3 & n.5 (citing *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)).

¹⁷ OPATSCO Comments at 7-8, 8-9, 11; ITTA Comments at 9-10; IT Comments at 6.

¹⁸ The lack of adequate market pricing data in the record precludes Cox from taking a position at this time as to what the maximum allowable volume discount should be. The Commission should request pricing data from MVPDs and programmers on a confidential basis and allow parties to the proceeding to review that data and propose reforms based on actual pricing information.

