



## SUMMARY

The buying group reforms the Commission has proposed will not solve the problem of anti-competitive volume discounts offered to the largest MVPDs and the accompanying inflated rates paid by mid-sized and small cable operators, but with a few important modifications, the Commission's proposals could be a constructive first step toward creating a more equitable programming marketplace. As further explained herein, if the Commission's goal is to eradicate unfair practices within the programming market and the resulting detrimental impact on the consumer, then this cannot be the *only* step taken toward this objective.

As Cox and others have explained in this and other proceedings, the large volume discounts offered by both vertically and non-vertically integrated programmers to the largest MVPDs bear no relation to the economic or other benefits of large-scale distribution those MVPDs provide. The result is that small and mid-sized MVPDs like Cox pay far more for programming than a properly functioning market would dictate, while the largest MVPDs pay far less. This result is bad for competition, and it is bad for consumers.

The best solution to this problem is for the Commission to employ its authority under Section 628(b) of the Act to prohibit MVPDs from entering into these non-economic volume discounts regardless of whether the programmer is vertically integrated. This approach makes sense because it addresses all non-market program pricing disparities, unlike the current buying group proposals, which at best will address only the small proportion of the overall programming market comprised of vertically-integrated programmers. Cox's simple and straightforward solution to the volume discount problem thus would restore fairness to a programming market that is significantly out of balance.

Absent a comprehensive solution, Cox appreciates that the Commission has offered a first modest step towards addressing the volume discount problem through its proposed buying group reforms. Existing buying groups historically have been of limited utility for a mid-sized cable operator like Cox. Because buying groups lacked protection under the Commission's program access rules, programmers have felt free to exclude mid-sized operators from participating in buying group master agreements and to impose other obstacles to participation like prohibiting operators from opting into a master buying group agreement after it is signed (and thus precluding from participation any MVPD operating pursuant to an individual agreement with that programmer). Changing these practices and making buying groups a more effective vehicle for small and mid-sized MVPDs would at least improve their bargaining position in negotiation for vertically-integrated programming.

Unfortunately, the rules as proposed would not achieve even these modest goals. Instead, the proposed rules almost certainly would exclude mid-sized MVPDs with over 3 million customers from the protection of the Act. This exclusion would raise programming costs for mid-sized providers that would be forced to shoulder higher costs to finance the volume discounts offered to both the largest MVPDs and the smallest, which have banded together to form a competitive buying group. Ultimately these pricing imbalances will harm competition and consumers. Rather than install an artificial 3 million subscriber limit, the Commission should leave it to buying groups themselves to make reasonable decisions about their membership based on legitimate legal and business concerns. The rules the Commission adopts should not include a subscriber threshold at all, but if the Commission deems that an essential feature of the rules, the threshold should be high enough (for example, 6 million) to permit mid-

sized operators to participate and their subscribers to reap the benefits of a more rational programming market.

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the growing volume discount problem because the rules as proposed almost certainly would not help mid-sized cable operators at all and would not ensure that buying groups become an efficient, easily utilized means for small and mid-sized operators to attain the volume discounts enjoyed by their larger competitors. Moreover, the proposed rules will have no effect on powerful independent cable programmers whose unfair volume discounting practices are every bit as discriminatory as those of vertically integrated cable programmers. Cox urges the Commission to adopt buying group reforms that also address the volume discount problems faced by mid-sized MVPDs. Cox also renews its request that the Commission exercise its authority under Section 628(b) of the Act to adopt a more comprehensive solution to unfair volume discounts charged by all programmers.

**II. ONLY BY PROHIBITING ALL UNFAIR VOLUME DISCOUNTS AND EXCLUSIVE CONTRACTS DIRECTLY THROUGH SECTION 628(b) CAN THE COMMISSION EFFECTIVELY SOLVE THE VOLUME DISCOUNT PROBLEM.**

In its recent proceeding regarding exclusive programming contracts, the Commission received evidence that small and mid-sized cable operators are required to pay far more for the right to carry popular cable programming networks than the largest MVPDs.<sup>3</sup> These pricing disparities appear to far exceed any legitimate volume-based discount. Rather, these disparities likely reflect the lower rates produced by the superior bargaining leverage of the largest MVPDs

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<sup>3</sup> See, e.g., Comments of Cox, MB Docket Nos. 12-68, 07-18, 05-192 at 3-7 (filed June 22, 2011); Comments of Mediacom, MB Docket Nos. 12-68, 07-18, 05-192 at 9-17 (filed June 22, 2011) (“Mediacom Comments”); Comments of the Org. for the Promotion & Advancement of Small Telecomm’cns Cos. & the Nat’l Telecomm’cns Coop. Ass’n (“OPASTCO Comments”), MB Docket Nos. 12-68, 07-18, 05-192 at 11-13 (filed June 22, 2011); Comments of the Indep. Tel. & Telecomm’cns Alliance, MB Docket Nos. 12-68, 07-18, 05-192 at 10-12 (filed June 22, 2011); Joint Comments of Interstate Telecomm’cns, *et al.*, MB Docket Nos. 12-68, 07-18, 05-192 at 5-8 (filed June 22, 2011) (“IT Comments”); Comments of Blooston Rural Video Serv. Providers, MB Docket Nos. 12-68, 07-18, 05-192 at 3-4 (filed June 22, 2011). See also ACA Comments at 25-34.

and an accompanying shift of programmers' costs to the small and mid-sized MVPDs that lack the leverage to achieve equitable pricing.<sup>4</sup> The end result is a marketplace where the largest MVPDs gain the benefits of unduly preferential programming rates while small and mid-sized operators pay rates for programming that are much higher than they should be in a competitive market.<sup>5</sup> As programming rates continue to spiral out of control, these pricing disparities mean that small and mid-sized operators are essentially subsidizing lower rates for their larger competitors. These market imbalances inhibit competition and ultimately harm consumers.

Cox continues to favor a comprehensive solution to the volume discount problem that would employ the Commission's authority under section 628(b) to combat anti-competitive volume discounts offered by all programmers and accepted by all MVPDs.<sup>6</sup> While Cox appreciates the Commission's efforts to create stronger, more effective buying groups as part of the solution to the volume discount problem, the rules that the Commission has proposed have two key limitations. First, they would likely exclude mid-sized cable operators like Cox, and they would not solve some basic business limitations of buying groups, such as ensuring that members can opt into an existing buying group master agreement with a programmer once that member's individual agreement with that programmer has expired. Cox provides several recommendations for revisions to the proposed rules in Section III. B. below. Unless the Commission revises its proposals, even the modest progress on unfair programming pricing practices that could help mid-sized cable operators and their millions of customers will be thwarted.

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<sup>4</sup> See Cox Comments at 3-4; Reply Comments of Charter Comm'ns, Inc., MB Docket Nos. 12-68, 07-18, 05-192 at 3 (filed July 23, 2011); Mediacom Reply Comments at 2-3.

<sup>5</sup> See *id.*

<sup>6</sup> See Cox Comments at 4-7; Cox Reply Comments at 3-7.

A second key limitation of this reform is that the buying group rules – even if reformed to perform optimally – apply only to negotiations and carriage agreements involving cable-affiliated programming, which is an increasingly small portion of the overall programming market.<sup>7</sup> Unaffiliated programmers would remain free to continue their current volume discounting practices and would remain immune from any challenge based on discriminatory programming rates. Thus, small and mid-sized MVPDs would continue to be subject to unfair and uneconomic rates for unaffiliated programming, which makes up the vast bulk of MVPD channel lineups and includes some of the most popular and important programming, while the largest MVPDs would continue to enjoy artificially low rates for the same programming. For these reasons, buying group reform cannot be a comprehensive remedy to the volume discount problem.

The same shortcoming infects the Commission’s proposal to presume that exclusive contracts involving cable-affiliated regional and national sports networks violate the Commission’s rules.<sup>8</sup> While Cox does not object to this proposal, it does object to the fact that it would not cover unaffiliated programmers that might offer important sports programming exclusively to a single provider. The most obvious example of this type of exclusivity is DirecTV’s deal to carry NFL Sunday Ticket, an extremely popular package of pro football programming, the most popular sport in America. Unquestionably, Sunday Ticket gives DirecTV a competitive advantage over other MVPDs, including much smaller MVPDs like Cox, that has nothing to do with the rates DirecTV charges or the quality of DirecTV’s customer service. Consumers committed to watching more NFL football than that offered by local

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<sup>7</sup> See *Order and FNPRM*, ¶ 29; Revision of the Commission’s Program Access Rules *et al.*, *Notice of Proposed Rulemaking*, 27 FCC Rcd 3413, 3427-28 (2012) (noting decline of cable-affiliated national programming to 14.4% of the market).

<sup>8</sup> See *Order and FNPRM* at ¶¶ 74-79.

channels and the national sports networks have no choice but to subscribe to DirecTV. This type of exclusivity is equally anti-competitive whether it is an affiliated or an unaffiliated programmer providing the programming, and it is equally anti-competitive regardless of whether the exclusive rights are locked up by a 20 million subscriber cable operator or a 20 million subscriber DBS operator. A rule that constrains the activities only of affiliated programmers will not solve this problem.

The more comprehensive solution that Cox has endorsed would avoid these shortcomings by combatting anti-competitive volume discounts and programming contracts involving all MVPDs, regardless of whether they are dealing with an affiliated or unaffiliated programmer.<sup>9</sup> Congress has provided the Commission with Section 628(b), which is specifically designed to prohibit anti-competitive behavior by covered MVPDs.<sup>10</sup> And the Commission has interpreted Section 628(b) to permit it to prohibit covered MVPDs from entering into contracts it deemed anti-competitive even when the conduct at issue was arguably permitted by other provisions of the Act<sup>11</sup> and when the Commission entirely lacked jurisdiction over the other contracting party.<sup>12</sup> The same interpretation of section 628(b) would work to eliminate both volume discounts and unfair exclusive programming contracts regardless of whether the programmer involved is cable-affiliated. The Commission should simply prohibit MVPDs covered by Section 628(b) from entering into contracts including unfair and discriminatory volume

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<sup>9</sup> See Cox Comments at 4-7; Cox Reply Comments at 3-7.

<sup>10</sup> 47 U.S.C. §548(b).

<sup>11</sup> Review of the Comm'n's Program Access Rules & Examination of Program Tying Arrangements, *First Report and Order*, 25 FCC Rcd 746 (2010) (prohibiting terrestrial regional sports network exclusivity despite statutory prohibition extending only to satellite-delivered programming), *aff'd*, *Cablevision Sys. Corp. v. FCC*, 649 F.3d 695 (2011).

<sup>12</sup> Exclusive Serv. Contracts for Provision of Video Servs. in Multiple Dwelling Units and Other Real Estate Devs., *Report and Order and Further Notice of Proposed Rulemaking*, 22 FCC Rcd 20235 (2007) (prohibiting multiple dwelling unit exclusive contracts despite lack of statutory jurisdiction over property owners), *aff'd*, *NCTA v. FCC*, 567 F.3d 659 (D.C. Cir. 2009).

discounts or exclusive contracts for “must-have” sports programming.<sup>13</sup> Cox therefore continues to urge the Commission to use its authority under Section 628(b) to commence a proceeding to examine volume discounting practices, determine the full scope of the problem, and adopt rules to curtail unfair volume discounting practices.

### **III. THE COMMISSION SHOULD REVISE ITS BUYING GROUP REFORM PROPOSALS TO INCLUDE ALL SMALL AND MID-SIZED MVPDS.**

While reforming the buying group rules will be only a small step towards creating a fair playing field for programming rates, Cox nonetheless generally supports the Commission’s proposals to make buying groups more effective at securing fair rates from cable-affiliated programmers. Congress intended that small and mid-sized cable operators would be able to readily establish buying groups that would be entitled to the safeguards of the program access rules, including restrictions on discriminatory pricing.<sup>14</sup> The record before the Commission has demonstrated, however, that several provisions of the Commission’s buying group rules have interfered with buying groups’ ability to realize Congress’s vision, and rendered the largest buying group, the National Cable Television Cooperative (“NCTC”) less effective at securing

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<sup>13</sup> Section 628(b) is broad enough to cover all the largest MVPDs. That section of the statute applies to DBS providers like DirecTV, which qualify as “satellite broadcast programming vendors” within the meaning of the statute. *See* Cox Comments at 3; Cox Reply Comments at 6; Ex Parte letter from David J. Wittenstein, Counsel for Cox, to Marlene H. Dortch, Sec’y, FCC, MB Docket Nos. 07-29, 07-198, and 07-51 (filed Feb. 17, 2010)).

<sup>14</sup> *See Order and FNPRM* at ¶ 83 & n.327 (citing, *inter alia*, S. REP. NO. 102-92, at 25 (1991), reprinted in 1992 U.S.C.C.A.N. 1133, 1160 (“To address the complaints of small cable operators that cable programmers will not deal with them or will unreasonably discriminate against them in the sale of programming, the legislation requires vertically integrated, national cable programmers to make programming available to all cable operators and their buying agents on similar price, terms, and conditions.”); H.R. CONF. REP. NO. 102-862, at 91 (1992), reprinted in 1992 U.S.C.C.A.N. 1231, 1273 (“National and regional programmers affiliated with cable operators are required by the Senate bill to offer their programming to buying groups on terms similar to those offered to cable operators.”)).

competitive programming rates than individual MVPDs of comparable or larger size.<sup>15</sup>

Changing the rules to allow buying groups to carry out Congress's intent could lead to more equitable vertically-integrated programming costs for participating buying group members, with attendant benefits to consumers.

The Commission's goal in reforming its buying group rules should be to combat discriminatory pricing by providing rules that permit small and mid-sized operators the opportunity to negotiate collectively for fair rates. This means that the Commission's rules should not impede full participation by MVPDs at risk of facing unfair prices. In some cases, Cox has been excluded from participation in buying group agreements. The result of this type of exclusion is higher prices for Cox, the smaller cable operators deprived of Cox's subscriber contribution to the group, and all of these subscribers' customers. In addition, Cox sometimes has chosen not to participate in buying group agreements, primarily because the current rules do not permit buying groups to bargain effectively on behalf of all its members. As described below, to the extent the Commission's proposals will strengthen buying groups in the future, the Commission should adopt them. Where such rules will foreclose participation or weaken buying groups generally – particularly as with the proposed “safe harbor” provision – those rules should be rejected or modified.

**A. The Commission Should Protect Buying Group Participation by All Small and Mid-Sized MVPDs, not Just Those With Fewer than Three Million Subscribers.**

To be even marginally effective, any changes to the buying group rules must be inclusive enough to permit participation in buying groups by all small and mid-sized MVPDs. Cox opposes the Commission's and ACA's “safe harbor” proposal, which in effect would permit

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<sup>15</sup> See, e.g., ACA Comments at 11-15.

programmers to exclude from a master buying group agreement any individual member with more than three million subscribers.<sup>16</sup> Such a “safe harbor” is unsupported, unnecessary, and would significantly reduce the benefits – modest at best – that reform of the buying group rules might otherwise create.

The proposed “safe harbor” presumes – wrongly and without foundation – that MVPDs with more than three million subscribers have the size necessary to forgo buying group protections without suffering harm. In fact, mid-sized operators like Cox and Charter, each of which has more than three million subscribers, provided unrebutted evidence that they suffer significant pricing disparities compared to the largest MVPDs – disparities that cannot be explained by legitimate volume discounts alone.<sup>17</sup> It is Cox’s understanding that some programmers retain the right to approve participation in buying group master agreements and then exercise that right to exclude mid-sized operators like Cox. This tactic allows programmers to preserve their leverage to extract higher rates from both the buying group and the excluded mid-sized operators. The “safe harbor” would ratify this unfair practice and effectively codify it in the FCC’s rules. Excluding MVPDs with more than three million subscribers would arbitrarily deprive mid-sized operators of relief from unlawful volume discounts.

The *FNPRM* lacks any economic basis for distinguishing between MVPDs based on the three million subscriber threshold and indeed has suggested no reason why a safe harbor is necessary. ACA apparently based this figure on the size of its members that regularly participate

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<sup>16</sup> *Order and FNPRM* at ¶¶ 92-94.

<sup>17</sup> *See Cox Comments* at 4; *Charter Comments* at 3; *see also Mediacom Reply Comments* at 3-4.

in NCTC's master agreements.<sup>18</sup> But if the rules are amended to help NCTC and other buying groups become more effective, participation by mid-sized MVPDs like Cox likely would increase. A three million subscriber "safe harbor," however, would make participation by mid-sized operators subject to veto by programmers, effectively shutting Cox out of future NCTC agreements.<sup>19</sup>

The "safe harbor" ceiling, which would condition guaranteed participation by a mid-sized operator upon a demonstration that it already purchases substantial amounts of programming through the buying group, would punish rather than protect mid-sized MVPDs.<sup>20</sup> Under this framework, MVPDs with more than three million subscribers that do not currently take regular part in a buying group's agreements likely would never be able to take advantage of those agreements, because each vertically-integrated programmer could simply reject participation by the mid-sized MVPDs in its deals. And, because their participation would regularly be rejected, mid-sized operators would never be able to demonstrate that they participate in agreements at the same frequency as other group members. This would have the effect of allowing programmers

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<sup>18</sup> *Order and FNPRM* at n.363 (citing Letter from Barbara S. Esbin, Counsel for ACA, to Marlene H. Dortch, Sec'y, FCC, MB Docket Nos. 12-68, 07-18, 05-192 (August 2, 2012), Attachment at 11).

<sup>19</sup> The *Order and FNPRM* purports to find some precedent for the "safe harbor" in the 1.5 million subscriber limitation the Commission adopted for group arbitration under the *Comcast/NBCU Order*, but that restriction does not support the "safe harbor" proposed here. *Order and FNPRM* at n.363. In that case, the Commission was concerned that small operators would not be able to afford to arbitrate, so it allowed small operators to band together to share arbitration costs. The question was determining which operators were large enough to fund their own arbitrations. Under that analysis, unfettered access to buying group protections should be available to any operator that cannot obtain competitive programming rates, and that group clearly includes mid-sized operators like Cox.

<sup>20</sup> *Order and FNPRM* at ¶ 94.

to determine whether mid-sized operators can be participating members of a buying group, and vertically-integrated programmers would have no incentive to permit it.<sup>21</sup>

These defects in the proposed “safe harbor” would significantly reduce the effectiveness of the other changes to the buying group rules that the Commission has proposed and that Cox supports.<sup>22</sup> Indeed, adoption of the proposed “safe harbor” would affirmatively harm mid-sized MVPDs like Cox, and their customers. Mid-sized MVPDS that are shut out of buying group agreements likely would suffer even more severe price discrimination as programmers seek to shift costs from **both** the largest MVPDs that already enjoy unfair volume discounts **and** the newly-empowered buying groups that now would be able to claim significant discounts onto the entirely unprotected mid-sized MVPDs. These higher programming costs ultimately would raise costs and impair service to customers. Moreover, the “safe harbor” would blunt the effectiveness of buying groups by depriving them of the increased scale that mid-sized operators could provide, preventing them from competing with the largest MVPDs for programming prices.<sup>23</sup>

For these reasons, the Commission should not adopt a “safe harbor.” Rather, the Commission should permit all small and mid-sized operators to participate freely in buying groups and should not permit programmers to determine the participating members of MVPD buying groups. If, however, the Commission deems a “safe harbor” to be necessary, the subscriber number should be set high enough to give mid-sized operators the unfettered ability to

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<sup>21</sup> As described in Section III.B, *infra*, Cox supports permitting buying groups to choose their own members without interference from programmers.

<sup>22</sup> See Section III.B, *infra*.

<sup>23</sup> The Commission notes that NCTC represents cable operators serving 25 million subscribers, *Order and FNPRM* at n.363, a membership size that should permit it to compete with even the largest MVPDs for favorable programming rates. In reality, however, NCTC would rarely if ever actually bring that many subscribers to the negotiating table if programmers refuse to permit the largest members of NCTC (including Cox) from participating in its master programming agreements. *Id.* at n.362.

participate regardless of the percentage of programming they purchase through the buying group. A “safe harbor” of 6 million subscribers would permit both small and mid-sized operators to participate, take advantage of fair volume discounts, and gain the scale and scope necessary to compete more effectively for fair rates.

**B. Cox Supports the Commission’s Other Proposals To Strengthen Buying Groups.**

Presuming that the Commission correctly resolves the “safe harbor” issue, Cox agrees that the Commission’s other proposed buying group reforms could be effective to help small and mid-sized MVPDs bargain for fairer programming rates from vertically-integrated programmers. In particular, Cox supports the Commission’s proposals to (1) liberalize the liability requirements a buying group must satisfy to gain the protection of the Commission’s rules;<sup>24</sup> (2) prohibit programmers from refusing to deal with the individual members of a qualified buying group;<sup>25</sup> (3) require that programmers offer comparable prices to buying groups and individual MVPDs of comparable size;<sup>26</sup> and (4) require MVPDs to provide buying groups with a price schedule specifying what rates they could expect to achieve for delivering specified numbers of subscribers from member MVPDs.<sup>27</sup> Cox also supports the Commission’s proposal to prohibit buying groups from unreasonably denying membership to a requesting MVPD,<sup>28</sup> but urges the Commission to recognize that reasonable motives other than past non-payment may justify exclusion of a requesting MVPD under some circumstances.

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<sup>24</sup> See *id.* at ¶¶ 83-88.

<sup>25</sup> See *id.* at ¶ 91.

<sup>26</sup> See *id.* at ¶¶ 95-97.

<sup>27</sup> See *id.* at ¶ 99.

<sup>28</sup> See *id.* at ¶ 89.

### **1. Rationalize Buying Group Liability Rules.**

The *FNPRM* properly recognizes the comments of ACA and other MVPDs, which demonstrated that the current liability rules have precluded MVPDs from banding together in effective, statutorily protected buying groups.<sup>29</sup> This has deprived buying cooperatives like NCTC of the ability to claim the full protections from discriminatory pricing that Congress intended to afford to buying groups and their members. Providing buying groups the opportunity to qualify for Section 628 protections by assuming liability for forwarding member payments to programmers would help make buying groups more effective vehicles for protecting the MVPDs Congress sought to protect. To the extent the Commission deems it necessary to protect programmers' rights, Cox does not object to codifying the requirement that buying groups must expel delinquent members for non-payment.<sup>30</sup>

### **2. Prohibit Refusals To Deal.**

Cox also strongly supports the Commission's proposal to prohibit cable-affiliated programmers from refusing to permit individual members of a qualified buying group from opting into an agreement negotiated by the group.<sup>31</sup> Such exclusion simply leads to higher prices for Cox (because it has been blocked from participating in the group) and the buying group members (because they could not take advantage of the larger volume discounts that might have been available if Cox's subscribers were included). Congress could not have intended to give programmers the power effectively to determine the composition of MVPD buying groups by choosing which individual members to deal with. The rules should expressly prohibit programmers from trying to do so.

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<sup>29</sup> *See id.*

<sup>30</sup> *See id.*

<sup>31</sup> *See id.* at ¶ 91.

This prohibition on refusals to deal should explicitly require a programmer to permit a cable service provider to opt into a master agreement entered into by a buying group after its commencement date if that provider had been party to an individual agreement with the programmer that expires after buying group agreement commences. One problem Cox has experienced with buying group participation is that, under current practice, if the expiration date of its individual programmer agreements does not correspond to the commencement date of the group agreement, it has been precluded from opting into the master agreement once its individual agreement expires. That practice depresses buying group participation, leading to higher rates for both Cox and the group. The Commission's rules should make clear that any deal that precludes members from opting into a buying group agreement when its agreement with that programmer expires constitutes an unlawful refusal to deal.

### ***3. Require Comparable Prices/Pricing Transparency.***

Cox likewise supports the Commission's proposal to require cable-affiliated programmers to offer comparable rates to buying groups and individual MVPDs of similar size and to provide buying groups with a schedule of prices that would inform the group what rates its members would pay based on the number of subscribers those members deliver by participating in an agreement.<sup>32</sup> As the Commission and several commenters have noted, the lack of transparency in the programming marketplace leads to uncertainty and pricing disputes.<sup>33</sup> Comparable pricing and price schedule requirements would help remedy those problems in the

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<sup>32</sup> See *id.* at ¶¶ 95-97, 99.

<sup>33</sup> See *id.* at ¶ 99 (citing ACA Comments at 32); Cox Comments at 6; IT Comments at 7; OPATSCO Comments at 13; Mediacom Comments at 17.

buying group context and would make future price discrimination through unfair volume discounts (and accompanying price discrimination complaints to the Commission) less likely.<sup>34</sup>

#### **4. *Require Reasonable Membership Decisions.***

Finally, Cox agrees with the Commission's proposal that buying groups should be prohibited from unreasonably refusing membership to MVPDs seeking to join.<sup>35</sup> The Commission should, however, make allowances for the rights of buying groups to structure their own membership to obtain the best possible rates for programming. As the Commission notes, if a buying group has *bona fide* reasons for excluding a member, based on, for example, antitrust issues or past non-payment, exclusion of a requesting MVPD should be permitted.<sup>36</sup>

#### **IV. CONCLUSION**

For the reasons described above, Cox continues to urge the Commission to take a comprehensive approach to volume discounts by exercising its authority under Section 628(b) to prohibit MVPDs from entering into contracts that involve unfair volume discounts. In the absence of such action, Cox agrees that buying group reform may form part of the solution to unfair volume discounts for cable-affiliated programming. Such reforms, however, will help only if the Commission makes the rules inclusive enough to ensure that all small and mid-sized operators can readily participate in buying groups. Cox therefore supports the more inclusive

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<sup>34</sup> Cox notes that requiring all programmers to adhere to a price schedule based on the number of subscribers an MVPD can guarantee would be an excellent bulwark against price discrimination and would be fully consistent with the Commission's construction of its authority under Section 628(b). *See generally* Section II., *supra*.

<sup>35</sup> *See id.* at ¶ 89.

<sup>36</sup> *See id.*

