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
	)	

To: The Secretary's Office
Attn: The Media Bureau

REPLY COMMENTS OF COX COMMUNICATIONS, INC.

Cox Communications, Inc. ("Cox"), by its attorneys and pursuant to 47 C.F.R. § 1.415(c), hereby files these reply comments in response to the comments filed in the above-referenced proceeding regarding the Commission's proposal to limit its buying group safe-harbor to MVPDs with three million or fewer subscribers.[1] While Cox continues to support adoption of many of the Commission's buying group proposals, it urges the Commission either to refrain from creating a safe-harbor threshold, or, at a minimum, to increase that threshold to a level that would permit all small and mid-sized cable operators to participate in buying groups.

I. The Commission Should Reject the Proposed Three Million Subscriber Safe Harbor.

As Cox explained in its comments, the Commission's proposals to strengthen buying groups by reforming the liability rules, prohibiting vertically integrated programmers from refusing to deal with individual members, and requiring comparable pricing between buying groups and similarly situated individual MVPDs could be useful first steps toward addressing the

[1] Revision of the Comm'n's Program Access Rules, Report and Order, Further Notice of Proposed Rulemaking, and Order on Reconsideration, MB Docket No. 12-68, FCC 12-123 (rel. Oct. 5, 2012) (the "*Order and FNPRM*"); Media Bureau Announces Comment and Reply Comment Deadlines for the Further Notice of Proposed Rulemaking Regarding Revision of the Comm'n's Program Access Rules, MB Docket No. 12-68, DA 12-1735, at ¶¶ 92, 94 (Med. Bur. rel. Oct. 31, 2012).

problem of unfair and discriminatory volume discounting practices that today are distorting the cable programming market.[2] The record in this proceeding has shown that programmers frequently grant unreasonable volume discounts to the largest MVPDs that cannot be justified by any economic benefit received in return in contravention of Section 628(c)(2)(B)(iii).[3] To recover their costs of production and make a profit, those same programmers then must shift the cost of those discounts to small and mid-sized operators like Cox. The result is that the normal rules of supply, demand, and optimal price have ceased to apply, and the rates paid by small and mid-sized operators are determined by the leverage (or lack thereof) that they can bring to the negotiating table – with that leverage determined primarily based on size. In other words, small and mid-sized operators like Cox pay more so that the largest MVPDs can pay less. This ultimately trickles down to higher rates and greater operational challenges for small and mid-sized operators. Consequently, as programming costs are shifted disproportionately to mid-sized and small MVPDs, these operators are subject to higher costs that make it more difficult to

[2] Comments of Cox Communications, Inc., MB Docket No. 12-68, filed Dec. 14, 2012, at 6-14 ("Cox Comments").

[3] 47 U.S.C. § 548(c)(2)(B)(iii); *see also*, *e.g.*, Comments of Cox Communications, Inc., MB Docket Nos. 12-68, 07-18, 05-192, filed June 22, 2011, at 3-7 ("Cox Program Access Comments"); Comments of Mediacom, MB Docket Nos. 12-68, 07-18, 05-192, filed June 22, 2011, at 9-17; Comments of the Org. for the Promotion & Advancement of Small Telecomm'cns Cos. & the Nat'l Telecomm'cns Coop. Ass'n, MB Docket Nos. 12-68, 07-18, 05-192, filed June 22, 2011, at 11-13; Comments of the Indep. Tel. & Telecomm'cns Alliance, MB Docket Nos. 12-68, 07-18, 05-192, filed June 22, 2011, at 10-12; Joint Comments of Interstate Telecomm'cns, et al., MB Docket Nos. 12-68, 07-18, 05- 192, filed June 22, 2011, at 5-8; Comments of Blooston Rural Video Serv. Providers, MB Docket Nos. 12-68, 07-18, 05-192, filed June 22, 2011, at 3-4. *See also* Comments of the Am. Cable Ass'n., MB Docket Nos. 12-68, 07-18, 05-192, filed June 22, 2011, 11-12, 25-34.

develop the innovative services demanded by today's customers.[4] Implementing buying group reform would begin to address this issue for vertically integrated programming.[5]

Unfortunately, as Cox and Mediacom pointed out in their comments, adopting the proposed three million subscriber safe harbor for presumptive buying group membership would undo even the limited positive impact that the proposed reforms would otherwise have.[6] Under the current proposal, an individual MVPD would be presumed to have all the rights accorded to buying groups and their members only if the MVPD has three million or fewer subscribers.[7] Alternatively, MVPDs also could attain the buying group protections if they can show that "the share of programming the member licenses through the buying group is not significantly smaller than the average share of programming other members of the buying group license through the buying group."[8]

Such a rule would create a classic catch-22. The rule would permanently deprive mid-sized operators like Cox that do not currently purchase a large volume of programming through

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[4] *Id.* at 2-3; Comments of Mediacom Communications Corp., MB Docket No. 12-68, filed Dec. 14, 2012, at 3-4. *See also, e.g.*, Reply Comments of Charter Communications, Inc., MB Docket Nos. 12-68, 07-18, 05-192, filed July 23, 2011, at 3.

[5] As Cox has maintained in this and other proceedings, reform of the buying group rules would not address the larger problem that the same volume discounting practices employed by vertically integrated programmers also are utilized by non-vertically integrated programmers. Cox Comments at 2-6; Cox Program Access Comments at 3-7; Reply Comments of Cox Communications, Inc., MB Docket Nos. 12-68, 07-18, 05-192, filed July 23, 2011, at 3. Spiraling programming rates charged by non-affiliated programmers are an even bigger problem than those charged by vertically-integrated programmers because there are significantly more non-affiliated programmers in the market today. The Commission has the tools necessary to deal with this problem under the unfair practices prohibition contained in Section 628(b), and Cox renews its request that the Commission commence a separate proceeding to consider a more comprehensive solution to the volume discount problem. *See id*.

[6] Cox Comments at 7-11; Mediacom Comments at n.24.

[7] *See Order and FNPRM*, Appendix H (proposed rule 76.1002(g)(1)(i)).

[8] *See Order and FNPRM*, Appendix H (proposed rule 76.1002(g)(1)(ii)).

buying groups from ever gaining the protection that the rule reforms aim to provide.[9] Cox has more than three million subscribers and, for reasons outlined in its comments, does not currently purchase most of its programming through a buying group. Under the proposed rules, the only way Cox could gain buying group protection would be to start buying most of its programming through a buying group. But without the protections of the rule, every programmer would have at least two incentives to refuse to permit Cox and other mid-sized cable operators to participate in any buying group arrangement. First, a programmer would be able to extract higher rates from both Cox and the buying group if it excludes Cox because separately both have less leverage than they have as a single negotiating unit. Second, the new buying group safe harbor itself would create an additional incentive for excluding Cox and like-sized operators. Permitting participation ultimately could lead to Cox being able to claim the protection of the program access rules by purchasing most of its programming through the group. This would result in lower rates from both Cox and the buying group because both have greater leverage when negotiating together.[10] Due to the predictable operation of these incentives, it will be virtually impossible for mid-sized operators like Cox to ever gain the protections of the buying group rules if they are adopted as proposed.

The comments filed in this proceeding do not include any meaningful justification for the three million subscriber threshold or any explanation for why effectively excluding mid-sized

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[9] One of the protections that the proposed rules would provide would be to prohibit vertically integrated programmers from refusing to permit protected buying group members from participating in buying group master agreements. *See Order and FNPRM*, Appendix C (proposed rule 76.1002(g)(1)). But unless an MVPD already is part of a buying group, it cannot claim this protection.

[10] Acting to exclude larger members would keep the total membership of the buying group lower, which would have the effect of increasing the rates the vertically integrated programmer could demand from the buying group. Thus the three million subscriber threshold not only damages MVPDs like Cox, it also ensures that smaller operators will pay higher rates than they would if mid-sized MVPDs were protected by the rules.

operators like Cox from buying group protections would be in the public interest. The American Cable Association ("ACA") supports the Commission's proposal, but offers little in the way of reasoned support for the safe harbor.[11] ACA primarily argues that the three million subscriber threshold is at the right level because it would lead to buying group protections for all of its members that regularly take part in buying group agreements negotiated by the National Cable Television Cooperative ("NCTC").[12] Yet, this provides no clear justification for concluding that the proposed safe harbor is the right policy. Buying group reform should be designed to promote the welfare of consumers and the cable television programming market, not just NCTC and its smaller members. The Commission's buying group rules should permit small and mid-sized MVPDs to form cooperatives that are capable of aggregating enough subscribers to match the buying power of the large MVPDs, so that no programmer is able to shift its costs unfairly from the largest MVPDs to the smaller. Whether that result involves an enlarged NCTC or some other yet-to-be-formed buying organization should be irrelevant to the Commission – the point is protecting consumers and repairing a malfunctioning market, not ensuring that NCTC remains the only viable buying group.

Cox therefore urges the Commission to adopt its buying group reform proposals without the safe harbor provision. If, however, the Commission determines that a safe harbor is necessary for public interest reasons that have not yet been discussed in the record, the safe harbor should be large enough to accommodate mid-sized operators like Cox. As Cox indicated

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[11] Comments of the American Cable Association, MB Docket No. 12-68, filed Dec. 14, 2012, at 21-22.

[12] *See id.*

in its comments, a safe harbor of six million customers would be acceptable to ensure that mid-sized operators are not shut out of buying group protections.[13]

II. The Opponents of Buying Group Reform Offer No Persuasive Reasons for Maintaining the Unfair Status Quo.

The vertically integrated programmers that commented in this proceeding neither refuted the need for reforms nor offered a persuasive justification for the three million subscriber safe harbor or for a lower threshold.[14] Instead, they argue that no buying group of any size needs the protection of the statute because smaller MVPDs are entirely capable of negotiating fair programming rates without additional rules. But this ignores the significant issues raised before the Commission regarding the unfair volume discounts received by the largest MVPDs and the higher rates paid by smaller MVPDs as a result.[15] The Commission has a more than sufficient basis for concluding that buying group reform is necessary even if only to provide a partial remedy to this problem.

It is also wrong to argue that the safe harbor threshold must be no higher than the negotiating cooperatives permitted in the News Corp./DirecTV and Comcast/NBCU merger orders. In those cases, the merged entity was required to negotiate with groups composed of members with no more than 400,000 subscribers and 1.5 million subscribers, respectively. But that precedent is irrelevant here because those merger conditions were meant only to combat merger-specific potential harms in those individual cases. Here, on the other hand, Congress has specifically found that buying groups should be generally available as part of the video programming industry.[16] The Commission is bound by that Congressional directive to enact buying group rules that are appropriate to ensure that

[13] Cox Comments at ii, 11.

[14] *See*, *e.g.*, Comments of AMC Networks, Inc., MB Docket No. 12-68, filed Dec. 14, 2012, at 9 ("AMC Comments").

[15] *See* n.3, *supra*.

[16] 47 U.S.C. §548(c)(2)(B).

vertically integrated programmers are not permitted to engage in non-economic price discrimination. The proposed buying group reforms are an entirely reasonable step to carrying out that mandate, but a safe harbor of three million subscribers – let alone the 1.5 million or 400,000 advocated by commenters – would make those reforms significantly less effective at combatting current unfair volume discounting practices, particularly given the size of the largest MVPDs. Nothing in the statute or the FCC's inapplicable merger precedent requires the Commission to adopt any of these proposed safe harbors, and the fact that each of the proposals would make the buying group rules far less effective should lead the Commission to reject any safe harbor lower than six million subscribers.

AMC also argues that permitting small and mid-sized MVPDs to form buying groups will lead to undue market concentration.[17] In the first instance, the Commission should reject this argument because any antitrust issues presented by buying groups can be more than adequately handled by the Department of Justice's business review process. If a proposed buying group raises antitrust issues, those issues will be identified and remedied by the DOJ. Congress instructed the FCC to facilitate buying groups, and the agency should not be deterred in that endeavor by the potential of future antitrust issues raised by an as-yet unformed buying group. But in any case, AMC's claims of looming antitrust problems are meritless because in order to rival the size of the largest MVPDs, a single buying group would need to include almost all of the MVPDs ranked below the top 4.[18] If the transactions that led to the creation of such large MVPDs did not result in undue market concentration among programming buyers, then

[17] AMC Comments at 9-10.

[18] Contrary to AMC's claims, the proposed buying group reforms also cannot be held to create undue concentration at the local market level. National programmers do not deal with the largest MVPDs on a market-by-market basis – they conclude nationwide deals that include all of each operator's subscribers. It is therefore disingenuous to claim that when dealing with smaller operators individual market factors should be permitted to have a large impact on price.

permitting smaller MVPDs to band together to achieve some semblance of negotiating parity certainly cannot.

Similarly meritless is AMC's argument that permitting small and mid-sized cable operators to enter into buying groups will lead to "a monopsony marketplace" that will unfairly place vertically-integrated programmers at a "competitive disadvantage."[19] AMC's argument is essentially that because a few large programming buyers dominate the market and demand lower prices, it must have access to a large pool of smaller buyers that lack leverage in order to finance the volume discounts it gives to the largest programmers. In reality, vertically integrated programmers will have the ability to sell their programming at a profit regardless of whether the Commission adopts the proposed reforms precisely because each owns the rights to unique programming and that programming is a critical input to the customers of cable operators. But if small and mid-sized MVPDs can form buying groups protected by the FCC's rules, the size and leverage differentials between programming buyers will decrease, and with that development, the wide and unlawfully discriminatory pricing disparities between buyers should decline, if not disappear. In other words, the proposed rules will simply require programmers to enter into agreements that accurately reflect economic costs rather that the leverage or lack thereof of their negotiating partners.[20]

The widely disparate prices charged by vertically integrated programmers today to large versus smaller MVPDs has created a situation that requires Commission action. This is precisely

[19] AMC Comments at 10.

[20] AMC's specious claim that the proposed rules would leave vertically integrated programmers at a "competitive disadvantage" with respect to unaffiliated programmers should be summarily rejected. The unfair practices of unaffiliated programmers cannot be used to justify permitting affiliated programmers to act in the same unfair and discriminatory manner. Indeed, AMC's argument is the clearest demonstration yet that the Commission should enact the comprehensive solution Cox advocates to combat unfair volume discounting practices by <u>both</u> affiliated and unaffiliated programmers. *See* n.5, *supra*.

the (rare) type of market failure that warrants regulatory correction. Vertically integrated programmers will not be damaged – they will simply be required to charge equitable programming prices to similarly-sized negotiating partners. Unless the FCC's intervenes, consumers will continue to unfairly subsidize discounts afforded to larger MVPDs.

Conclusion

For these reasons and the reasons stated in its comments, Cox urges the Commission to adopt a modified version of its buying group reforms that eliminates or increases the safe harbor rule for buying group inclusion.

Respectfully submitted,

COX COMMUNICATIONS, INC.

/s/

David J. Wittenstein
Jason E. Rademacher
Dow Lohnes PLLC
1200 New Hampshire Ave., NW
Suite 800
Washington, D.C. 20036

Its attorneys.

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