

DOCKET FILE COPY ORIGINAL

ORIGINAL  
RECEIVED

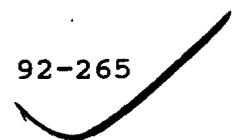
Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

JUL 14 1993

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of )  
)  
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 )

MM Docket No. 92-265



OPPOSITION TO PETITION FOR RECONSIDERATION

DISCOVERY COMMUNICATIONS, INC.

Judith A. McHale  
Senior Vice President/  
General Counsel  
Barbara S. Wellbery  
Vice President/  
Deputy General Counsel  
7700 Wisconsin Avenue  
Bethesda, MD 20814

July 14, 1993

No. of Copies rec'd  
List ABCDE

0/11

TABLE OF CONTENTS

	<u>Page</u>
I. The Commission Should Deny NRTC's Request That It Reconsider Its Decision that Damages and Attorneys' Fees Are Not Available for Violations of the Program Access Provisions of the 1992 Cable Act and the Commission's Rules . . . . .	1
II. The Commission Should Reject NRTC's Attempt to Expand the Scope of § 628(c)(2)(C) of the Act . . . . .	5
III. The Petition for Clarification of WJB-TV Fort Pierce Limited Partnership Misapprehends the Structure and Effect of the Program Access Rules . . . . .	7
IV. Conclusion . . . . .	9

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

RECEIVED

JUL 14 1993

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of )  
 )  
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 )

MM Docket No. 92-265

OPPOSITION TO PETITION FOR RECONSIDERATION

Discovery Communications, Inc. ("Discovery"), pursuant to Section 1.429 of the Commission's rules, hereby opposes the Petition for Reconsideration filed by the National Rural Telecommunications Cooperative ("NRTC") and provides a limited opposition to the Petition for Clarification filed by WJB-TV Fort Pierce Limited Partnership, L.P. in the above-referenced proceeding.

- I. The Commission Should Deny NRTC's Request That It Reconsider Its Decision that Damages and Attorneys' Fees Are Not Available for Violations of the Program Access Provisions of the 1992 Cable Act and the Commission's Rules

Section 628(e) of the 1992 Cable Act states that "the Commission shall have the power to order appropriate remedies, including, if necessary, the power to establish prices, terms and conditions of sale of programming to the aggrieved multichannel video programming distributor" in the event a programmer is found

to have violated the Act's program access provisions.<sup>1</sup> Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992) (the "1992 Cable Act" or the "Act"), § 628(e)(1). In the First Report and Order in MM Docket No. 92-265, FCC 93-178 (rel. Apr. 30, 1993), the Commission concluded that the 1992 Cable Act did not grant it the "authority to assess damages against the programmer or cable operator" for violations of the program access rules. First Report and Order at ¶ 81. NRTC seeks reconsideration of the Commission's decision, essentially arguing that the term "appropriate remedies" should be construed as broadly as possible -- claiming in effect that any conceivable remedy should be available. Petition for Reconsideration of NRTC at 4-10. This approach, however, is inconsistent with the general authority of the Commission and should be rejected.

First, the ability of an individual harmed as a result of a violation of the Communications Act or the Commission's rules to obtain damages is highly restricted. Under the Communications Act, it is an exceptional situation in which the Commission ever has the authority to award damages. Indeed, damages are available as a remedy only for violations of certain provisions applicable to common carriers. See 47 USC § 206. Significantly,

---

<sup>1</sup> For purposes of this pleading, Section 628 and the Commission's implementing regulations will be referred to generically as the "program access rules."

Congress specifically authorized the award of damages as an appropriate remedy for violation of those rules.

With regard to remedies available for violations of the program access provision, there is no such explicit reference to the award of damages. Accordingly, the Commission should not impose such a punitive remedy by virtue of a general authority to fashion an "appropriate" remedy. Thus, the Commission was correct in its determination that, absent a specific authorization, damages are not available as a remedy for violations of the program access rules.<sup>2</sup>

Not only is this result supported by the structure of both

to take these statutory factors into account when negotiating distribution agreements.

As a result, the negotiation of a particular contract within the parameters of the program access rules will involve a wide variety of subjective decisions by the programmer as it applies the statutory criteria to the specific facts presented. Often, ~~these decisions will be made without any pre-existing precedent~~

Accordingly, the Commission should adhere to its current approach in achieving compliance with the program access rules, which is to first allow the parties to resolve the dispute. The Commission's focus should be on correcting any errors in the application of the rules and educating programmers and distributors alike as to their proper application.

II. The Commission Should Reject NRTC's Attempt to Expand the Scope of § 628(c)(2)(C) of the Act

NRTC also argues that the Commission erred in implementing § 628(c)(2)(C) of the 1992 Cable Act. NRTC Petition at 10-15. The Commission's rule implementing that provision precludes cable operators from entering into an exclusive contract with a vertically integrated programmer in areas not served by a cable operator as of October 5, 1992. 47 CFR § 76.1002(c). NRTC argues that the rule should also preclude vertically integrated programmers from entering into any exclusive contracts in such areas -- including exclusive contracts with distributors using a technology other than cable. NRTC Petition at 11-12. This argument, however, ignores both the legislative history of the Act and the policy behind the program access rules.

First, the Conference Committee Report that accompanied the 1992 Cable Act states that "the regulations required [under § 628(c)(2)(C)] . . . prohibit exclusive contracts and other arrangements between a cable operator and a vendor which prevent a multichannel video programming distributor from obtaining

programming from a satellite cable programming vendor affiliated with a cable operator." H.R. Conf. Rep. No. 102-862, 102d Cong., 2d Sess. at 92 (1992) (emphasis added). Consistent with this language, the rule promulgated by the Commission prohibits cable operators from entering into exclusive contracts with vertically integrated programmers in areas not served by a cable operator as

areas that were unserved by cable. In that case, an exclusive contract effectively deprived consumers in those areas of their ability to obtain that particular program service.

Exclusive contracts between vertically integrated programmers and distributors utilizing technologies other than cable do not have this preclusive effect. Rather, they give consumers the ability to obtain the program service while enhancing competition among distributors and diversity in programming. Accordingly, Discovery respectfully submits that the Commission should deny NRTC's petition to expand the scope of § 76.1002(c) of the Commission's rules.

III. The Petition for Clarification of WJB-TV Fort Pierce Limited Partnership Misapprehends the Structure and Effect of the Program Access Rules

As a final matter, Discovery wishes to offer a brief comment on the petition for clarification filed by WJB-TV Fort Pierce Limited Partnership ("WJB"), a wireless cable operator. WJB's petition is primarily designed to clarify the date on which the provisions relating to exclusive contracts become effective. Discovery is not commenting on this issue. However, in closing its petition, WJB makes several statements that Discovery submits misstate the effect and essential nature of the program access rules.

For example, WJB states that as a result of the program access rules "all providers should be offered the programming on

the same terms given to their competitors in the marketplace." WJB Petition for Clarification at 5. Similarly, "all video providers in a given market . . . would have equal access to programming on equal terms and conditions." Id.

As the Commission recognized, however, § 628 does not mandate that all competitors be given access to programming on precisely the same terms. Rather, that provision gives programmers flexibility in negotiating contracts with distributors, as long as the terms can be justified under the statute. Programmers, for example, may consider such factors as creditworthiness, offering of service, economies of scale and other direct and legitimate economic benefits reasonably attributable to the number of subscribers served by the distributor. 1992 Cable Act, § 628(c)(2)(B)(i),(iii). The rules promulgated by the Commission to implement these provisions recognize the validity of these factors. See, e.g., 47 CFR § 76.1002. Accordingly, Discovery merely wishes to note that the comments made by WJB in its petition for clarification demonstrate a fundamental misunderstanding of the manner in which the program access rules have been designed by Congress and implemented by the Commission.

IV. Conclusion

For the foregoing reasons, Discovery respectfully submits that the Commission should deny the petition for reconsideration of NRTC, reject WJB-TV's efforts to rewrite the Act, and adhere to its decision in the First Report and Order with regard to these matters.

Respectfully submitted,

DISCOVERY COMMUNICATIONS, INC.

BY:



Judith A. McHale  
Senior Vice President/  
General Counsel  
Barbara S. Wellbery  
Vice President/  
Deputy General Counsel  
7700 Wisconsin Avenue  
Bethesda, MD 20814

July 14, 1993

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of July, 1993, I caused copies of the foregoing "Opposition To Petition For Reconsideration" to be mailed via first-class postage prepaid mail to the following:

David Honig, Esq.  
Law Offices of David Honig  
1800 NW 187th Street  
Miami, FL 33056  
Counsel for Caribbean  
Satellite Network, Inc.

Robert D. Joffe, Esq.  
Cravath, Swaine & Moore  
Worldwide Plaza  
825 Eighth Avenue  
New York, NY 10019  
Counsel for Time Warner