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BEFORE THE

**Federal Communications Commission**

WASHINGTON, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of

Petition for Rulemaking to Amend  
47 C.F.R. § 76.1003 --  
Procedures for Adjudicating  
Program Access Complaints

)  
) RM No. 9097  
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**OPPOSITION OF TIME WARNER CABLE**

Time Warner Cable ("Time Warner"), a division of Time Warner Entertainment Company, L.P., by its attorneys and pursuant to Section 1.405(a) of the Commission's rules, hereby submits its opposition to the Petition for Rulemaking filed by Ameritech New Media, Inc. ("Ameritech") on May 16, 1997.<sup>1</sup> Ameritech's petition, which seeks certain specified amendments to the Commission's rules governing program access proceedings, is without merit and should be denied.

**INTRODUCTION AND SUMMARY**

The Commission derives its authority over program access proceedings from Section 628 of the Communications Act, as amended by the Cable Television Consumer Protection and Competition Act of 1992.<sup>2</sup> Section 628 places limitations on the conduct of cable operators and vertically-integrated satellite cable programmers and directs the Commission to implement substantive and procedural rules for enforcing such limitations. Pursuant to

<sup>1</sup>The Commission placed Ameritech's petition on public notice on June 2, 1997 (Report No. 2201).

<sup>2</sup>Communications Act of 1934, § 628, 47 U.S.C. § 548.

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Congress' mandate, the Commission adopted rules implementing Section 628 on April 1, 1993.<sup>3</sup> Orders resolving petitions for reconsideration of those rules were adopted in November 1994 and December 1994.<sup>4</sup> In addition, since 1994, the Commission's annual inquiry into the status of competition for the delivery of video programming has afforded interested parties a yearly opportunity to offer comments and suggestions with respect to the effectiveness of Section 628 and the Commission's rules thereunder.<sup>5</sup>

In the course of its initial program access rulemaking, the reconsiderations thereof, and the annual competition inquiries, the Commission has considered and rejected suggestions that it amend its procedures for adjudicating program access complaints to establish specific decision deadlines, permit discovery as a matter of right, and allow complainants to recover damages.<sup>6</sup> Nonetheless, these are precisely the changes in the rules that Ameritech seeks through its petition. In support thereof, Ameritech cites no specific

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<sup>3</sup>First Report and Order, MM Docket No. 92-265, 8 FCC Rcd 3359 (1993).

<sup>4</sup>Memorandum Opinion and Order on Reconsideration of the First Report and Order, MM Docket No. 92-265, 10 FCC Rcd 1902 (1994) ("November Reconsideration"); Memorandum Opinion and Order on Reconsideration of the First Report and Order, MM Docket No. 92-265, 10 FCC Rcd 3105 (1994) ("December Reconsideration").

<sup>5</sup>See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, First Report, CS Docket No. 94-48, 9 FCC Rcd 7442 (1994) ("First Competition Report"); Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Second Annual Report, CS Docket No. 95-61, 11 FCC Rcd 2060 (1995) ("Second Competition Report"); Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Third Annual Report, CS Docket No. 96-133, 5 CR 1164 (1996) ("Third Competition Report").

<sup>6</sup>See, e.g., Third Competition Report, 5 CR at 1208 (finding insufficient evidence to warrant changes in rules to provide greater expedition in the regulation of program access complaints or the imposition of damages awards); November Reconsideration, 10 FCC Rcd at 1910-11 (finding that damages awards are unnecessary); First Report and Order, FCC Rcd at 3420-21 (rejecting mandatory discovery).

evidence of problems with the existing rules. Instead, Ameritech argues more generally that the proposed changes are needed because competition has failed to develop under the current program access rules and, in fact, is being impeded by those rules.

As discussed below, Ameritech's contentions regarding the state of multichannel video programming distribution ("MVPD") competition, and the impact of the program access rules on that competition, are belied by Ameritech's own experience as well as the experience of the industry in general. Moreover, adoption of the specific rules changes advocated by Ameritech not only is unnecessary, but also would strain the Commission's already scarce resources, promote conflict rather than compromise, and would otherwise disserve the public interest.

## DISCUSSION

### I. COMPETITION IS GROWING, NOT STAGNATING, UNDER THE CURRENT PROGRAM ACCESS RULES.

The principal purpose of the program access rules is to promote the growth of MVPD competition.<sup>7</sup> According to Ameritech, however, the sought after competition is not developing under the current rules. Instead, Ameritech suggests, the current rules are impeding the growth of competition by encouraging dilatory behavior on the part of vertically-integrated program vendors.

The flaw in Ameritech's argument is that, by all measures, MVPD competition is growing. For example, as described in the Commission's most recent competition report, the number of DBS subscribers has doubled in each of the past two years and the total

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<sup>7</sup>See Second Competition Report, 11 FCC Rcd at 2135. See also 138 Cong. Rec. S. 14224 (Sept. 21, 1992) (statement of Sen Inouye).

number of subscribers to MVPDs other than traditional cable systems has grown to 11 percent.<sup>8</sup> And, by its own admission, Ameritech itself is aggressively pursuing competitive entry as a wireline alternative to incumbent cable operators.<sup>9</sup>

Just as important as the growth in competition is the fact that competition is increasing because of, not despite, the program access rules.<sup>10</sup> Again, Ameritech's own experience is instructive. In Upper Arlington, Ohio, Ameritech has begun offering franchised cable service in direct competition with Time Warner. Ameritech's system offers 58 non-premium services, including each of the top fifteen cable networks ranked by ratings performance (eight of which are vertically-integrated) and 24 out of 25 of the top cable networks ranked by total subscribership.<sup>11</sup> Additionally, in light of Ameritech's particular concerns about the availability of sports programming, it is worth pointing out that the Upper Arlington channel line-up includes ESPN, ESPN2, Golf Channel, Sports Channel, Classic Sports, WTBS, WGN and TNT. Under the circumstances, it is hardly surprising that Ameritech's system serving Upper Arlington, as well as a number of other Ameritech

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<sup>8</sup>Third Competition Report, 5 CR at 1166.

<sup>9</sup>Petition for Rulemaking at 3-4.

<sup>10</sup>The program access rules have been credited as "a necessary factor" in the development of competitive alternatives to incumbent cable systems. Third Competition Report, 5 CR at 1206 (citations omitted); see also Second Competition Report, 11 FCC Rcd at 2136 (acknowledging general agreement among commenters that the program access rules are helping emerging competition to cable).

<sup>11</sup>See Exhibit A. Rankings by ratings and subscribership are based on information contained in Table 6 and 7 of Appendix G to the Commission's Third Competition Report, 5 CR at 1265-66.

systems, have been found to be providing "effective competition" to incumbent cable operators in their service areas.<sup>12</sup>

Finally, the most compelling rebuttal to Ameritech's contention that the current program access rules are not achieving the results desired by Congress is the fact that, in the Telecommunications Act of 1996, Congress extended the scope of Section 628 to cover common carriers, but did not make any changes in the procedures for adjudicating program access complaints. In contrast, with respect to a number of other Cable Act provisions, Congress did adopt "reform" amendments. These included amendments mandating decision deadlines for cable programming services tier rate complaints and market modification requests.<sup>13</sup> Congress' apparent determination that similar revisions were not needed with respect to program access cases is, in and of itself, reason enough for the Commission to deny Ameritech's rulemaking petition.

## **II. AMERITECH'S PETITION FAILS TO ESTABLISH THAT THE PUBLIC INTEREST WOULD BE SERVED BY ADOPTION OF ANY OF THE PROPOSED REVISIONS IN THE PROGRAM ACCESS RULES.**

As indicated, each of the rule changes proposed by Ameritech previously has been considered and rejected by the Commission. Ameritech's petition fails to offer any reason

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<sup>12</sup>See Time Warner Entertainment Co., L.P. (Upper Arlington, OH), 11 FCC Rcd 17393 (1996). See also Comcast Cablevision of Sterling Heights, Inc. (Sterling Heights, MI et al.), DA 97-1117 (CSB, rel. May 29, 1997); Cablevision of the Midwest, Inc. (Berea, OH), DA 97-648 (CSB, rel. April 3, 1997); Time Warner Entertainment - Advance/Newhouse Partnership (Wayne, MI), 12 FCC Rcd 3175 (1997); Coaxial Communications of Central Ohio (Columbus, OH), 12 FCC Rcd 1872 (1997); Continental Cablevision of Southeast Michigan (Plymouth, MI et al.), 12 FCC Rcd 1467 (1997); Time Warner Entertainment Co., L.P. (Columbus, OH), 11 FCC Rcd 17298 (1996).

<sup>13</sup>Telecommunications Act of 1996, Sec. 301(b), (d).

for the Commission to revisit those judgments. Indeed, adoption of any of the proposed changes would place unnecessary burdens on the Commission and otherwise disserve the public interest.

**A. Mandated Decision Deadlines.**

Citing what it apparently regards as unwarranted delays in the resolution of program access complaints, Ameritech has proposed that the Commission establish mandatory decision deadlines of ninety days from the filing of a complaint in cases where there is no discovery and 150 days where there is discovery. Implicit in this proposal is the unwarranted suggestion that the Commission staff has been less than diligent in its consideration of program access complaints. In fact, however, Time Warner's review of the twenty reported program access complaint decisions indicates that Ameritech's generalizations about the lack of expedition in the resolution of program access cases are quite misleading.

Specifically, Time Warner's review of the reported decisions found twelve instances in which the parties reached a settlement (often with the assistance of the staff) and the complaint was voluntarily dismissed; two instances in which the complaint was declared moot; five instances where the complaint was denied; and only one instance in which a program access complaint was granted. In that one case in which the complaint was granted, the Commission rendered its decision in only four months from the close of the pleading

cycle.<sup>14</sup> Furthermore, orders denying or voluntarily dismissing complaints have been issued in even shorter periods.<sup>15</sup>

While not all of the program access cases have been resolved as rapidly as those cited above, there are a variety of reasons why a particular case may remain open for an extended period of time. For example, the complaint may contain deficiencies that require it to be refiled or one or both parties may request (often by mutual consent) extensions of filing deadlines.<sup>16</sup> In addition, the complexity of the matters raised in the complaint may slow down the process. In one as-yet unresolved program access proceeding, the complaint was

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<sup>14</sup>Cellularvision of New York, L.P. v. Sports Channel Assoc., 10 FCC Rcd 9273 (1995).

<sup>15</sup>See, e.g., CAI Wireless Systems, Inc. v. Cablevision Systems, Inc., 11 FCC Rcd 3004 (1996) (complaint withdrawn 71 days after filing); Mid-Atlantic Cable Service Co. v. Home Team Sports, 9 FCC Rcd 3991 (1994) (complaint voluntarily dismissed four months after complaint filed); Corporate Media Partners d/b/a Americast v. Continental Cablevision, Inc., 11 FCC Rcd 7735 (1996) (complaint denied two and one-half months after close of pleading cycle); Hutchens Communications, Inc. v. TCI Cablevision of Georgia, 9 FCC Rcd 4849 (1994) (complaint denied four and one-half months after close of pleading cycle).

It should be noted that Ameritech's petition cites the Hutchens case as the fastest decision in a program access case, inexplicably ignoring the even faster denial of its own complaint against Continental. Furthermore, in cases where the complaint is voluntarily dismissed, the date of the Commission's order can be misleading. For example, in Consumer Satellite Systems, Inc. v. Lifetime Television, 9 FCC Rcd 3212 (1994), the parties settled their dispute and submitted a request for voluntary dismissal more than a month before the Commission issued its order terminating the proceeding. Even with that "delay," the order was issued only three months after the complaint was first filed. See also Mid-Atlantic Cable Service, *supra* (request for dismissal filed three months after complaint and following three consent requests to extend deadline for filing answer).

<sup>16</sup>See, e.g., American Cable Company v. Telecable of Columbus, Inc., 11 FCC Rcd 10090 (1996). Ameritech cites the American Cable Company case as the most protracted program access proceeding. In American Cable the complaint raised geographic uniformity issues as well as program access issues. In addition to filing a new complaint at the request of the staff, complainant filed several amended complaints. The reply was not filed until two months after the answer and both sides filed a plethora of additional pleadings.

148 pages long and contained factual averments relating to written and oral communications occurring over a period of at least six years.<sup>17</sup> Obviously, it would not serve the public interest to impose mandatory decision deadlines that make it impossible for parties to fully respond to a complainant's allegations (or reply to a respondent's answer).

In light of the foregoing, the Commission should reject Ameritech's proposed decision deadlines. It is no secret that the Commission's resources are stretched thin. Moreover, as indicated above, Congress has, in certain instances (such as rate complaints, market modification requests, and must carry cases), imposed specific decision deadlines on the Commission. Ameritech's request that similar deadlines be established for program access cases will only divert Commission resources from its statutory obligations and further impede the agency's ability to prioritize its work. It is understandable that Ameritech would want program access matters put ahead of other proceedings, just as cable operators would like pole attachment proceedings to be decided by a date certain. Everyone cannot be first and the Commission should not be hamstrung by artificial decision deadlines that Congress itself apparently has not regarded as necessary.

**B. Right To Discovery.**

Ameritech's second proposed amendment to the program access rules would create a right to discovery in all Section 628 proceedings. The current rules permit discovery, but only on a case-by-case basis as deemed necessary by the Commission staff reviewing the

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<sup>17</sup>See British-American Communications, Inc. v. Prime Ticket Network, et al., CSR 4802-P (filed August 8, 1996). The British-American complaint, which has been held in abeyance upon the mutual consent of the parties, is currently the subject of a joint stipulation requesting dismissal of the proceeding.

complaint.<sup>18</sup> In deciding not to permit discovery as a matter of right in program access cases, the Commission found that it would not be efficient or advisable to mandate uniform discovery processes in light of “the nature of the programming distribution marketplace, and the wide range of sales practices.”<sup>19</sup> Ameritech’s petition fails to offer any rebuttal to this conclusion. While it is true that extensive discovery is the hallmark of private antitrust actions, one of the principal reasons for enacting Section 628 was to provide parties with a more streamlined, less costly alternative for resolving their disputes than that provided by traditional antitrust law. Thus, the fact that full discovery is available in an antitrust action counsels against Ameritech’s proposal to permit similar discovery in a Section 628 case.

In addition to adding to the cost of a program access proceeding, allowing mandatory discovery will promote the filing of complaints by parties seeking to engage in fishing expeditions. The Commission has wisely structured its program access enforcement procedures so as to minimize the number of complaints filed and to encourage the resolution of disputes without involving the Commission. Indeed, as noted above, under current procedures, the vast bulk of program access disputes have been settled voluntarily among the parties. The adoption of a mandatory discovery process is inconsistent with the accomplishment of these goals and should be rejected.

Finally, Ameritech’s call for discovery as a matter of right will inevitably lead to breaches of confidentiality. The Commission’s rules recognize that the resolution of program

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<sup>18</sup>See 47 C.F.R. § 76.1003(g). See also First Report and Order, 8 FCC Rcd at 3389, 3420-21.

<sup>19</sup>First Report and Order, 8 FCC Rcd at 3421.

access complaints may involve the production of competitively sensitive information. While the rules provide for various means of protecting the confidentiality of such information, the first level of protection is not to require the production of such material unless the staff determines that discovery is necessary. Ameritech's proposal is at odds with the Commission's well-considered concern about maintaining confidentiality and should be rejected.

**C. Damages.**

The third amendment proposed by Ameritech would provide for the imposition of forfeitures and/or damages awards in Section 628 proceedings. The Commission has considered this issue on a number of occasions and has concluded that the existing sanctions provided for in its rules are sufficient to deter violations of the rules.<sup>20</sup> While the Commission has held open the possibility of revisiting this issue, it has indicated that it will do so only if it finds that the rules are not working to produce the results desired by Congress.

As discussed above, Ameritech's own experience and the experience of the MVPD industry in general indicates that the program access rules are succeeding in promoting greater competition. Thus, there is no reason for the Commission to alter its stance on the issue of damages. Indeed, Time Warner continues to believe that the Commission lacks the requisite authority to award damages in a program access dispute. Moreover, Time Warner

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<sup>20</sup>See November Reconsideration, 10 FCC Rcd at 1910-11; Second Competition Report, 11 FCC Rcd at 2138; Third Competition Report, 5 CR at 1208. See also First Report and Order, 8 FCC Rcd at 3392.

reiterates its intention to challenge the legality of any damages provision adopted by the Commission.<sup>21</sup>

### CONCLUSION

Time Warner strongly urges the Commission to deny Ameritech's petition for rulemaking. The Commission has previously considered and rejected similar proposals and has been given no reason for reversing its prior decisions. Indeed, adoption of the proposed amendments likely would strain the Commission's resources and harm the public by encouraging contentiousness over compromise.

Respectfully submitted,

**TIME WARNER CABLE**



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Dated: July 2, 1997

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<sup>21</sup>See Second Competition Report, 11 FCC Rcd at note 453 (citing Time Warner Comments).

**EXHIBIT A**

- 3 PEG ACCESS
- 4 WCMH (NBC)
- 5 WWHO
- 6 WSYX (ABC)
- 7 WOSU (PBS)
- 8 WTTB (FOX)
- 9 WGN
- 10 WBNS (CBS)

- 19 SNEAK
- PREVUE
- 20 PEG ACCESS
- 21 PEG ACCESS

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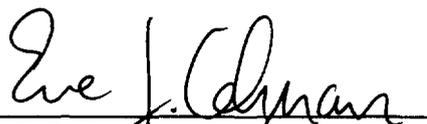
**CERTIFICATE OF SERVICE**

I, Eve J. Lehman, a secretary at the law firm of Fleischman and Walsh, L.L.P.  
hereby certify that copies of the foregoing "Opposition of Time Warner Cable" were served  
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