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**Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

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FEDERAL COMMUNICATIONS COMMISSION
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RM No. 9097

In the Matter of)
)
Ameritech New Media, Inc.)
Petition for Rulemaking)

**OPPOSITION OF
THE NATIONAL CABLE TELEVISION ASSOCIATION
TO PETITION FOR RULEMAKING**

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The National Cable Television Association, Inc. ("NCTA"), 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").¹ NCTA is the principal trade association of the cable television industry in the United States, representing owners and operators of cable television systems serving more than 80 percent of the cable households in the United States, and more than 100 cable program networks.

INTRODUCTION AND SUMMARY

Ameritech seeks to initiate a rulemaking proceeding to change the existing program access rules. Specifically, Ameritech urges adoption of rules: (1) to impose expedited time frames for the resolution of program access complaints; (2) to automatically allow complainants to demand discovery when they file a program access

¹ Filed May 16, 1997 (Hereinafter "Petition".)

complaint; and (3) to impose forfeitures and award damages for all Section 628 violations. The Commission should deny the Petition.

Ameritech's Petition is a solution in search of a problem. The Commission has closely monitored developments regarding competitors' access to cable programming since Congress adopted Section 628 in 1992. The FCC established detailed procedures for complaints in its initial rules in 1993² and made certain changes on reconsideration in 1994.³ In addition, the FCC has sought and analyzed information regarding the working of its program access rules as part of its annual competition inquiries -- including the one now pending -- and each time has decided that no changes to its rules were warranted. For example, in its most recent Competition Report, the FCC examined and rejected proposals to change its rules to expedite review of program access complaints and to award penalties and damages.⁴ Moreover, the Commission repeatedly has found that enforcement of its program access rules has ensured that competing MVPDs have access to vertically-integrated program services in fulfillment of Congress' goals.⁵

² First Report and Order, 8 FCC Rcd. 3359 (1993).

³ Memorandum Opinion and Order, 10 FCC Rcd. 1902 (1994).

⁴ Third Annual Competition Report at ¶159-160. (rel. Jan. 2, 1997).

⁵ See, e.g., Second Annual Report, 11 FCC Rcd. 2060, 2136 (1995); Third Annual Report at ¶152 (noting that "many parties agree that the program access rules have helped emerging competitors to cable obtain access to programming, although other parties continue to argue that the rules are unnecessary.")

Ameritech's Petition presents no reason for the Commission to revisit these conclusions. If anything, the Petition demonstrates that Ameritech is vigorously challenging incumbent cable operators in the 37 communities in which it has obtained franchises⁶ and that Ameritech's ability to compete has been helped, not hampered, by the workings of the program access rules.⁷

DISCUSSION

I. AMERITECH HAS FAILED TO SHOW THE NEED FOR EXPEDITED DEADLINES FOR RESOLUTION OF PROGRAM ACCESS COMPLAINTS

Ameritech claims the need for the Commission to adopt additional expedited procedures to deal with program access complaints. Specifically, Ameritech urges that the FCC adhere to a 90 day deadline for resolving program access petitions and a 150 day deadline in cases where there is discovery.⁸ Ameritech also proposes that the FCC shorten the time period for responses to program access complaints.

The Petition is long on hyperbole, but short on facts to support this schedule. Ameritech has not shown that it has been the victim of a single program access violation. In fact, in the one case brought by Ameritech that has been decided, both the Bureau and

⁶ Petition at 3.

⁷ For example, in finding that Ameritech provides "effective competition" in several communities in Michigan and Ohio, the FCC noted that Ameritech provides over 80 channels of programming. Comcast Cablevision of Sterling Heights, 1997 FCC Lexis 2794 (rel. May 28, 1997); Cablevision of the Midwest, Inc., 1997 FCC Lexis 1655 (rel. Apr. 3, 1997); Time Warner, 12 FCC Rcd. 3175 (rel. Mar. 13, 1997).

⁸ Id. at 8.

the Commission denied Ameritech's complaint. The Bureau's decision, moreover, was hardly reached in a sluggish manner -- rather, it was decided in a little more than 4 months.⁹ And Ameritech's pending complaint against Rainbow Programming Holdings was filed in December 1996 and only fully briefed since February 1997. In the meantime, Ameritech has access to the programming that it desires and has been rapidly continuing to overbuild cable systems in numerous communities.¹⁰

Aside from its failure to show any injury to itself (or anyone else), there is no reason to adopt Ameritech's proposed schedule. FCC procedures already encourage the speedy resolution of program access complaints. In 1993, the FCC, as it described it, "developed a streamlined complaint process that will enable [it] to settle uncomplicated complaints quickly while still resolving complex cases in a timely manner."¹¹ The rules are working in the manner intended. Many complaints have been settled by the parties, and many others have been resolved by the FCC.¹²

⁹ *Americast v. Continental Cablevision, Inc.*, 11 FCC Rcd. 7735 (CSB1996), affirmed, 12 FCC Rcd. 3455 (1997) (Complaint filed February 29, 1996; decision released July 3, 1996).

¹⁰ Ameritech's Petition seeks to leave the impression that it does not have access to "attractive sports programming". Petition at 4-5. But it appears that Ameritech in fact does provide a full array of sports programming to its cable customers -- including regional sports. See CSR-4873-P, *Corporate Media Partners d/b/a Americast and Ameritech New Media, Inc. v. Rainbow Programming Holdings, Inc.* (Answer, filed Jan. 10, 1997) at 8-9 (detailing agreements between SportsChannel and Petitioner).

¹¹ First Report and Order, 8 FCC Rcd. 3359, 3364 (1993).

¹² In its First Annual Competition Report, the FCC noted that it had received only a "relatively small number of complaints . . . concerning denial of access to programming on the grounds of exclusivity agreements." 9 FCC Rcd. 7442, 7528 (1994). Most of those complaints were settled. See *id.*, Appendix F. The FCC's Second Competition Report noted that it had resolved 4

In addition, as part of its initial rules, the FCC accelerated the time frame for responding to program access complaints, granting respondents only 30 days to file an answer. Further expediting the filing deadlines by requiring an answer within 20 days after a complaint is filed, as Ameritech urges¹³, would fail to afford adequate time in which to accurately gather necessary information to support a response or to work out a privately negotiated settlement with the complainant.¹⁴

In any event, the FCC has already examined -- and rejected -- a similar proposal just months ago. In its Third Annual Competition Report, the Commission explained that while some commenters urged expedited review of program access complaints, the agency "believed the procedures established in our rules for program access complaints already provide for an expedited procedure to resolve such disputes, and that commenters have not presented any additional evidence to suggest that revising these procedures would further accelerate this process."¹⁵ Ameritech presents no new evidence that this conclusion should be changed.

program access complaints. 11 FCC Rcd. 2060, 2136 (1996). Ten additional disputes were resolved by the time the Third Competition Report was issued. Third Annual Report, CS Docket No. 96-133 at ¶151 (rel. Jan. 2, 1997).

¹³ Petition at 15.

¹⁴ Ameritech also proposes that programmers be required to file additional information along with their answer, including copies of contracts. Petition at 15. The FCC's rules already provide complainants with an avenue for obtaining information prior to filing a complaint, and those procedures properly balance the rights of competing MVPDs to information necessary to successfully prosecute a program access complaint and the right of programmers to be free from frivolous complaints. See 47 C.F.R. §76.1003 (c) (ix).

¹⁵ Third Annual Report at ¶159.

Finally, Congress in the 1996 Telecommunications Act specifically identified areas in which it determined that imposing deadlines on the FCC was warranted. For example, it adopted deadlines for the resolution of must carry market modifications¹⁶ and for reviewing rate complaints.¹⁷ While Congress at the same time changed Section 628,¹⁸ it did not impose a statutory deadline for resolution of complaints and indicated no dissatisfaction with the pace of FCC's enforcement of the statute.

The FCC previously decided not to require resolution of certain issues within a prescribed time frame. For example, the Commission refused to adopt NCTA's proposal that the agency resolve within 90 days cable operator petitions demonstrating that they face effective competition.¹⁹ This was in spite of the statutory requirement that if effective competition is interposed as a defense, the FCC must rule on the question within 90 days.

Given the FCC's track record of promptly dealing with program access complaints, and the need to ensure that program networks can respond appropriately, Ameritech has failed to show why the Commission should reverse its judgment of just 5 months ago that no expedited deadline for complaints about program access is warranted.

¹⁶ 47 U.S.C. §534(h) (1)(C)(iv) (requiring FCC to resolve market modification request within 120 days).

¹⁷ 47 U.S.C. §543(c)(3) (imposing 90 day deadline).

¹⁸ 47 U.S.C. §548(j) (applying program access rules to common carriers).

¹⁹ See Order and Notice of Proposed Rulemaking, CS Docket No. 96.85 (rel. April 9, 1996) at ¶18 (stating only that FCC would "act promptly" on these requests).

II. THE COMMISSION SHOULD MAINTAIN ITS RULES REGARDING DISCOVERY

Under existing rules, FCC staff may order discovery in those program access cases in which they deem it appropriate upon examination of the pleadings.²⁰ Ameritech, however, urges the Commission to change its rules to automatically give a complainant a “right to a full range of discovery in all Section 628 cases.”²¹

The Commission should not adopt the proposal. Aside from the obvious clash with Ameritech’s plea for expedition, granting complainants an automatic right to discovery would provide them the unbridled ability to engage in burdensome, time consuming, and expensive fishing expeditions. The Commission’s rules already incorporate a proper balance of procedures to ensure that programmers’ businesses are not unduly disrupted while at the same time allowing limited and targeted discovery where the FCC deems it appropriate to resolve a case.

Moreover, a complainant under the existing rules has the burden of establishing a prima facie case that demonstrates that the Commission’s rules have been violated.²² Only after a successful showing will staff even consider requesting additional documents if the FCC determines that further information is necessary to resolve issues raised in the

²⁰ 47 C.F.R. §76.1003(g).

²¹ Petition at 19. It also proposes that the Commission should “punish[] frivolous efforts to deny or obstruct discovery” by incorporating sanctions contained in the Federal Rules of Civil procedure.

²² First Report and Order, 8 FCC Rcd. at 3420-21.

complaint.²³ Ameritech's proposal would turn this requirement on its head, apparently allowing discovery even before a prima facie case had been made that any violation of the rules had occurred. And extensive complainant discovery would beget extensive programmer discovery prior to a prima facie case. The discovery battle would ultimately delay the prompt resolution of complaints.

Ameritech also argues that because discovery is permitted as of right in federal civil antitrust actions, it should be permitted as of right by the FCC.²⁴ But the right to pursue a program access complaint at the FCC is not intended to be identical to a full-blown antitrust action. Congress envisioned just the opposite when it adopted Section 628. As the Senate Report makes clear, the goal of the "expedited administrative remedy" is "to have programming disputes resolved quickly and without imposing undue costs on the involved parties."²⁵ Of course, nothing prevents a complainant, should it wish to pursue the extensive discovery that the federal rules permit, from bringing an antitrust action in court.²⁶

In short, the existing FCC rules strike the proper balance between the need to investigate program access violations and the right of programmers to conduct their

²³ Id.

²⁴ Petition at 18.

²⁵ S. Rep. No. 102-92, 102d Cong., 1st Sess. 29 (June 28, 1991).

²⁶ See id.

businesses free from burdensome requests. Ameritech's lop-sided approach should be rejected.²⁷

III. THE COMMISSION SHOULD REJECT AMERITECH'S CALL FOR DAMAGES

Finally, Ameritech argues that the Commission "should amend its rules to provide economic disincentives, in the form of forfeitures and/or award of damages, for all violations of Section 628."²⁸ This identical argument has been raised and addressed by the Commission on several occasions. Ameritech presents nothing new to warrant the Commission changing its views.

²⁷ Ameritech's call for new, aggressive and intrusive program access procedures in the absence of any record to justify the approach is particularly ironic in light of the company's steadfast insistence in the Interconnection proceeding that Commission involvement should be the minimum required. For example:

- 1) Ameritech seeks a deadline for resolving program access complaints. But when competitors called for national guidelines for access to Operations Support Systems (OSS) by a date certain, Ameritech objected that a competitor "simply has not demonstrated any factual basis for any deadline." "Opposition of Ameritech to Petitions for Clarification and Reconsideration Filed by Various Parties," CC Docket No. 96-98, Oct. 31, 1996, at 15.
- 2) Ameritech asks for program access procedures that go well beyond the procedures prescribed by the statute. But when competitors called for expansion of the collocation requirement beyond the strict statutory design, Ameritech argued going beyond the statute's bounds "lack a legal basis, raise substantial practical problems, and should be rejected." Id. at 33.
- 3) Ameritech calls for these steps despite the existence of Commission procedures addressing this issue already adopted through the rulemaking process and the absence of any demonstration that the existing procedures are not working effectively. But in response to a call for additional ILEC reporting requirements to aid in the policing of nondiscriminatory access, Ameritech asserted "Additional reporting requirements would burden incumbent LECs without meeting any proven need or providing any offsetting benefit. Id. at 16.

²⁸ Petition at 21.

The Commission in its reconsideration of the original program access rules was “[n]ot persuaded by petitioners’ arguments that creating such a [damages] remedy for violations of the program access rules is necessary at this time. Instead, we believe that the sanctions available to the Commission, pursuant to Title V, together with the program access complaint process, are sufficient to deter entities from violating the program access rules.”²⁹ In particular, the Commission explained that the program access rules were working well, and were advancing Congress’ goal of increasing competition to cable systems by providing greater access to cable programming services. Nevertheless, the Commission maintained the right to revisit the issue should it be shown that its processes were not working.³⁰

The Commission just a few months ago did revisit this issue in the course of its Annual Report on Competition.³¹ The Commission again refused to impose damage awards, stating that “these parties have not provided sufficient evidence to persuade us that penalties are necessary at this time to ensure effective enforcement of our program access rules.”³²

This Petition adds nothing new. It fails to identify a single violation of the rules -- no less any actions that would warrant adoption of the punitive measures it advocates.

²⁹ Memorandum Opinion and Order, 10 FCC Rcd. at 1911.

³⁰ Id.

³¹ Third Annual Report at ¶160.

³² Id.

In the face of the relative paucity of complaints and the widespread availability of cable programming to competing MVPDs, Ameritech tries to change the subject. It attempts to claim that damages are necessary because of the alleged “unacceptably slow pace of the development of meaningful competition in the MVPD marketplace...”³³ Other than its rhetoric, however, Ameritech presents no nexus between any violations of the program access rules and the state of competition with cable. In fact, there is none. The Commission has recognized several times that competitors do have access to cable network programming³⁴ -- as indeed does Ameritech. Armed with access to a full array of this programming, competing MVPDs have captured 11 percent of the total MVPD subscribership -- and have increased their share an average of 22 percent each year since 1990.³⁵ Indeed, given Ameritech’s own decisive entry into head to head cable competition it is hard to understand why it, of all parties, would link program access rules and competitive entry. It has proved to be no barrier to itself.

In short, Ameritech presents no reason for the Commission to revisit this issue already decided in previous reviews. Damages should not be assessed for program access violations.

³³ Petition at 21.

³⁴ See, e.g., First Annual Report, 9 FCC Rcd. at 7528; Second Annual Report, 11 FCC Rcd. at 2136; Third Annual Report at ¶152.

³⁵ Third Annual Report at ¶5.

CONCLUSION

For the foregoing reasons, the FCC should deny the Petition.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Erica M. Smith, do hereby certify that on this 2nd day of July, 1997, copies of the foregoing "**Opposition to Petition for Rulemaking**" were delivered by first-class, postage pre-paid mail upon the following:

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