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Federal Communications Commission FCC 97-415

DEC 29 9 15 AM '97

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of:	)	
	)	
Implementation of the Cable Television Consumer Protection and Competition Act of 1992	)	CS Docket No. 97-248
	)	RM No. 9097
	)	
Petition for Rulemaking of Ameritech New Media, Inc. Regarding Development of Competition and Diversity in Video Programming Distribution and Carriage	)	

MEMORANDUM OPINION AND ORDER AND NOTICE OF PROPOSED RULEMAKING

Adopted: December 18, 1997 **Released: December 18, 1997**

By the Commission: Commissioner Furchtgott-Roth issuing a statement.

Comment Date: February 2, 1998
Reply Comment Date: February 23, 1998

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I. INTRODUCTION

1. In this *Memorandum Opinion and Order and Notice of Proposed Rulemaking*, we grant the petition for rulemaking filed by Ameritech New Media, Inc. ("Ameritech") requesting that the Commission issue a notice of proposed rulemaking to amend its program access rules.[1] Pursuant to Section 1.401 of the Commission's rules, on June 2, 1997, the Commission issued a public notice seeking comment on Ameritech's petition. Timely comments and oppositions were filed on July 2, 1997; reply comments were filed on July 17, 1997. As discussed herein, we are initiating a proceeding to consider the amendment of several aspects of the program access rules.

II. BACKGROUND

2. Section 628 of the Communications Act of 1934, as amended ("Communications Act"), prohibits unfair or discriminatory practices in the sale of satellite cable and satellite broadcast programming.[2] Section 628 is intended to increase competition and diversity in the multichannel video programming market, as well as to foster the development of competition to traditional cable systems, by prescribing regulations that govern the access by competing multichannel systems to cable programming services.[3] Section 628(b) provides that:

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[1]47 C.F.R. §76.1000 - 1004.

[2]Communications Act §628, 47 U.S.C. §548.

[3]*Id.* §628(a).

> it shall be unlawful for a cable operator, a satellite cable programming vendor in which a cable operator has an attributable interest, or a satellite broadcast programming vendor to engage in unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or to prevent any multichannel video programming distributor from providing satellite cable programming or satellite broadcast programming to subscribers or consumers.[4]

Section 628(c) instructs the Commission to adopt regulations to identify particular conduct that is prohibited by Section 628(b).[5] The Communications Act provides parties aggrieved by conduct alleged to violate the program access provisions the right to commence an adjudicatory proceeding before the Commission.[6] In addition, as part of the Telecommunications Act of 1996(" Act"), Congress expanded the program access protections to include common carriers and their affiliates that provide video programming by any means directly to subscribers, and to satellite cable programming vendors in which a common carrier has an attributable interest.[7]

3. In *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*, First Report and Order ("*First Report and Order*"), the Commission promulgated regulations implementing the Communication Act's program access provisions.[8] The Commission determined that a program access complaint process derived from the Section 208 common carrier[9] and Section 315(b) lowest unit charge complaint processes,[10] modified to limit discovery procedures, would provide the most flexible and expeditious means of enforcing the anti-discrimination program access provisions through the adjudication process.[11] The Commission stated that discovery will not be permitted as a matter of right in all cases, but

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[4]*Id.* §628(b).

[5]*Id.* §628(c).

[6]*Id.* §628(d).

[7]Communications Act §628(j), 47 U.S.C. §548(j); *see Implementation of Section 302 of the Telecommunications Act of 1996, Open Video Systems,* Second Report and Order, 11 FCC Rcd 18223, 18314 - 326 (1996) (discussing program access in the context of open video systems); *Implementation of Section 302 of the Telecommunications Act of 1996, Open Video Systems,* Third Report and Order and Second Order on Reconsideration, 11 FCC Rcd 20227, 20296 - 302 (1996) (same).

[8]*First Report and Order,* FCC 93-178, 8 FCC Rcd 3359 (1993).

[9]Communications Act §208, 47 U.S.C. §208.

[10]Communications Act §315(b), 47 U.S.C. §315(b).

[11]*First Report and Order* at 3416.

only as needed on a case-by-case basis, as determined by Commission Staff.[12]

4. With regard to the issue of damages, the statute provides 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."[13] The Commission initially concluded that the Communications Act does not grant the Commission the authority to assess damages against programmers or cable operators that violate Section 628.[14] In *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*, Memorandum Opinion and Order on Reconsideration of the First Report and Order ("*Order on Reconsideration*"), the Commission reversed this decision holding that because the Communications Act does not limit the Commission's authority to determine what is an appropriate remedy, and that damages are clearly a form of remedy, the plain language of Section 628 is consistent with a finding that the Commission has authority to afford relief in the form of damages.[15] The Commission also determined that petitioners did not persuade the Commission that assessing damages for violations of the program access rules was necessary at that time.[16] The Commission stated that, if future events demonstrate that the sanctions approved for program access violations are not adequate to discourage anticompetitive conduct, the Commission would revisit the issue.[17]

II. THE PLEADINGS

A. Ameritech's Petition

5. In its petition, Ameritech requests that the Commission issue an NPRM to amend certain of the program access rules contained in Part 76 of its rules.[18] Ameritech proposes that the Commission: (1) guarantee expedited review by imposing specific time deadlines for resolving program access cases; (2) institute a right of discovery to enable complainants to obtain information necessary to prove Section 628 violations; and (3) institute economic penalties in the

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[12] *Id.*

[13] Communications Act § 628(e), 47 U.S.C. § 628(e).

[14] *First Report and Order* at 3392.

[15] *Order on Reconsideration*, FCC 94-287, 10 FCC Rcd 1902, 1910-11 (1994).

[16] *Id.* at 1911.

[17] *Id.*

[18] 47 C.F.R. §76.1000 - 76.1004.

form of fines or damages to create an economic disincentive discouraging Section 628 violations.[19]

6. With respect to the issue of imposing specific time limits by which the Commission must resolve program access matters, Ameritech contends that delays in Commission decision-making have impeded the development of competition in the multichannel video programming distribution market.[20] Therefore, Ameritech proposes that, in cases where the complainant has elected not to take discovery, the Commission amend its rules to require that a decision on a Section 628 complaint must be rendered within 90 days of the Commission's receipt of the complaint. Where a complainant opts to conduct discovery, Ameritech proposes that such proceeding be resolved within 150 days of the Commission's receipt of the complaint.[21] In addition, Ameritech proposes that the Commission amend its rules so that answers to program access complaints be filed within 20 days after the service of the complaint, instead of the 30 day period currently permitted by the Commission's rules.[22] Ameritech further proposes that, in cases where there is no discovery, the time for filing a reply be reduced from 20 days to 15 days, and that replies be eliminated in cases where discovery is conducted.[23] In those matters where discovery is conducted, Ameritech proposes that the Commission convene a status conference within five days of the filing of the defendant's answer.[24]

7. With respect to the issue of discovery, Ameritech argues that, because discovery is essential to a complainant's ability to make its case, especially in cases alleging price discrimination, complainants in Section 628 cases should be permitted discovery as of right similar to that provided for in the Federal Rules of Civil Procedure.[25] Under this proposal, Ameritech acknowledges that the Commission's right to conduct discovery would remain unchanged.[26] To ensure expedited review, Ameritech proposes that the Commission's rules require that all discovery be concluded within 45 days following the initial status conference.[27]

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[19]Ameritech Petition at 1-2.

[20]*Id.* at 8.

[21]*Id.* at 14.

[22]*Id.* at 15; *see* 47 C.F.R. §76.1003(d) (30 day answer period). Ameritech also proposes that the Commission require answers to include copies of programming agreements and other documentary evidence of practices challenged in the complaint. Ameritech Petition at 15.

[23]*Id.* at 16.

[24]*Id.* As noted *infra* ¶8, Ameritech proposes that completion of discovery be required within forty-five days following the status conference.

[25]*Id.* at 8-9; *see* Fed. R. Civ. P. 26(b).

[26]Ameritech Petition at 19.

[27]*Id.*

8. With respect to damages, Ameritech argues that the Commission's rules should be amended to provide for the imposition of forfeitures and/or the award of damages against all entities determined to have committed Section 628 violations. Ameritech argues that Section 628 cannot act as an antidote for anticompetitive behavior by cable operators and programmers unless there is a significant economic disincentive provided for in the rules.[28] Ameritech notes that in *Order on Reconsideration,* the Commission concluded that nothing in the statute limited the Commission's authority to impose remedies, including damages, for violations of Section 628. As further noted by Ameritech, the Commission declined to exercise its authority to award damages at that time and stated that it would revisit the issue should circumstances warrant.[29] Ameritech submits that economic disincentives are now necessary to prevent further anticompetitive conduct. Ameritech supports the imposition of substantial monetary penalties retroactive to the date of the filing of the notice of intent to initiate a Section 628 proceeding.[30]

[28] *Id.* at 9.

[29] *Order on Reconsideration,* 10 FCC Rcd at 1911.

[30] Ameritech Petition at 22-23; *see* 47 C.F.R. § 1003(a).

B. Comments In Favor of Ameritech's Petition

9. Several commenters support Ameritech's Petition.[31] For example, the Media Access Project generally supports Ameritech's petition because "shortcomings in the Commission's rules may allow vertically-integrated cable operators to delay or avoid the prohibitions of Section 628 in contravention of Congress's intent to have programming disputes resolved quickly."[32] Similarly, World Satellite Network, Inc. ("WSN"), a program purchasing cooperative for satellite master antenna television ("SMATV") and multichannel multipoint distribution service ("MMDS") operators, also supports Ameritech's petition and argues that the current program access rules do not effectively reflect the statutory mandate of fair and equal access to programming.[33]

1. Time Limits

10. Americast supports the imposition of fixed time periods after the close of the pleading cycle within which a decision must be rendered. Americast suggests that a determination be released within 45 days of the close of the pleading cycle.[34] DIRECTV argues that measures to expedite the resolution of program access complaints will result in the more rapid introduction of competition in the multichannel video programming distributor ("MVPD") marketplace.[35]

2. Discovery

11. Several commenters urge the Commission to adopt a rule that would require limited document discovery as a matter of course as a means of fostering more meaningful and vigorous enforcement of Section 628.[36] In the alternative, Americast supports Commission adoption of strict procedures for requiring discovery when Commission Staff has determined that a complainant has demonstrated a *prima facie* case.[37] Americast proposes that the complainant serve the Commission and the defendant with a limited document discovery request, which must

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[31] *See* Media Access Project Comments ("MAP Comments"); Corporate Media Partners d/b/a Americast Comments ("Americast Comments"); DIRECTV, Inc. Comments ("DIRECTV Comments"); Wireless Cable Association International, Inc. ("WCA Comments").

[32] MAP Comments at 1, citing Communications Act §628(f)(1), 47 U.S.C. §548(f)(1).

[33] WSN Comments at 1.

[34] Americast Comments at 7.

[35] DIRECTV Comments at 2.

[36] Americast Comments at 9-12; DIRECTV Comments at 3; WCA Comments at 11-12.

[37] Americast Comments at 10-11.

be granted or denied within 10 business days of the filing of the defendant's answer. If granted, the defendant would then have 10 business days to provide the relevant documents. The Wireless Cable Association ("WCA") asserts that alternative MVPDs (like satellite service providers) are denied a full opportunity to present their best case to the Commission if they are not given access to certain documents within the defendant's possession that would demonstrate whether a program access violation has occurred. WCA argues that, in price discrimination cases, absent access to such documents, it is virtually impossible to prove that a programmer has refused to deal on fair and equitable terms.[38] WCA asserts that "by simply establishing blanket rules as to what documents must be produced in response to specific types of program access complaints, the Commission can effectively eliminate unnecessary layers of decision-making while ensuring that all relevant documents are made available to the complaining party as quickly as possible."[39] WCA contends that this limited right of discovery would facilitate expeditious resolution of program access complaints and serve the public interest by minimizing the damage inflicted on alternative MVPDs through the delay tactics of defendants.[40]

3. Damages

12. Several commenters support Ameritech's position that the Commission has the authority to impose damages and should amend its rules to make damages available as a remedy in program access cases.[41] For example, commenters assert that the Commission has the statutory authority to award damages based on Section 628(e)(1)'s use of the phrase "appropriate remedies."[42] Americast notes that in the *Order on Reconsideration*, the Commission stated that it would reconsider the issue of damages if the current process for resolving complaints was not preventing anticompetitive behavior.[43] Americast urges the Commission to establish that monetary damages and forfeitures will be available for violations of Section 628 and asserts that the threat of damages is necessary to bring programmers into compliance with the Commission's rules. In addition, Americast argues that, if necessary, the issues of liability and damages can be bifurcated.[44] WCA also asserts that under Section 4(i) of the Communications Act, the

[38]WCA Comments at 11-12.

[39]*Id.* at 12.

[40]*Id.* at 13.

[41]*See* WCA Comments at 14-18; Americast Comments at 13-18; DIRECTV Comments at 3.

[42]Americast Comments at 13; WCA Comments at 14.

[43]Americast Comments at 15, citing *Order on Reconsideration*, 10 FCC Rcd at 1904.

[44]Americast Comments at 16-17.

Commission enjoys significant discretion to choose from a range of reasonable remedies.[45] WCA notes that the Administrative Procedure Act ("APA") grants federal agencies the authority to impose "sanctions" on entities subject to its jurisdiction, and that assessment of damages is specifically included in the APA's definition of "sanction."[46] Commenters further assert that, in the absence of economic damages, a defendant has little incentive to negotiate with an aggrieved MVPD before a complaint is filed, nor does it have the incentive to resolve the matter in a timely manner after a complaint is filed.[47] WCA asserts that the availability of damages in program access cases will alleviate the problems MVPDs face from evasive cable operators and programmers.[48] DIRECTV agrees that providing for penalties or damages awards for proven violations would allow for more meaningful and vigorous enforcement of Section 628.[49]

4. Other Issues

13. Americast argues that the Commission should also consider: (1) whether adjudicated anti-competitive behavior should be treated as raising serious questions of fitness to be a Commission licensee at the time of renewal of Commission licenses; and (2) whether the Commission has the authority to impose punitive damages in those limited and egregious cases of willful price discrimination, or denial of programming, in which exposure to economic damages may be an insufficient deterrent.[50] DIRECTV supports a Commission proceeding to fine-tune the program access rules and argues it may be appropriate for the Commission to reconsider, and to develop a record on, whether the protections of the program access rules should be extended to cover terrestrially-delivered programming that technically may not fall within the definitions of "satellite cable programming" or "satellite broadcast programming" contained in Section 628.[51] DIRECTV contends that the Commission could also examine under what circumstances the rules should be extended to encompass acts or practices by non-vertically integrated programmers whose purpose or effect is to deny MVPDs the fundamental access they

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[45]WCA Comments at 15; *see* Communications Act §4(i), 47 U.S.C. §154(i). Section 4(i) of the Communications Act provides that:

> The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions.

Id.

[46]WCA Comments at 16; *see* 5 U.S.C. §551(10)(E).

[47]WCA Comments at 16-17.

[48]*Id.* at 3.

[49]DIRECTV Comments at 3.

[50]Americast Comments at 17.

[51]DIRECTV Comments at 3-4.

need in order to provide viable competition to incumbent cable operators.[52]

C. Comments Opposing Ameritech's Petition

1. Time Limits

14. Several commenters oppose Ameritech's suggestion that the Commission adopt time deadlines for program access complaints and acknowledge that in *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Third Annual Report ("*1996 Report*"),[53] the Commission considered and rejected suggestions to amend its program access rules to establish specific decision deadlines.[54] Home Box Office ("HBO") notes that Ameritech's program access complaint was resolved in four months, significantly less than the 12 month average touted by Ameritech in its Petition. In addition, HBO contends that the program access cases that took longer than average to resolve were won by defendants and therefore complainants suffered no injury. HBO asserts that Ameritech's demand for discovery as of right is inconsistent with its request for short, firm resolution deadlines by lengthening the complaint process. In this regard, HBO argues that the Commission's November 1996 proposal to abolish or limit discovery in light of the new statutory deadlines for resolving common carrier complaints is persuasive evidence that Ameritech's time limit proposal should be denied.[55]

15. NCTA asserts that Ameritech has failed to show the need for expedited deadlines for resolution of program access complaints, nor has it shown that it has been the victim of a program access violation.[56] NCTA further notes that, despite the competitive conditions cited by Ameritech in its petition, Congress failed to impose a statutory deadline for program access matters in the 1996 Act.[57] NCTA asserts that the rules already provide for expeditious resolution of program access complaints. NCTA argues that requiring an answer within 20 days, instead of the current 30 days, would not afford adequate time for gathering the necessary information to defend such claims.

16. Time Warner asserts that implicit in Ameritech's proposal is the suggestion that Commission staff have been less than diligent in their consideration of complaints. In defense

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[52] *Id.* at 4.

[53] *1996 Report*, FCC 96-496, at ¶159 (rel. January 2, 1997).

[54] Time Warner Comments at 2; Rainbow Comments at 3; NCTA Comments at 5.

[55] HBO Comments at 2-4; *see Implementation of the Telecommunications Act of 1996: Amendment of Rules Governing Procedures to be Followed When Formal Complaints are Filed Against Common Carriers*, Notice of Proposed Rulemaking, FCC 96-460 at ¶49 (rel. November 27, 1996).

[56] NCTA Comments at 3.

[57] *Id.* at 6.

thereof, Time Warner notes the 12 instances of settlement, as well as a variety of reasons why a program access case may remain open for an extended period of time.[58] While the WCA favors expedited resolution of program access complaints, it is "aware that processing delays in the program access arena in many cases are attributable to chronic staff shortages within the Commission's Cable Services Bureau and, on occasion, requests for extensions of time filed by the complaining or defending parties. . . ."[59] In lieu of imposing inflexible time limits on the resolution of program access complaints, WCA favors expediting action on program access matters by assigning more staff to the Cable Services Bureau.[60]

2. Discovery

17. Opponents of Ameritech's petition contend that, rather than expediting program access case resolution, allowing discovery as of right would result in burdensome, time consuming fishing expeditions by complainants.[61] One commenter asserts that a request for discovery under Ameritech's plan would necessitate at least five rounds of pleadings, as well as interrogatories, objections to interrogatories, and requests for written documents, and depositions.[62] HBO argues that Ameritech's petition is unnecessary because discovery is available under the Commission's current procedures. HBO asserts that discovery complicates and delays complaint proceedings, and cites a 1996 Common Carrier Bureau Second Report and Order "authorizing staff to limit the scope of discovery because such limitation `could be an effective deterrent to attempts by parties to use discovery for purposes of delay or to gain tactical leverage for settlement purposes.'"[63] HBO argues that discovery as of right encourages fishing expeditions, increases the potential for abuses by entities seeking to gain access to competitor's pricing information, and would provide minimal utility as most complainants receive relevant documents as part of the pleading cycle.[64] Time Warner notes that in the *1996 Report*, the Commission considered and rejected suggestions to amend its program access rules to permit discovery as of right, finding a uniform discovery process inefficient and inadvisable given the nature of the programming distribution marketplace.[65] Commenters argue that the fact that litigants have the

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[58]Time Warner Comments at 6-8.

[59]WCA Comments at 10, n. 25.

[60]WCA Comments at 10, n. 25.

[61]HBO Comments at 7-8; NCTA Comments at 7; Rainbow Comments at 5-6; Time Warner Comments at 8-10.

[62]Rainbow Comments at 5-6.

[63]HBO Comments at 6, citing *Implementation of Section 302 of the Telecommunications Act of 1996*, Second Report and Order, 11 FCC Rcd 18223, 18342 (1996).

[64]HBO Comments at 7-8.

[65]Time Warner Comments at 2, citing *1996 Report*, at ¶159.

right to discovery in an antitrust action does not mean that a right of discovery should necessarily be available in this type of administrative proceeding.[66]

3. Damages

18. Several commenters oppose the imposition of damages in program access matters.[67] Commenters contend that the Commission's rules already permit forfeitures in program access cases under Title V[68] and that proposals for the inclusion of damages were presented to and rejected by the Commission.[69] Commenters assert that Ameritech has not demonstrated that the Commission's earlier decision was in error.[70] In addition, Commenters assert that the agency lacks the authority to award such damages under Section 628.[71] One commenter notes that a recent Common Carrier Bureau ("CCB") proceeding observed that the agency did not have the general authority to award punitive damages in complaint proceedings.[72] In this regard, HBO contends that a damages remedy would require elaborate regulatory mechanisms in order to determine economic damages adding unnecessary complication and further delay to the resolution of most program access claims.[73] Rainbow also asserts that Ameritech's petition provides no evidence that the existing program access rules are inadequate to implement the provisions of Section 628.[74]

D. Reply Comments

19. In its reply, Ameritech asserts that access to quality programming is indispensable to successful operation of a cable service. In response to Time Warner and NCTA's comments, Ameritech asserts that its securing of 45 cable franchises does not demonstrate that it is receiving access to quality programming, nor does it demonstrate the access it is receiving is at nondiscriminatory rates, terms and conditions.[75] Ameritech contends that the Commission's

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[66]NCTA Comments at 8; Time Warner Comments at 9.

[67]HBO Comments; NCTA Comments; Rainbow Comments; Time Warner Comments.

[68]HBO Comments at 9-11.

[69]*Id.* at 9-11; NCTA Comments at 9-10; Rainbow Comments at 3, n. 10; Time Warner Comments at 2.

[70]HBO Comments at 9-11; NCTA Comments at 9; Time Warner Comments at 10-11.

[71]HBO Comments at 12; Time Warner Comments at 10-11.

[72]HBO Comments at 12, citing *Just Aaron*, 10 FCC Rcd 11519, 11520 (CCB 1995).

[73]HBO Comments at 13.

[74]Rainbow Reply at 1.

[75]Ameritech Reply at 4-5.

previous consideration of the issues raised by its petition should not preclude the granting thereof. Rather, three principal reasons indicate that the Commission should reconsider the issues raised in this proceeding: (1) that the failure of widespread, meaningful competition to take root in the video marketplace is becoming increasingly evident with the passage of time; (2) that there are highly significant, new marketplace developments, such as the accelerating trend toward consolidation in the cable industry, which pose a threat to the protections afforded by Section 628;[76] and (3) that future program access complaints are likely to focus increasingly on discriminatory pricing and practices.[77]

20. Ameritech asserts that the availability of discovery as a matter of right would alter the mindset of cable programmers and operators, providing a disincentive to engage in dilatory activities.[78] Ameritech argues that the increased complexity and difficulty of proving price discrimination cases requires that discovery as of right be available to complainants.[79] Ameritech asserts that discovery as of right is less demanding on Commission Staff than the current structure of the rules which provides for direct Staff involvement in discovery.[80] Ameritech challenges the assertion of other commenters that this new right would lead to expensive and costly fishing expeditions. To remedy any perceived problems with the provision of discovery as of right, Ameritech suggests that protective orders would safeguard against confidentiality breaches.[81]

21. Ameritech cites Section 628(e) to support its assertion that the Commission has the authority to award damages.[82] Ameritech asserts that the availability of damages would persuade cable programmers and operators to comply with the program access rules by providing a disincentive to engage in dilatory activities.[83] In addition, Ameritech maintains that, if anticompetitive abuses decline as a consequence of these rule changes, the Commission will conserve resources because of the reduction in Section 628 complaints.[84]

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[76]Ameritech also cites DIRECTV's observation of recent reports of a shift from satellite delivered cable programming to fiber optic delivered cable programming. *See* Ameritech Reply Comments at 8, citing DIRECTV Comments at 3.

[77]Ameritech Reply at 7-8.

[78]*Id.* at 7.

[79]*Id.* at 9.

[80]*Id.* at 11.

[81]*Id.* at 12-13.

[82]*Id.* at 14.

[83]*Id.* at 7.

[84]*Id.* at 10.

22. In its reply, Echostar agrees with Americast's comments that the proposed damages remedy would act as a deterrent to violators, and would encourage aboveboard behavior, fair settlements and competition.[85] Echostar asserts that proof of violations of the program access rules are typically in the defendant's exclusive custody. Echostar states that the Commission's current rules allow the prospective plaintiff to request some information from the defendant, but that the defendant has little incentive to comply with such requests, since there is essentially no sanction for noncompliance.[86] Echostar contends that discovery as of right can be narrowed to obtain only the material relevant to establishing a complainant's case, and that protective orders can allay confidentiality concerns.[87]

23. Bell Atlantic/NYNEX argues that the Commission should establish penalties that will stop systematic violations of the Commission's rules, such as those allegedly committed by Rainbow Programming Holdings, Inc. Bell Atlantic/NYNEX asserts that without penalties, cable operators have little incentive to conform to the law and contend that penalties would lighten the Commission's burden as well.[88]

24. OpTel asserts that the program access process is so time consuming that it denies practical relief to the complainant. OpTel argues that the relative paucity of program access cases is not due to increased competition but to complainants' unwillingness to be involved in a process that will yield the same result whether the case is settled or resolved by the Commission.[89] OpTel argues that delays in the complaint process serve the interests of the dominant MVPDs by increasing barriers to new entrants and harming new entrants' subscribers by depriving them of desired programming.[90] OpTel argues that without the threat of damages, there is no practical incentive for MVPDs to pursue a remedy through the Commission, nor is there an incentive for violators to comply with the rules.[91]

25. In its reply, WCA supports DIRECTV's proposal to expand the scope of the program access rules to terrestrial-distribution of programming. WCA also urges the Commission to use the Ameritech Petition as an opportunity to develop a record as to whether the program

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[85]Echostar Reply Comments at 6.

[86]*Id.* at 4.

[87]*Id.* at 5.

[88]Bell Atlantic/NYNEX Reply Comments at 3-4.

[89]OpTel Reply at 2.

[90]*Id.* at 3.

[91]OpTel Reply Comments at 3.

access rules should encompass the activities of non-vertically integrated programmers.[92]

26. In its Reply, Lifetime opposes efforts to expand the program access rules to cover non-vertically integrated programmers for two reasons. First, Lifetime argues that there is no need to expand the rules to a broader section of the marketplace than Congress intended. Lifetime notes that Congress did not expand the rules to non-vertically integrated programmers when, as part of the 1996 Act, it amended the section to cover common carriers. Lifetime also notes that the Commission rejected similar proposals in the *1996 Report*.[93] Second, Lifetime notes that expanded program access rules would put independent programmers at an even greater competitive disadvantage in the marketplace. Lifetime contends that being subject to program access rules would make less feasible future programming plans and ventures.[94]

27. NCTA argues that the Commission lacks the authority to extend the program access rules to programmers other than vertically-integrated, satellite delivered cable program services. NCTA asserts that Section 628 applies only to programmers in which a cable operator has an attributable interest.[95] NCTA states that the Commission examined this issue in the *1996 Report* and found no evidence to warrant action.[96] With respect to terrestrially-delivered service, NCTA notes that the Commission found no evidence that satellite programmers were switching to terrestrial delivery to evade the program access rules. NCTA also asserts that the Commission was not able to determine the effect that exclusive arrangements had on competition.[97]

28. Viacom argues that the Commission lacks evidence, either empirical or anecdotal, justifying a recommendation to Congress regarding DIRECTV's proposals. Viacom asserts that the Commission lacks the legal authority to extend the program access rules to terrestrially-delivered transmissions, or to entities that are not vertically integrated cable operators or common carriers engaging in the delivery of video services directly to subscribers.[98] Viacom also observes that the Commission has previously rejected attempts to expand the program access rules in this manner. Viacom suggests that such expansion would impede competition and constrain the entire programming industry by restricting the flow of capital to new and established programming

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[92]WCA Reply at 5.

[93]Lifetime Reply at 2-3.

[94]*Id.* at 4.

[95]NCTA Reply at 2.

[96]*Id.* at 3, citing *1996 Report*, at ¶157.

[97]NCTA Reply at 3, citing *1996 Report*, at ¶157.

[98]Viacom Reply at 2.

services.[99]

E. Small Cable Business Association Comments

29. The Small Cable Business Association ("SCBA") filed comments in response to the *Notice of Inquiry, In the Matter of Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*.[100] Because portions of SCBA's comments bear directly on the subject matter of this proceeding, we see good cause to incorporate and to address them in this proceeding.

30. SCBA believes that the Commission should modify its program access rules to preserve small cable's ability to compete. SCBA argues that small cable faces substantial challenges in purchasing programming at fair rates from large media companies and incurs substantially higher programming costs than large multiple system operators ("MSO") when measured on a per subscriber basis.[101] SCBA argues that small cable will bear the brunt of the continuing consolidation of direct broadcast satellite ("DBS") services and cable programming interests.[102] SCBA argues that a large media company that operates DBS could deny small cable operators access to its programming because such programming is not "primarily intended for direct receipt by cable operators. . . ."[103]

31. SCBA urges the Commission to recommend to Congress the need for legislation to broaden the program access rules to include programming provided to all MVPDs, rather than just cable operators.[104] SCBA urges the Commission to expand the program access rules to all satellite delivered programming and asserts that several programming groups have refused to deal with the National Cable Television Cooperative ("NCTC"), a program buying cooperative through which numerous SCBA members purchase programming.[105]

32. In addition, SCBA objects to the joint and several liability rules that some

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[99] *Id.* at 3.

[100] *See Notice of Inquiry, In the Matter of Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, CS Docket No. 97-141, 11 FCC Rcd 7413 (1997).

[101] SCBA Comments at 8.

[102] *Id.* at 10.

[103] *Id.* at 11, quoting Communications Act §705(d)(1), 47 U.S.C. §605(d)(1) (definition of satellite cable programming).

[104] *Id.* at 11-12.

[105] *Id.* at 13-15.

programmers assert relieve them of the obligation to sell programming to NCTC.[106] SCBA asserts that certain programmers have refused to deal with NCTC because it does not require joint and several liability among its members. Rather, SCBA believes that there is no need for joint and several liability from a practical or legal perspective. SCBA submits that NCTC retains significant financial reserves to ensure its ability to pay programmers.[107]

IV. DISCUSSION AND NOTICE OF PROPOSED RULEMAKING

33. Ameritech argues that the Commission should issue an NPRM seeking comment on the issues of specific time limits for the resolution of program access proceedings, discovery as of right, and the imposition of damages for violations of the Commission's program access rules. We grant Ameritech's petition to issue an NPRM with regard to each of these issues. As further discussed below, we also grant DIRECTV's request that we seek comment on expanding program access protections to cover certain satellite-delivered programming that is converted to terrestrially-delivered programming. In addition, we seek comment on SCBA's proposal insofar as it requests that the Commission eliminate the joint and several liability requirement relating to cooperative buying groups.[108]

34. We note that, as mandated by the 1996 Act, the Commission, in *Implementation of the Telecommunications Act of 1996: Amendment of Rules Governing Procedures to Be Followed When Formal Complaints Are Filed Against Common Carriers* ("*Formal Complaint Order*"), recently adopted amended rules applicable to the processing of formal complaints against common carriers.[109] Where appropriate, we will discuss the pertinent aspects of that proceeding and their applicability to the program access rules upon which we seek comment herein. To the extent an amendment adopted in the *Formal Complaint Order* is not discussed herein, we invite parties advocating the adoption of such amendment in the program access context to comment thereon.

A. Issues Upon Which We Do Not Seek Comment

35. We deny Americast's request that the Commission consider whether adjudicated

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[106] *Id.* at 12.

[107] *Id.* at 13.

[108] In addition, SCBA argues that continued consolidation of DBS services and cable programming interests such that a large media company that operates DBS could deny small cable operators access to its programming as not "primarily intended for direct receipt by cable operators. . . ." SCBA Comments at 11, quoting Communications Act §705(d)(1), 47 U.S.C. §605(d)(1) (definition of satellite cable programming). The Commission continues to monitor this issue. At this time, we do not have sufficient evidence to recommend the issuance of an NPRM on this issue.

[109] *Implementation of the Telecommunications Act of 1996: Amendment of Rules Governing Procedures to Be Followed When Formal Complaints Are Filed Against Common Carriers*, Report and Order, FCC 97-396, CC Docket No. 96-238, __ FCC Rcd __ (November 25, 1997).

anticompetitive behavior should impinge upon the fitness of a candidate in issuing or renewing a Commission license. The fitness of each candidate for issuance or renewal of a Commission license is properly analyzed on a case-by-case basis in the context of such proceeding, and, in doing so, the Commission can consider in connection with the issuance and renewal of broadcast licenses, any relevant anticompetitive behavior in accordance with its previously stated character policy and with the renewal standards set forth in Section 309 of the Communications Act.[110]

36. DIRECTV and SCBA suggest that the Commission should examine under what circumstances the program access rules should be extended to encompass acts or practices by non-vertically integrated programmers whose purpose or effect is to deny MVPDs access to programming. The Commission discussed this issue in the *1996 Report*, stating that:

> we recognize the concern raised by some parties that access to programming from non-vertically integrated programmers may inhibit competition in markets for the distribution of multichannel video programming. The evidence before us, however, is insufficient for us to make any determination concerning the effect, if any, that exclusive arrangements involving non-vertically integrated programmers may have on competition in local markets for the delivery of multichannel video programming.[111]

The Commission continues to monitor this issue. At this time, we do not have sufficient evidence of a problem to recommend the issuance of an NPRM on this issue.

B. Time Limits

37. At the outset of our discussion, we note that Ameritech's assertion that it takes the Bureau over one year to resolve program access complaints is misleading because it includes geographic uniformity cases where program access concerns were raised only tangentially.[112] In addition, in some of the proceedings used to calculate Ameritech's purported 12 month average processing time, the Bureau, at the request of counsel for complainants and defendants, stayed the matter due to ongoing settlement negotiations between the parties.[113] Consequently, the resolution times involved in these proceedings were influenced by agreement and at the request of the parties. As the Commission has stated, we encourage "resolution of program access

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[110]*See* Policy Regarding Character Qualifications in Broadcast Licensing, Report, Order and Policy Statement, 102 FCC 2d 1179 (1986); Communications Act § 309(k), 47 U.S.C. § 309(k) (broadcast license renewals).

[111]*1996 Report* at ¶157.

[112]Geographic uniformity cases concern uniform rate violations of Section 623(d) of the Communications Act.

[113]*See Consumer Satellite Systems,Inc., et. al. v. United Video Satellite Group*, 11 FCC Rcd 7428 (1996);*OpTel v. Century*, DA 96-2146 (CSB rel. Dec. 20, 1996); *British American v. Prime Ticket, et. al.*, DA 97-1495 (CSB rel. July 17, 1997).

disputes through negotiated settlements in an effort to avoid time-consuming, complex adjudication. This policy favoring private settlement and alternative dispute resolution conserves Commission resources and is thus in the public interest."[114] Moreover, if negotiated settlements and cases in which program access was raised as a tangential issue are deleted from Ameritech's calculation, the average processing time of program access cases is reduced to 8.1 months.[115] In cases involving a complainant's inability to obtain programming (refusal to sell or exclusivity complaints), the average processing time is 6.5 months.[116]

38. We seek comment on Ameritech's proposed time limits for the processing of program access complaints: 90 days after the filing of the complaint in cases not involving discovery and 150 days after the filing of the complaint in cases in which discovery is conducted. Specifically, we seek comment on appropriate time limits for the resolution of program access complaints: should the Commission adopt the 90-day and 150-day time periods proposed by Ameritech; should some other time period apply; or should the Commission not adopt time limits. In addition, we seek comment on whether the time limit, if any, should run from the time the complaint was filed, as proposed by Ameritech, or whether the time limit should run from some other point, such as the close of pleadings, or the close of discovery.

39. In addition, Ameritech's request for one universally applicable time limit may not sufficiently take into account the myriad circumstances faced by the Commission in resolving program access complaints. In a relatively simple program access complaint, such as a refusal to sell, the Commission could in most instances fully and fairly resolve such case within the time limits advocated by Ameritech.[117] In the instance of a heavily contested price discrimination proceeding, however, full and fair resolution of such a case in the time limits advocated by Ameritech becomes more problematic and may, in fact, disadvantage the complainant. In addition, Ameritech's request for specific time limits may potentially work at cross purposes to Ameritech's request for discovery as of right. On the one hand, Ameritech advocates a 90-day

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[114] *Consumer Satellite Systems, Inc., et al. v. United Video Satellite Group, Inc.*, 11 FCC Rcd 7428, 7429 (1996); *National Rural Telecommunications Cooperative v. EMI Communications Corp.*, 10 FCC Rcd 9785 (1995) (same).

[115] The 9.5 month average processing time includes a 30 day answer period and a 20 day reply period in all cases except petitions for exclusivity pursuant to Section 76.1002, which provides for a 30 day answer period and a 10 day reply period. *See* 47 C.F.R. § 76.1003 (d) and (e); 47 C.F.R. § 76.10002 (b)(5)(ii) and (iii).

[116] The 6.5 month average processing time includes both a 30 day answer period and a 20 day reply period. *See* 47 C.F.R. § 76.1003 (d) and (e).

[117] *See e.g., Cellularvision v. SportsChannel Associates,* 10 FCC Rcd 9273 (1995) (complaint filed February 22, 1995, order released August 24, 1995), *reconsideration denied*, 11 FCC Rcd 3001 (1996); *Bell Atlantic Video Services v. Rainbow Programming Holdings and Cablevision Systems Corporation*, DA 97-1452 (rel. July 11, 1997) (complaint filed March 28, 1997, order released July 11, 1997). In addition, we note that Ameritech filed its exclusivity complaint on February 29, 1996 and an order resolving Ameritech's complaint was released on July 3, 1996. *See Corporate Media Partners d/b/a Americast and Ameritech New Media, Inc. v. Continental Cablevision, Inc. and Home Box Office*, 11 FCC Rcd 7735 (1996).

time limit on resolution of program access complaints; however, Ameritech also advocates discovery practices which could significantly lengthen the time necessary to resolve program access complaints. Accordingly, we also seek comment regarding whether one universally applicable time limit should apply to all program access complaints, or whether one time limit should be established for cases involving denial of programming, with another longer time limit established for price discrimination cases, which generally involve issues of greater complexity. We also seek comment on any other reasonable distinction between program access cases which would impact the appropriate time limit, if any, for resolution of that type of program access proceeding.

40. In addition, we seek comment on Ameritech's proposal to shorten the answer (30 days to 20 days) and reply (20 days to 15 days) pleading periods applicable to program access complaints. We tentatively conclude that the pleading cycle should not be shortened.[118] We believe that the benefit of the 15 days saved by Ameritech's proposal is outweighed by the need to provide sufficient time for parties to best marshal their arguments and evidence. We believe that processing times for program access complaints will be shortened through the precise statement of issues and evidence allowed by a sufficient pleading cycle. This position is further supported by the possibility that the parties will not only be generating answers and replies during this 30-day and 20-day pleading periods, but will also be developing discovery requests and objections to discovery requests.[119]

C. Discovery

41. In promulgating the program access rules, the Commission addressed the issue of discovery, holding that:

> If the staff determines that the complaint has established a *prima facie* case, and further information is necessary to resolve the complaint . . . the staff will issue a ruling to that effect. The staff will then determine what additional information is necessary, and will develop a discovery process and timetable to resolve the dispute expeditiously. Given the nature of the programming distribution marketplace, and the wide range of sales practices, we do not believe that it would be efficient or advisable to

[118]We note that our tentative conclusion not to shorten the answer and reply periods is not in accord with the Commission's decision in the *Formal Complaint Order* to shorten the answer period by 10 days. *See Formal Complaint Order* at ¶94. We believe that our tentative conclusion is reasonable in light of the fact that the considerable notice and issue clarification inherent in the pre-filing procedures required by the *Formal Complaint Order* are not present in the program access context, where a complainant need only give the defendant 10 days notice prior to filing a program access complaint. *See Formal Complaint Order* at ¶¶36-46 (common carrier formal complaint pre-filing procedures and activities); 47 C.F.R. §76.1003(a) (program access complaint notice requirement).

[119]*See infra* ¶43, discussing a proposal to have parties file their discovery requests and objections concurrently with their answer and reply.

> mandate uniform discovery processes herein for Section 628 complaints. Instead, we will provide the staff with flexibility to assess each case and order discovery accordingly.
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> * * *
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> If the staff cannot readily identify what information is needed, it can direct the parties to submit discovery requests and supporting memoranda within a specified time period. The staff will then schedule a status conference to resolve discovery disputes and establish a timetable for compliance.[120]

After the conclusion of discovery, the staff will require the parties to submit briefs, together with proposed findings of fact, conclusions of law and proposed remedies at a specified date.[121]

42. In response to Ameritech's petition, we seek comment on several means of expediting the discovery process. In this regard, we seek comment on whether it would speed the discovery process to have complainants submit proposed discovery requests with their program access complaints and require Defendants to submit their proposed discovery requests and objections to complainants' discovery requests with their answer. Complainants would submit their objections to defendants' discovery requests with their reply.

43. We seek comment on any other change in the procedures applicable to program access complaints that would result in the necessary information disclosure in the most efficient, expeditious fashion possible. In this regard, we seek comment on whether different standards for discovery should be applied to different types of program access complaints, such as price discrimination, exclusivity, and denial of programming. We also seek comment on whether the issuance of a standardized protective order applicable to program access complaints would expedite the necessary information disclosure.[122] We have attached for comment a draft standardized protective order.[123]

44. We seek comment on Ameritech's proposal that complainants be entitled to discovery as of right particularly in light of our conclusion not to permit discovery as of right in common carrier formal complaint proceedings.[124] We tentatively conclude, however, that Ameritech has not demonstrated that the current system of Commission-controlled discovery is

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[120] *First Report and Order* 8 FCC Rcd at 3420-21.

[121] *Id.* at 3421.

[122] *See e.g., Notice of Inquiry and Notice of Proposed Rulemaking*, 11 FCC Rcd 12406 (1996) (Appendix A: Model Protective Order and Declaration).

[123] *See* Appendix A: Standard Protective Order and Declaration for Use in Section 628 Program Access Proceedings.

[124] *See Formal Complaint Order* at ¶¶109-114.

inadequate, or that discovery as of right would improve the quality or efficiency of the Commission's resolution of program access complaints. In addition, we tentatively conclude that discovery as of right is inconsistent with the 1992 Act's, and Ameritech's, goal of expeditious disposition of program access matters. Given the sensitive and proprietary nature of the information involved in program access matters, we believe that, in any event, discovery as of right would almost inevitably devolve into Commission-controlled discovery. In two previous instances, both price discrimination complaints, Commission Staff has implemented discovery.[125] Although we tentatively conclude that Commission-controlled discovery has worked adequately in these instances, and will continue to serve the public interest best, we seek comment on Ameritech's proposed discovery process.

D. Damages

45. With regard to the issue of damages, the Communications Act provides 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."[126] The Commission also has the existing authority under Title V to impose forfeitures for violations of the program access rules. In its *Order on Reconsideration*, the Commission stated that its authority "is broad enough to include any remedy the Commission reasonably deems appropriate, including damages."[127] In the *Order on Reconsideration,* the Commission declined, however, to exercise its authority to award damages at that time, but reserved the right to revisit the issue in the future.[128] We believe that our initial determination that the sanctions available to the Commission pursuant to Title V, together with the program access complaint process, would act as a sufficient check on delaying conduct by cable operators and vertically integrated programmers was an appropriate first step. We seek comment on whether forfeitures alone are an adequate deterrent. We also seek comment on whether an additional check on anticompetitive conduct such as the imposition of damages for violations of Section 628 of the Communications Act may now be appropriate and in the public interest. In this regard, we also seek comment on the appropriate interaction, if any, between damages and the Commission's existing forfeiture authority under Title V to impose forfeitures for violations of the program access rules.

46. We also seek comment regarding the correct procedures through which to implement damages or forfeitures in the context of specific program access proceedings. For example, we seek comment on the date from which damages should be levied for violations of Section 628. We seek comment on whether the operative date should be the date of the notice

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[125]*NRTC v. EMI*, 10 FCC Rcd 9785 (1995); *Consumer Satellite Systems v. CNN*, CSR 4676-P, CSR 4677-P, CSR 4678-P, (consolidated 1996).

[126]Communications Act § 628(e), 47 U.S.C. § 628(e).

[127]*Order on Reconsideration*, 10 FCC Rcd 1902, 1911 (1994).

[128]*Id.* at 1911.

of intent to file a program access complaint, as Ameritech suggests, or the date of filing of the program access complaint, or the date on which the violation first occurred. Because the complainant has the ability to file a complaint at any time after the 10 day notice requirement set forth in Section 76.1003(a) of the Commission's rules, we seek comment on whether damages should be calculated from the date upon which the complainant filed its program access complaint with the Commission. We also seek comment on the adequacy and clarity of the forfeiture procedures and guidelines set forth in Section 503 of the Communications Act, the Commission's rules,[129] and case law. In addition we seek comment on Americast's proposal that, in some cases, the most efficient manner of processing program access cases would be to bifurcate the program access violation determination from the damages or forfeiture determination.[130] We seek comment on whether Commission Staff should be given the discretion to bifurcate the violation and sanction portions of program access proceedings and whether doing so would more efficiently process such cases.

47. We note that our forfeiture guidelines establish a baseline forfeiture of $7,500.00 per day for violation of the program access rules and seek comment on this amount.[131] We also seek comment on the calculation of damages, if assessed. Commenters should consider whether the Commission should determine damages on a case-by-case basis, or whether there should be a standard calculation for damages in program access matters. Those arguing that damages should be based on a standard calculation should comment on how the Commission should determine such standard calculation. We also seek comment on the basis on which damages, if assessed, should be calculated. For example, should damages be based on lost profit, the difference between the rate that the complainant was charged and the rate the complainant should have been charged, or some other legitimate basis.

48. The *Formal Complaint Order* adopts the requirement that a complainant seeking damages must file in its complaint or supplemental complaint either a detailed computation of damages or a detailed explanation of why such a computation is not possible at the time of filing.[132] We seek comment on whether a similar requirement should be adopted as part of the

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[129]47 C.F.R. §1.80(b)(4) Note.

[130]The Commission concluded in the *Formal Complaint Order* that it would exercise discretion where appropriate to bifurcate liability and damages issues on its own motion. *See Formal Complaint Order* at ¶170.

[131]*See The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, CI Docket No. 95-6, Appendix A, __ FCC Rcd __ (rel. July 28, 1997) (Note: Guidelines for Assessing Forfeitures, Section I. Base Amounts for Section 503 Forfeitures).

[132]*See Formal Complaint Order* at ¶178. The *Formal Complaint Order* requires that all complaints or supplemental complaints contain either:

a) A detailed computation of damages, including supporting documentation and materials; or

program access pleading process. Commenters advocating the adoption of such a requirement should address whether the explanation standards adopted in the *Formal Complaint Order* should be adopted, or whether some other explanation standard should apply.

49. Finally, Americast requests that the Commission consider whether it has the authority to impose punitive damages in those limited and egregious cases of willful price discrimination or denial of programming. As stated in the *Order on Reconsideration*, "[b]ecause the statute does not limit the Commission's authority to determine what is an appropriate remedy, and damages are clearly a form of remedy, the plain language of this part of Section 628(e) is consistent with a finding that the Commission has authority to afford relief in the form of damages."[133] Americast asserts that this analysis, in its broadest reading, could apply to the imposition of punitive damages in egregious cases.[134] We observe, however, that Americast has not presented persuasive evidence suggesting that punitive damages should be imposed in program access cases. Accordingly, we tentatively conclude that punitive damages should not be imposed in program access cases. We seek comment on this tentative conclusion.

E. Terrestrial-Delivery of Programming

50. Section 628 of the Communications Act is applicable to cable operators, satellite cable programming vendors in which a cable operator has an attributable interest, and satellite broadcast programming vendors and generally applies to the delivery of "satellite cable programming and satellite broadcast programming."[135] DIRECTV argues that the Commission

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b) An explanation of:

(i) What information not in the possession of the complaining party is necessary to develop a detailed computation of damages;

(ii) Why such information is unavailable to the complaining party;

(iii) The factual basis the complainant has for believing that such evidence of damages exists; and

(iv) A detailed outline of the methodology that would be used to create a computation of damages with such evidence.

Id.

[133]*Order on Reconsideration,* 10 FCC Rcd at 1910.

[134]We note that the *Just Aaron* decision cited by HBO for the proposition that the Commission lacks the general authority to impose punitive damages seems inapposite. *See Just Aaron v. GTE California, Inc.*, 10 FCC Rcd 11519, 11520 (CCB 1995). The CCB's decision in *Just Aaron* does not relate to the Commission's damages authority pursuant to Section 628 of the Communications Act.

[135]Communications Act § 628(a), 47 U.S.C. § 548(a).

should consider whether the program access rules should be extended to cover terrestrially-delivered programming that may not technically fall within the statutory definitions of "satellite cable programming" or "satellite broadcast programming." As the Commission stated in the *1996 Report*:

> We recognize that improved technology and lower costs are improving the efficiency of terrestrial distribution of programming, particularly over fiber optic facilities. As a result, it appears that it may become possible for a vertically-integrated programmer to switch from satellite delivery to terrestrial delivery for the purpose of evading the Commission's rules concerning access to programming. If a trend of such conduct were to occur, we would have to consider an appropriate response to ensure continued access to programming.[136]

In the *1996 Report*, the Commission also cited *In Re Implementation of Section 302 of the Telecommunications Act of 1996 -- Open Video Systems*, Second Report and Order ("*Second Report and Order*"), as holding "we do not foreclose a challenge under Section 628(b) to conduct that involves moving satellite delivered programming to terrestrial distribution in order to evade application of the program access rules and having to deal with competing MVPDs."[137]

51. On its face, Section 628 does not preclude a programmer from altering its distribution method from satellite-distribution to terrestrial-distribution. DirectTV seems to suggest, however, that it contravenes the spirit, if not the letter, of Section 628 if a vertically-integrated programmer moves from satellite-delivered programming to terrestrial-delivered programming for the purpose of evading the program access requirements. Such an action could arguably constitute an "unfair method[ ] of competition or unfair or deceptive act[ ] or practice[ ], the purpose or effect of which is to hinder significantly or to prevent any multichannel video programming distributor from providing satellite cable programming or satellite broadcast programming to subscribers or consumers."[138] We seek comment on appropriate ways to address such situations. As a threshold matter, we specifically ask commenters to address the statutory basis for any suggested remedial action, and whether legislation is needed. To the extent that commenters contend that Commission action is appropriate, we seek comment on what types of evidence a complainant may marshal to prevail on a claim against a programmer that has moved satellite-delivered programming to terrestrial delivery to evade the program access requirements. We also seek comment on whether programming that has been moved from satellite to terrestrial delivery can or should be subject to program access requirements based on the effect, rather than the purpose, of the programmer's action.

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[136] *1996 Report* at ¶154.

[137] *See Second Report and Order,* 11 FCC Rcd at 18325, n. 451.

[138] Communications Act §628(b), 47 U.S.C. §548(b).