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Federal Communications Commission

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WASHINGTON, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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

COMMENTS OF TIME WARNER CABLE

Time Warner Cable ("Time Warner"), a division of Time Warner Entertainment Company, L.P., by its attorneys, hereby submits its comments in response to the Commission's Notice of Proposed Rulemaking ("NPRM") in the above-referenced proceeding.

INTRODUCTION

The instant NPRM seeks comment on several proposals to amend the Commission's rules implementing the "program access" provisions of the Communications Act.¹ These proposals include: (i) whether to adopt specific decision deadlines for resolving program access complaints; (ii) whether to permit discovery as a matter of right in all program access cases; (iii) whether to allow complainants to recover damages or otherwise subject cable operators and/or programmers to monetary penalties for violation of the program access rules; (iv) whether to apply program access requirements where a vertically integrated programmer shifts from the use of satellites for wholesale distribution to a terrestrial mode of

¹Communications Act, § 628; 47 U.S.C. § 548.

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delivery; and (v) whether to amend the existing rules regarding the provision of financial assurances by cooperative buying groups.

The NPRM has its origins in a Petition for Rulemaking filed with the Commission last year by Ameritech New Media, Inc. which focused on the issues of mandated decision deadlines, expanded discovery, and the imposition of damages awards. Time Warner filed an opposition to the Ameritech rulemaking petition addressing each of these proposals and, in the paragraphs that follow, will expand upon and update that opposition. In addition, Time Warner will briefly address the question of whether program access requirements can be applied to terrestrially-delivered programming services.²

Before turning to these specific issues, however, Time Warner wishes to reiterate its general opposition to the adoption of any revisions to the existing program access rules. The underlying premise of the Ameritech petition (and of the comments supporting and/or expanding on the proposals in that petition) is that the current rules have been ineffective in ensuring that vertically-integrated programming services are available on a non-discriminatory basis. Yet, there is absolutely no evidence to support this premise. While there are now 68 vertically-integrated satellite delivered programming networks, only a relative handful have ever been the subject of program access complaints (and, over the past four and a half years, only three such complaints have been granted).³ Moreover, in its

²Time Warner will not address the buying group issue in these comments; however, we reserve the right to do so in reply comments.

³A summary of all of the program access complaints filed with the Commission since the implementation of Section 628 is appended to Chairman Kennard's recent response to an inquiry from the Chairman of the House Subcommittee on Telecommunications, Trade, and
(continued...)

most recent annual report regarding the status of competition in the video marketplace, the Commission identified what it believes to be the principal impediments to the growth of competition to incumbent cable operators. These included the unavailability of local broadcast signals from direct-to-home satellite services, physical obstructions to over-the-air reception, and limited MMDS channel capacity.⁴ Notably, the Commission did not cite the denial of access to vertically-integrated program networks as a current barrier to competition. To the contrary, the Commission expressly acknowledged that the program access rules have been credited as a "necessary factor" in the development of competitive alternatives to cable and pointed out that one of the features of DBS that is most appealing to subscribers is the "large number of channels and programming variety, especially sports and movies" available to them.⁵ In short, it is evident that competing MVPDs are able to obtain all the programming they need. Given the Commission's own findings, there simply is no reason to "fix" or otherwise expand the current program access rules.

DISCUSSION

I. Time Limits For Resolving Program Access Complaints/Expanded Discovery/Damages.

The NPRM seeks comment on whether, as proposed by Ameritech, (i) the Commission should impose on itself specific time deadlines (90 days in cases not involving

³(...continued)

Consumer Protection. See letter from William E. Kennard, to The Honorable W.S. (Billy) Tauzin (January 23, 1998). Chairman Kennard's letter also provides information regarding the number of vertically-integrated nationally delivered satellite program networks.

⁴Annual Assessment of the Status of Competition in the Delivery of Video Programming, CS Docket No. 97-141, FCC 97-423 (rel. Jan. 13, 1998) at ¶¶ 57, 72 and n.272.

⁵Id. at n.744 and ¶ 56.

discovery and 150 days in cases involving discovery) for resolving program access complaints; (ii) discovery should be permitted as a matter of right in program access cases; and (iii) violations of the program access rules should be remedied through the awarding of damages. Time Warner addressed each of these proposals in its opposition to Ameritech's rulemaking petition.⁶ As demonstrated therein, amending the Commission's rules to establish mandatory decision deadlines, permit discovery as a matter of right, or allow the awarding of damages is unnecessary and would be unwise.

Specifically, in its opposition to Ameritech's rulemaking petition, Time Warner reviewed the reported program access cases and determined that there was no pattern of undue delay, a conclusion echoed by the Commission's own analysis.⁷ Recent decisions further confirm that the length of time needed to resolve a program access case is influenced primarily by the voluntary actions of the parties.⁸ Moreover, it is worth noting again that Congress, in enacting the Telecommunications Act of 1996, established statutory decision deadlines for the resolution of market modification and cable rate complaint cases.⁹ The fact

⁶A copy of Time Warner's opposition to Ameritech's rulemaking petition is attached hereto and incorporated by reference.

⁷NPRM, ¶ 37.

⁸For example, of the four program access complaints resolved by the Cable Services Bureau in the latter half of 1997, the proceeding that took the longest to decide was delayed at the request of the parties in order to facilitate its eventual settlement. See British American Communications, Inc. v. Prime Ticket Network, 12 FCC Rcd 10284 (CSB, 1997). In contrast, Bell Atlantic Video Services Company's complaint against Rainbow Programming Holdings was resolved, in favor of Bell Atlantic, less than four months after the complaint was filed. Bell Atlantic Video Services Company v. Rainbow Programming Holdings, Inc., 12 FCC Rcd 9892 (CSB 1997).

⁹Telecommunications Act of 1996, Section 301(b), (d).

that similar deadlines were not established for program access cases strongly suggests that Congress does not share Ameritech's perception that the Commission has been dragging its feet in dealing with program access cases.

Apart from the absence of any need to "speed up" the resolution of program access cases, the imposition of mandated decision deadlines would simply be unwise. Adherence to such deadlines not only would impair the Commission's ability to meet its other, statutorily-mandated deadlines, but also would prevent the Commission from giving program access cases the full and thorough consideration that they may require. Program access cases vary widely in their complexity; while some are fairly straightforward, others can and do raise difficult questions on issues such as contract interpretation or ownership attribution. Moreover, the statutory program access provisions recognize various affirmative defenses which respondents must be given a full opportunity to present. Under the circumstances, the desire for expedition must be tempered by the need of both the Commission and the parties to address all of the issues raised. The current rules strike an appropriate balance between expedition and due process and should not be revised.

The need to maintain an appropriate balance between expedition and due process also counsels against the adoption of rules allowing discovery as a matter of right in program access cases. As the Commission has recognized, the sensitive and proprietary nature of the information at issue in program access cases will invariably lead to disputes over the scope of discovery. NPRM at ¶ 44. Such disputes can best be minimized by the current rules, which allow for discovery on a case-by-case basis as deemed necessary by the Commission staff

reviewing the complaint.¹⁰ Given the absence of any evidence that the current rules are preventing discovery from taking place where it would otherwise be appropriate, Time Warner strongly supports the Commission's tentative decision not to permit discovery as a matter of right in program access cases.

Finally, in response to Ameritech's proposal that the Commission amend its rules to allow for damages awards in program access cases, the NPRM seeks comment on the issue of whether forfeitures alone provide an adequate deterrent to program access violations or whether the public interest would be served by the imposition of damages as well. Again, Time Warner believes that Ameritech's proposal is a solution in search of a problem. Assuming *arguendo* that the Commission has the statutory authority to award damages in program access cases (an assumption that Time Warner has disputed in the past and continues to dispute here), there is simply no public policy basis for doing so.

In particular, there is no evidence that the absence of a damages remedy in the current rules is encouraging program access violations. The record demonstrates that program access complaints are rarely brought to the Commission and are even more rarely found to have merit; however, if the Commission provides for damages awards, there is a substantial risk that the result will be a deluge of frivolous program access complaints brought simply for the purpose of extorting settlement monies from deep-pocketed cable operators and/or programming providers. Moreover, amending the program access rules to create a damages remedy also would upset the delicate balance built into Section 628.

¹⁰See 47 C.F.R. § 76.1003(g). See also First Report and Order, 8 FCC Rcd at 3389, 3420-21.

Section 628 is intended to provide broad, prophylactic relief without the burdens (and delay) inherent in full-blown commercial litigation. Providing for an award of damages would require both the Commission and the parties to engage in elaborate and contentious fact-finding in order to demonstrate and quantify a measure of actual harm.¹¹ As a practical matter, such a process would likely drag out program access disputes indefinitely, resulting in the kinds of burdens and delays that Congress sought to avoid. In light of the above, it is evident that the existing complaint process is sufficient to deter the risk of anticompetitive behavior and quickly resolve disputes without additional remedies.

II. Terrestrial Delivery Of Programming.

In comments filed in response to the Ameritech rulemaking petition, DirecTV expressed concern that because Section 628 refers only to satellite-delivered programming, a vertically-integrated programmer could seek to escape the program access rules by shifting wholesale distribution of its service from satellite to terrestrial delivery. The NPRM acknowledges that Section 628 does not expressly preclude a programmer from altering its distribution method but nonetheless seeks comment on whether there is a statutory basis for the application of the program access requirements to programming that has been moved from satellite distribution to terrestrial distribution.

At the outset, it must be emphasized that the issue raised by the NPRM relates only to situations in which a vertically integrated programmer that has been offering a satellite-

¹¹For example, with a damages remedy, the program access rules would have to contain a procedure for the Commission to accurately evaluate whether a complainant had been actually harmed by losing or been unable to gain subscribers, whether and to what extent such loss was caused by the defendant's actions, and most importantly to quantify the economic value of such a loss.

delivered service (and thus is subject to the program access rules) changes its mode of delivery to a terrestrial-based technology. There is and can be no issue regarding program services that are distributed terrestrially *ab initio*. Such services, which include both local origination channels that are offered by one or more systems under common ownership as well as regional services that are offered to multiple systems within a geographic region, are completely beyond the Commission's statutory jurisdiction under the program access rules.

As for the status under the program access rules of vertically-integrated programming that is moved from satellite distribution to terrestrial delivery, Time Warner submits that there is no need for the Commission to attempt to articulate rules of general applicability at this time. There is currently pending before the Commission a program access complaint involving an alleged satellite to terrestrial shift of programming. Chairman Kennard's letter to Chairman Tauzin indicated that the Commission lacks direct information regarding any other situation involving the shift of programming from satellite to terrestrial distribution and that, in the Commission's view, concerns about such shifts "relate more to potential future problems than to problems that may have already occurred."¹² Under the circumstances, the prudent course is for the Commission to resolve the case before it on the basis of the legal and factual arguments presented therein, rather than engage in an abstract, and essentially unnecessary rulemaking exercise.

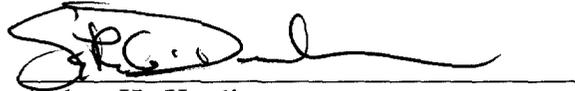
¹²Kennard letter, *supra* at pages 5-6.

CONCLUSION

It is an undeniable (and irreversible) fact that the cable television industry is operating in an increasingly competitive environment. And it is an equally undeniable (and irreversible) fact that the program access provisions of the Communications Act, and the Commission's rules implementing those provisions, have played an essential role in the creation of this increasingly competitive environment. The proposed changes in the Commission's rules described in the NPRM and discussed above would upset a careful balance between expeditious resolution of program access claims and due process. In the absence of any demonstrated need for a change in its rules, the Commission should reject proposals for mandated decision deadlines, discovery as a matter of right, and damages awards. In addition, the Commission should resist suggestions that it offer general guidance in this proceeding regarding the applicability of the program access rules to vertically-integrated programming services that are shifted from satellite distribution. Instead, the Commission should leave the resolution of that issue to case-by-case adjudication if and when actual cases present themselves.

Respectfully submitted,

TIME WARNER CABLE

A handwritten signature in black ink, appearing to read 'A.H. Harding', written over a horizontal line.

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