

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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

COMMENTS OF BELL ATLANTIC

Of Counsel
Edward D. Young III
Michael E. Glover
Leslie A. Vial

Betsy L. Roe
1320 North Court House Road, 8th fl.
Arlington, VA 22201
(703) 974-6348

Attorney for the
Bell Atlantic Telephone Companies

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Section 628 of the Communications Act of 1934, which prohibits unfair or discriminatory practices by vertically-integrated programmers in the sale of satellite cable and satellite broadcast programming, was intended to facilitate competition in the multichannel video programming market. NPRM, FCC 97-415, ¶ 1 (rel. Dec. 18, 1997). Six years after enactment of Section 628, however, such competition has failed to materialize on a broad scale,² in part due to problems new entrants face in obtaining access to programming. Access to popular national or regional programming controlled

¹ The Bell Atlantic telephone companies (“Bell Atlantic”) are Bell Atlantic-Delaware, Inc., Bell Atlantic-Maryland, Inc., Bell Atlantic-New Jersey, Inc., Bell Atlantic-Pennsylvania, Inc., Bell Atlantic-Virginia, Inc., Bell Atlantic-Washington, D.C. , Inc., Bell Atlantic-West Virginia, Inc., New York Telephone Company and New England Telephone and Telegraph Company.

² See Fourth Annual Report to Congress, *Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming* (rel. Jan. 13, 1998), ¶¶ 7-8.

by incumbent cable operators is critical to the success of new entrants, since consumers are unlikely to switch to services that do not carry their favorite programs. The Commission's current rules addressing program access, however, give vertically-integrated programmers little incentive to resolve program access disputes expeditiously. To the contrary, the absence of financial penalties and a clear, short timeline for resolution of such disputes give defendants whose business interests lie in discriminating against new multichannel video distributors a strong incentive to delay the day of reckoning as long as possible, because there is little downside to doing so.

The Commission should put real teeth in the program access rules by granting Ameritech's petition, with certain modifications described below, and by taking swift and decisive action against those who seek to evade the Act's intent by switching from satellite to non-satellite-based technologies to deliver programming.

I. Program Access Complaints Should be Subject to the Same Rules the Commission Recently Adopted for Other Formal Complaints.

The Commission recently adopted new rules to expedite adjudication of formal complaints filed in common carrier proceedings and to comply with the new statutory deadlines imposed by the Telecommunications Act of 1996 for resolution of such complaints. The Commission concluded such amended rules were necessary "to ensure that complaint proceedings are promptly and fairly resolved and, more generally, to promote the Act's goal of full and fair competition in all telecommunications markets." Similar concerns – ensuring prompt and fair resolution of program access complaints and promoting full and fair competition in the cable and video programming delivery market – merit granting Ameritech's petition.

A. The Commission Should Adopt the Same Timelines for Resolution of Program Access Complaints and Other Formal Complaints.

In its Formal Complaint Order, the Commission established a 90-day deadline for resolving formal common carrier complaints (other than those under Section 255 of the Act) involving no discovery and a 150-day deadline for resolving complaints requiring discovery.³ The Commission should adopt the same deadlines for resolving program access complaints, in order to ensure compliance with the Act's requirement for expedited review of such complaints.⁴ Deadlines guaranteeing prompt resolution of program access complaints will also minimize the competitive harm new entrants suffer each day that they are unable to provide their customers with desirable programming or are paying discriminatory rates for it.

There is nothing inherently different or more complex about the issues to be resolved in program access complaints than in formal common carrier complaints that would merit different timelines for resolution. Indeed, common carrier rate complaints, which often turn on highly technical network architecture issues, arguably raise more complicated issues in many cases than those of a refusal to deal or exclusive contract case under the program access rules. As the Commission has observed, “[U]niform procedures and pleading requirements will promote efficiency in the Commission’s administration of complaints and will minimize confusion among the parties.”⁵ The

³ Under the Commission’s Order, the time limit runs from the time the complaint is filed. (FCC 97-396 (rel. Nov. 25, 1997)).

⁴ See 47 U.S.C. 548(f)(1).

⁵ Formal Complaint Order, ¶ 29.

Commission should therefore ease administrative burdens for staff and litigants alike by adopting the same rules for program access complaints as for other formal complaint proceedings before the Commission.

In the NPRM initiating this proceeding, the Commission tentatively concluded that it should not grant Ameritech's proposal to shorten the answer pleading period to 20 days and the reply pleading period to 15 days, consistent with the Formal Complaint Order. NPRM ¶ 40. The Commission noted that the "considerable notice and issue clarification inherent in the pre-filing procedures required by the Format Complaint Order are not present in the program access context," citing 47 C.F.R. § 76.1003(a).⁶ The Commission required such pre-filing procedures for formal complaints to aid the Commission and litigants in clarifying in advance the issues to be resolved (and perhaps even facilitating settlement of some issues). Formal Complaint Order, ¶ 42. If the Commission were to adopt the same pre-filing procedures for program access complaints, it would facilitate clarification and resolution of issues raised in these proceedings, and permit the Commission to conform the pleading cycles for both formal common carrier and program access complaints.

B. The Commission Should Permit Discovery as of Right in Price Discrimination Cases and Require Filing of Certain Documents In Refusal to Deal or Exclusive Contract Cases.

In its Formal Complaint Order, the Commission decided not to permit discovery as of right in formal complaint proceedings. Instead, the Commission required litigants to submit certain facts and documents in support of their claims with the

⁶ NPRM, ¶ 40, n. 118.

complaint and answer, permitted them to file a limited number of written interrogatories, and gave Commission staff greater control over the discovery process. All of these practices should also be adopted for program access complaints.

Different discovery standards, however, are appropriate for different types of program access cases. With regard to refusal to deal cases, the complainant typically has tried to negotiate terms for access to programming and alleges that the defendant has failed to respond in a meaningful manner to those overtures. In such cases, the complainant should be required to submit with its complaint written correspondence or documents relating to its request for negotiation and responses from the defendant, if any. The defendant should be required to submit with its answer any additional correspondence or documents relevant to its defense, and a full explanation of why it is justified in not coming to terms with complainant.

With regard to cases alleging that defendants are relying on a contract granting exclusive carriage rights to another party as grounds for refusing to give the complainant access to programming, the defendant should be required to submit with its answer the complete contract (and any modifications, correspondence, or other documents) upon which it relies in claiming exclusivity.

In the third type of program access case – those alleging pricing discrimination – discovery of right is often critical to permit a complainant to prove its case. Knowledge of rates charged by the program access defendant to other multichannel video programming distributors (MVPDs) is information that a complainant rarely can obtain absent discovery, because vertically-integrated programmers are not required to disclose the terms of their contracts publicly. As a result, a new entrant may suspect that

the rates it is being required to pay are higher than market rates but will often have no way to prove that claim unless it reviews the contracts under which such programming is provided to other MVPDs. Consequently, the Commission should permit complaints in price discrimination cases to be based on information and belief, but grant discovery as of right to permit complainants to review all relevant contracts under appropriate non-disclosure agreements.

C. The Commission Should Award Damages for Section 628 Violations and Bifurcate the Violation and Sanction Portions of the Proceedings.

The Commission has appropriately concluded that it has authority under Section 628(e) to award damages to complainants in program access cases,⁷ but has chosen, for policy reasons, simply to order violators of the program access rules to comply with the law prospectively, rather than to impose economic penalties. As Ameritech details in its petition, in the absence of such economic sanctions, “it is more profitable for cable operators and programming vendors to violate the law than to obey it.” Ameritech Petition at 21.

The Commission, however, promised to revisit the issue of economic penalties if it were brought to the Commission’s attention that “the current processes are not working.”⁸ They are not. For example, in July 1997, the Commission’s Cable Services Bureau determined that Rainbow Media Holdings, Inc. (Rainbow) had

⁷ Order on Reconsideration, *Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Development of Competition and Diversity in Video Programming Distribution and Carriage*, 10 FCC Rcd 1902, 1911 (1994) (“Reconsideration Order”).

⁸ *Id.*

unlawfully refused to sell Sportschannel New York to Bell Atlantic Video Services in Dover Township, New Jersey (the "Dover Township Order").⁹ By that time, Rainbow had already delayed BVS' access to sports programming for almost a year, placing BVS at a competitive disadvantage to the incumbent cable provider that carried that programming in competing for subscribers. As Bell Atlantic has previously detailed, Rainbow had already been accused in numerous other complaints of unlawful refusals to sell programming to, or discrimination against, new entrants.¹⁰ Because Rainbow faced neither forfeitures nor damage awards, it came out ahead, from an economic and competitive perspective, even if it was eventually found guilty of violating the program access rules. It is little wonder that Rainbow evidently decided that disregarding the law made good business sense. The Commission should give vertically-integrated programmers the correct incentives to comply with, rather than disregard, the law by imposing damage awards for violations of Section 628.

Forfeiture penalties alone, moreover, would be an inadequate deterrent, because they do not reflect the full economic and competitive damage the unlawful behavior inflicts on its competitors. Only an award of damages to the competitor would offset the economic and competitive gains to defendant of engaging in the unlawful behavior. In fact, without access to critical programming, a new entrant may not even be able to obtain sufficient subscribers to enter the market successfully. For these reasons,

⁹ Memorandum Opinion and Order, *Bell Atlantic Video Services Co. v. Rainbow Programming Holdings, Inc.*, 12 FCC Rcd 9892 (1997).

¹⁰ See Reply Comments of Bell Atlantic and NYNEX, Petition for Rulemaking to Amend 47 C.F.R. § 76.1003 - Procedures for Adjudicating Program Access Complaints, RM No. 9097 (filed July 17, 1997) at 2.

the Commission should amend its program access rules to award damages to complainants whose complaints are found meritorious. Bell Atlantic urges the Commission not to adopt a standard damage award but to calculate appropriate damages on a case-by-case basis. Given the broad variety of facts and issues underlying program access complaints, it is difficult to see how a one-size-fits-all damage award would be appropriate. For example, in a rate discrimination case, the appropriate award may be the difference between the rate the complainant was charged and the rate the complainant should have been charged. On the other hand, in a refusal to deal case, the appropriate award may involve more complicated calculations of lost profits. In any event, the Commission as yet has no experience awarding damages for program access complaints. If the Commission were to decide to calculate a standard damage award, which it should not do, it should wait until it has sufficient case-by-case experience with damage awards in these cases to understand the parameters and issues involved in determining a standard award. But it would be far better for the Commission to adopt for program access complaints its Formal Complaint Order requirement that a complainant seeking damages file in its complaint a detailed computation of those damages or a detailed explanation why such a computation is not possible at the time of filing. Formal Complaint Order ¶178.

The Commission should not adopt a blanket rule that punitive damages will not be awarded in program access cases. As the Commission has observed, the Act places no limit on the Commission's authority to determine an appropriate remedy for

program access violations,¹¹ and certainly does not expressly forbid awards of punitive damages. The Commission should affirm its authority to award punitive damages, in case a sufficiently egregious violation merits imposition of such sanctions.

Finally, the Commission should bifurcate the merits and damages portions of program access proceedings. Bifurcation would expedite and streamline the complaint process by eliminating any need for discovery concerning the damages computation until and unless the Commission determined that a violation of the program access rules had in fact occurred.¹²

II. Moving Satellite-Delivered Programming to Terrestrial Delivery In Order to Evade The Program Access Rules Violates Section 628.

Bell Atlantic agrees with DirecTV that, if a vertically-integrated programmer delivering programming by satellite moves that programming to a terrestrial delivery system (such as by microwave) in order to evade the program access requirements, such action itself violates Section 628. Although Section 628 does not prohibit a programmer from changing distribution technologies, if the action is taken for the purpose of depriving competitors of the protections of the program access rules, it

¹¹ Reconsideration Order, 10 FCC Rcd at 1910. As the Commission observed, HBO's claim that *Just Aaron v. GTE California, Inc.*, 10 FCC Rcd 11519, 11520 (CCB 1995) establishes that the Commission may not award punitive damages is simply wrong. That case did not address the issue of the scope of the Commission's remedial authority under Section 628(b) of the Communications Act.

¹² The Commission has discretion to bifurcate liability and damages issues on its own motion pursuant to Section 208(a) of the Act. Formal Complaint Order ¶ 179. In that Order, the Commission noted that, "in cases where no liability has been found, significant resources will have been saved [through bifurcation] as a damages complaint will not have been necessary." *Id.* at ¶ 180. The Commission encouraged voluntary bifurcation, rather than imposing mandatory bifurcation, for formal complaints, however, in order to comply with the statutory deadlines applicable to such complaints.

would appear to 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 or broadcast programming to subscribers or consumers.”¹³ In fact, as the NPRM notes, the Commission itself has explicitly stated that it would “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.”¹⁴

This is not a mere fanciful concern. In April 1997, for example, the *New York Times* reported that Cablevision was “moving to circumvent a Federal requirement to share sports programming delivered by satellite with rivals in New York City. The law does not apply to programming services delivered by cable land lines, so the company is busily laying fiber-optic cables so it can switch its method of transmission.”¹⁵ In short, Cablevision is moving its most valuable and popular regional sports programming channels in New York from satellite-based delivery to terrestrially-based delivery for the express purpose and with the express effect of preventing competing multichannel video programming distributors from providing that programming to their subscribers. As

¹³ 47 U.S.C. § 548(b).

¹⁴ NPRM ¶ 50, citing Second Report and Order, *In Re Implementation of Section 302 of the Telecommunications Act of 1996 – Open Video System*, 11 FCC Rcd 18223, 18325, n. 451; see also Third Annual Report, *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 12 FCC Rcd 4358, 4435 ¶ 154.

such, its actions are proscribed by Section 628. Of course, Section 628 would still apply to non-satellite delivered programming if that same programming is distributed to other MVPDs by satellite. Vertically-integrated programmers must abide by the access requirements of Section 628 with regard to any programming that is delivered by satellite to anyone.

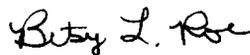
The legislative history of the 1992 Cable Act could fairly be read to suggest that any nationally or regionally distributed programming should be covered by Section 628, even if it has never been offered by satellite. According to the Senate report, the reach of Section 628 was limited “to national and regional cable programmers, that is, programmers which license for distribution to more than one cable community...” S.Rep. No. 102-92. at 28 (1991). At the time, most national and even regional programming was delivered by satellite. The advances in technology that have made terrestrial delivery systems a viable alternative have simply overtaken the specific statutory language, but not Congressional intent.

¹⁵ See Geraldine Fabrikant, “As Wall Street Groans, a Cable Dynasty Grows,” *New York Times*, Apr. 27, 1997, Sect. 3, p. 1; see also “Cablevision Reaches for Sports Exclusivity,” *Multichannel News*, Feb. 10, 1997, p. 1 .

Conclusion

The Commission should adopt the time limits for program access complaints suggested by Ameritech, permit reasonable discovery of right at the election of the complainant in price discrimination cases under Section 628, and provide explicitly for the award of damages for all Section 628 violations. The Commission should also sanction vertically-integrated programmers who move their programming from satellite delivery to terrestrial delivery in order to evade the program access rules.

Respectfully submitted,



Betsy L. Roe
1320 North Court House Road, 8th fl.
Arlington, VA 22201
(703) 974-6348

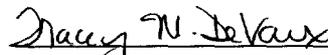
Of Counsel
Edward D. Young III
Michael E. Glover
Leslie A. Vial

Attorney for the
Bell Atlantic Telephone Companies

Dated: February 2, 1998

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of February, 1998 a copy of "Comments of Bell Atlantic" was served on the parties on the attached list.



Tracey M. DeVaux

* Via hand delivery.

Deborah Klein*
Cable Services Bureau
Federal Communications Commission
2033 M Street, NW
7th Floor
Washington, DC 20554

ITS, Inc.*
1919 M Street, NW
Room 246
Washington, DC 20554

(Hard copy and diskette version)