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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 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)	
)	
Petition for Rulemaking of Ameritech New Media, Inc.)	
Regarding Development of Competition and Diversity)	RM No. 9097
in Video Programming Distribution and Carriage)	

COMMENTS OF GTE

GTE Service Corporation and its affiliated
domestic telecommunications and video
companies

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TABLE OF CONTENTS

	<u>PAGE</u>
<u>SUMMARY</u>	ii
I. The Commission's Existing Program Access Rules Have Not Fostered the Competitive Environment Necessary to Challenge the Monopoly Position of Entrenched Incumbent Cable Operators.....	2
II. Revision of the Program Access Rules to Incorporate a Prudent Expedited Process is Appropriate.....	7
III. Absent a Right to Conduct Necessary Discovery, New Entrants Will Be Substantially Hindered in Enforcing Their Rights.....	9
IV. The Imposition of Economic Damages Is A Necessary Deterrent To Control Improper Actions By Cable-Affiliated Programming Vendors.....	10
V. Conclusion.	14

SUMMARY

GTE believes that the Commission's existing program access rules have not fostered the competitive environment necessary to challenge the monopoly position of entrenched incumbent cable operators. A major reason is that new entrants have not had a fair opportunity to obtain and market compelling programming which is available to incumbent operators. If competitive in-roads are to be made, then the Commission's program access rules must be revised.

GTE suggests that it is appropriate that the Commission revise the current program access rules to incorporate a prudent expedited process. Section 628 requires that the Commission provide for the expedited review of complaints by establishing a fifty-day pleading cycle. While the parties may be required therefore to act with some expedition, there is no similar requirement that the Commission resolve the complaint in a timely fashion. Thus, the imposition of an expedited process on the parties does little to address the problem of delay. The Commission must impose upon itself a 45-day time limit within which to resolve program access complaints once submitted.

Absent a right to conduct necessary discovery, new entrants will be substantially hindered in enforcing their rights. GTE believes that program access complaints present a unique circumstance which absolutely necessitates a right to discovery. Absent a complainant's right to conduct necessary discovery, such programming vendors have utterly no incentive to cooperate with the adjudicatory process.

The imposition of economic damages is a necessary deterrent to control improper actions by cable-affiliated programming vendors. The Commission has

authority under Title V to impose forfeitures for violations of its program access rules. However, the Commission has declined to assess authorized damages to date.

GTE believes that the Commission's existing (\$7500/day) forfeiture penalty is inadequate. . Because of this inadequacy, incumbent operators and their affiliated programming vendors have every incentive to thwart the competitive entry of a new entrant whether through denial or delay of programming. GTE suggests that larger more economically onerous forfeiture penalties be both established and applied by the Commission.

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GTE Service Corporation, on behalf of its affiliated domestic telecommunications and video companies,¹ respectfully submits these Comments in response to the *Commission's Memorandum Opinion and Order and Notice of Proposed Rulemaking ("Notice")* in the above-captioned docket, released December 18, 1997. As a provider of both competitive wireline and wireless video services,² GTE considers the Commission's concern regarding the effectiveness of its program access rules to be well-placed. Indeed, GTE believes that overwhelming evidence already submitted to

¹ GTE Alaska, Incorporated, GTE Arkansas Incorporated, GTE California Incorporated, GTE Florida Incorporated, GTE Hawaiian Telephone Company Incorporated, The Micronesian Telecommunications Corporation, GTE Midwest Incorporated, GTE North Incorporated, GTE Northwest Incorporated, GTE South Incorporated, GTE Southwest Incorporated, Contel of Minnesota, Inc., Contel of the South, Inc., GTE Communications Corporation, GTE Hawaiian Tel International Incorporated and GTE Media Ventures Incorporated (collectively, "GTE").

² GTE affiliates provide a competitive wireline video alternative in the Thousand Oaks, California area and the Clearwater-St. Petersburg, Florida area, and a competitive wireless video alternative in Honolulu, Hawaii.

the Commission demonstrates that substantial modifications to the current rules are required.

I. The Commission's Existing Program Access Rules Have Not Fostered the Competitive Environment Necessary to Challenge the Monopoly Position of Entrenched Incumbent Cable Operators.

When Congress enacted Title III of the Telecommunications Act of 1996, governing cable services,³ it clearly envisioned that its "de-regulatory national policy framework" would have a "pro-competitive"⁴ effect upon the cable industry. For this reason, Congress established a sunset date for upper tier cable rate regulation which is now a mere fourteen months away.⁵ Unfortunately, as Chairman Kennard recently -- and correctly -- articulated: "[I]t is clear that broad-based, widespread competition to the cable industry has not developed and is not imminent."⁶ The reason (as the chairman again correctly recognized⁷) is, at least in part, because new entrants have not had a fair opportunity to obtain and market compelling programming which is available to incumbent operators. In other words: The Commission's program access rules have not dissuaded program providers from discriminating in favor of incumbent

³ The Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, 114 (1996), *codified at* 47 U.S.C. § 153 *et seq.* (the "1996 Act").

⁴ Conference Report, 104th Congress, 2d Session, Report 104-458, Joint Explanatory Statement of the Committee of Conference ("*Conference Report*"), at 113.

⁵ 47 U.S.C. § 543(c)(4).

⁶ Commission Adopts Fourth Annual Report on Competition in Video Markets, Report No. CS 98-1 (released January 13, 1998), Separate Statement of Chairman William E. Kennard, at 1.

⁷ *Id.*, at 1-2.

operators, thereby protecting the monopoly positions of these entrenched incumbents. If competitive in-roads are to be made, and the benefits of competition envisioned by Congress are to be obtained by American consumers, then the Commission's program access rules must be revised.

It is undeniable that the incumbent cable industry continues to occupy the dominant position in the market for the delivery of video programming services.⁸ The ability to leverage this entrenched position has not been lost on incumbents, which have (on average) increased their rates 8.5% for regulated programming and equipment during the most recent study period.⁹ Their revenues continue to grow accordingly -- up 12.2% during the most recent study period.¹⁰ Faced with the sunset of upper tier regulation, incumbent operators and their affiliated programming vendors now have little (if any) incentive to treat new entrants in a competitively fair manner. To the contrary, they have every incentive to deny or delay new entrants' access to compelling programming, which they already possess, but which new entrants require to provide a competitive alternative.

Incumbent operators continue to maintain their near-stranglehold on compelling programming.

⁸ *Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, CS Docket No. 97-141, Fourth Annual Report, FCC 97-423 (released January 13, 1998) ("1997 Competition Report"). "87% of MVPD subscribers receive service from their local franchised cable operator." *Id.*, at para. 7.

⁹ *Id.*, at paras. 7, 11.

¹⁰ *Id.*, at para. 11.

"Overall, vertically integrated ownership interests have increased from 1996. In 1996, cable MSOs, either individually or collectively, owned more than 50% or more of 47 national cable programming networks. In 1997, cable MSOs own 50% or more of 50 networks.

In 1997, 26 of the 50 most subscribed to cable programming networks are vertically integrated. Two of the top 50 services (C-SPAN and C-SPAN 2), while not owned by cable operators, were developed with significant involvement by the cable industry. In terms of prime ratings, eight of the top 15 cable programming networks are vertically integrated ...

Vertical integration in national cable programming continues to involve principally the largest cable system operators. The eight largest cable MSOs have a stake in all of the 68 vertically-integrated services. ...

[T]he recently announced transaction to bring the Seagram (Universal Studios) cable networks under the control of HSN Inc. would apparently result in both the USA Network and the SCI-FI Network being considered vertically integrated."¹¹

The evidence already adduced for the Commission in this proceeding¹² is overwhelming that new entrants face staggering obstacles in their bid to provide a competitive alternative to incumbents which have steadily raised their rates in the

¹¹ *Id.*, paras. 159-62.

¹² *E.g.*, *En banc* proceeding, December 18, 1997, Testimony of Matthew Orestano. That incumbents use their entrenched position to disadvantage new entrants with respect to the acquisition of compelling programming comes as no surprise. In the proposed acquisition of Turner Broadcasting by Time Warner, TCI -- the nation's largest MSO -- extracted a "sweetheart" deal by which TCI was to be guaranteed lower prices for Turner programming -- such as WTBS, Headline News, and CNN -- than would be available to new entrants, *for a period of twenty years*. It was only through the intervention of the Federal Trade Commission that TCI, Turner and Time Warner were required to cancel this proposed sweetheart deal.

maintenance and pursuit of supra-competitive profits.¹³ The huge investment necessary to establish either a competing wireline or wireless video network is only the first hurdle faced by new entrants. The larger hurdle, on a prospective basis, is the timely acquisition of compelling programming upon nondiscriminatory rates, terms and conditions. This is the pressure point which incumbents and their programming affiliates may use to choke-off nascent competition. And it is where the Commission's existing rules have, unfortunately, failed to effectively address the competitive barriers erected by incumbents and their programming affiliates to new entrants.

There are two principal barriers for competitors seeking relief under the Commission's Section 628¹⁴ rules: (1) the time consuming nature of the process as it currently exists;¹⁵ and (2) that proof of violations generally exists in the sole custody of the defendant program vendors and their cable operator affiliates.¹⁶ To address these concerns, Ameritech in its rulemaking petition proposed: (1) that time limits be established for the expedition of program access complaints; (2) that complainants be afforded the right to discovery in order to obtain the information necessary to establish

¹³ Less than two months ago, the Commission unequivocally found that incumbent (non-competitive) operators continue to raise their prices to consumers and, for each period studied, charged higher average monthly rates than new entrants. *Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992: Statistical Report on Average Rates for Basic Service, Cable Programming Services, and Equipment*, MM Docket No. 92-266, Report on Cable Industry Prices, FCC 97-406 (released December 15, 1997) ("Report on Cable Industry Prices").

¹⁴ 47 U.S.C. § 548.

¹⁵ See also OpTel Reply Comments, at 2.

¹⁶ See also Echostar Reply Comments, at 4.

a violation; and (3) that penalties in the form of fines or damages be instituted to create an economic disincentive discouraging Section 628 violations.¹⁷

As a member of the *Americast* partnership, GTE fully supported (and still supports) Ameritech. Moreover, *Americast* proposed that: (1) the Commission's determination on a Section 628 complaint be released within 45 days of the close of the pleading cycle; (2) strict procedures requiring discovery be adopted when a complainant establishes a *prima facie* Section 628 violation; (3) the questions of liability and damages may be bifurcated in appropriate cases; (4) a finding of a Section 628 violation should have a specific negative impact on a defendant's request for license renewal; and (5) punitive damages should be assessed in egregious cases.¹⁸

In the *Notice*, the Commission requested comment upon several issues impacting relative to its existing program access rules. Specifically, the Commission requested comment on Ameritech's time limit, discovery and damages proposal. The Commission also requested comment whether its rules should continue to apply to

¹⁷ *Notice*, at para. 5.

¹⁸ *Notice*, at paras. 10-13.

programming which has been moved from satellite to terrestrial delivery. GTE addresses these issues below.¹⁹

II. Revision of the Program Access Rules to Incorporate a Prudent Expedited Process is Appropriate.

Section 628 requires that the Commission provide for the expedited review of complaints.²⁰ The Commission's current rules apply this mandate by establishing a fifty-day pleading cycle.²¹ While the parties may be required therefore to act with some expedition, there is no similar requirement that the Commission *actually resolve* the complaint in a timely fashion.

For new entrants, acquisition of compelling programming on nondiscriminatory rates, terms and conditions is the prerequisite to competitive market entry. Having already placed millions of dollars at stake to construct their networks, and invested thousands upon thousands of man-hours in preparing for market launch, all the plans of a new entrant may be effectively stymied if even one programming option which consumers consider important is denied or available only on an a discriminatory basis,

¹⁹ Unfortunately, the Commission has declined to seek comment upon the proposal of DIRECTV and SCBA that the program access rules be applied to non-vertically integrated programmers, asserting that it lacks "sufficient evidence of a problem." GTE believes that there is plentiful evidence of such a problem. But if the Commission requires evidence, GTE believes that it specifically *should have* included this issue in the *Notice*. The Commission's glaring refusal to consider this proposal seriously calls into question its commitment to address the anti-competitive barriers faced by new entrants. GTE is disappointed that the Commission will not even consider perhaps the most competitively effective revision of its rules, and therefore wonders whether the instant proceeding is intended to be little more than window-dressing designed to silence the concerns raised by new entrants.

²⁰ 47 U.S.C. § 548(f)(1).

²¹ 47 C.F.R. § 76.1003.

even if for only a very short period of time. For new entrants, delay in providing relief is tantamount to denial of relief.

From a competitive perspective, there is no worse result than for a new entrant to offer an *uncompetitive* program line-up to consumers, and therefore fail to attract or retain customers. New entrants already face the "inertia" hurdle in their attempts to attract customers away from the incumbent. But if a new entrant fails because it cannot offer a competitive line-up, the result is worse even than that of not entering the market at all, for it would cement the monopoly position of the entrenched incumbent by increasing the skepticism of consumers with respect to any competitor.

In summary: GTE believes that simply imposing an expedited process on the parties does little to address the problem of delay.²² Rather, the Commission must impose upon itself a 45-day time limit within which to resolve program access complaints once submitted.

²² Simply imposing an expedited process on the parties may also raise substantial due process concerns. See, e.g., Comments of GTE, January 12, 1998, in *Implementation of the Telecommunications Act of 1996: Amendment of Rules Governing Procedures To Be Followed When Formal Complaints Are Filed Against Common Carriers*, CC Docket No. 96-238. However, unlike Ameritech's proposals regarding time limits for pleadings in this docket -- which duly recognizes that it is the cable-affiliated programming vendor which will control the information necessary for the Commission to resolve the new entrant's complaint (see Part III, *infra*) -- the Commission's "mini-trial" proposal in the *Formal Complaints* docket disadvantages defendants who are in no better position than complainants (which, unlike defendants, are afforded an unlimited amount of time to prepare their cases prior to filing the actual complaint) and such "mini-trials" would be a reversal of the Commission's long-held (and heretofore judicially accepted) reliance on "paper" proceedings.

III. Absent a Right to Conduct Necessary Discovery, New Entrants Will Be Substantially Hindered in Enforcing Their Rights.

Program access complaints present a unique circumstance which absolutely necessitates a right to discovery. In program access matters, essentially all of the facts necessary to just resolution of the complaint will be in the exclusive control of the cable-affiliated programming vendor. Absent a complainant's right to conduct necessary discovery, such programming vendors have utterly no incentive to cooperate with the adjudicatory process. On the contrary, they have every incentive to obstruct the process by limiting access to the information which a new entrant complainant needs to make its case and which the Commission requires to fairly adjudicate the matter.

The Commission's current *discretionary* discovery procedures, which are vague upon their face, provide cold comfort to new entrants whose market roll-outs are stymied by recalcitrant cable-affiliated programming vendors. In reality, these discretionary procedures are actually a barrier to resolving program access complaints — since programming vendors and their entrenched cable affiliates have been able to rely on them to *avoid* discovery. Instead of providing new entrants' access to critical pricing and other information, the Commission's current rules have shielded programming vendors from meaningful inquiry.

In its petition, Ameritech proposes that a defendant programming vendor must provide all critical documents with its answer. This could be easily accomplished by modifying the word "may" to "shall" in 47 C.F.R. § 76.1003(d)(6)(iii). This would be a prudent first step. Indeed, it would be consistent with the 1996 Act's requirement in

Section 252 arbitration proceedings that "all relevant documents" be provided at the pleading stage.²³

In addition to this change, as set forth in *Americast's* Comments, GTE agrees that the Commission should require complainants to serve a document discovery request with their complaints upon a designated Commission staff member who must, within 10 business days, permit the discovery if the complainant has alleged a *prima facie* case. The defendant programming vendor would then be permitted 10 days to comply with the request,²⁴ but no later than the date when its answer is served (assuming a 20-day answer period).

In summary: Program access complaints present a unique circumstance which absolutely necessitates a right to discovery. Absent a complainant's right to conduct necessary discovery, such programming vendors have utterly no incentive to cooperate with the adjudicatory process.

IV. The Imposition of Economic Damages Is A Necessary Deterrent To Control Improper Actions By Cable-Affiliated Programming Vendors.

The Commission is correct that it has authority under Title V to impose forfeitures for violations of its program access rules.²⁵ The Commission is further correct that it

²³ 47 U.S.C. § 252(b)(2)(A).

²⁴ *Americast* Comments, at 11. If the defendant objects to the request, whether in whole or in part, such objections should be required within 5 days (rather than 10, as permitted for a proper response). At that point, Commission staff should have 5 days to resolve the objection(s). If Commission staff rules against a defendant, it should be afforded no more than an additional 5 days to respond. In this manner, the complainant will not be disadvantaged by a defendant's attempts to obstruct discovery and the pleading cycle established by the Commission will not be delayed.

²⁵ *Notice*, at para. 45. See also *HBO Comments*, at 9-11.

may assess damages, although it has declined to do so to date.²⁶ However, simply because the Commission has forfeiture authority and it has not heretofore imposed damages in program access complaint proceedings, this is unequivocally no barrier to a necessary, and affirmative, policy statement *now* that damages *will be* assessed a party guilty of Section 628 violations.

As set forth above, pernicious result which a cable-affiliated programming vendor may accomplish simply by denying or delaying compelling programming to a new entrant evinces the inadequacy of the Commission's existing (\$7500/day) forfeiture penalty. What incumbent operator would not choose to absorb such forfeitures rather than lose its monopoly position? The Commission should consider some simple mathematics.

GTE's Clearwater/St. Petersburg cable system is designed to pass approximately 440,000 homes upon completion. At \$7,500/day, an incumbent cable operator in this market would be assessed a monthly forfeiture of \$225,000 for Section 628 violations which would delay or deny competitive entry by GTE. If the incumbent's average monthly rate per subscriber is nearly \$29,²⁷ this forfeiture would be absorbed by the retention of approximate 7,750 subscribers. In other words, if GTE were projected to obtain more than 7,750 subscribers -- a mere 1.76% penetration of the anticipated homes passed -- then the incumbent would have every incentive to cause its affiliated programming vendor to delay or deny compelling programming to GTE.

²⁶ Notice, para. 45. See *Order on Reconsideration*, 10 FCC Rcd 1902, 1911 (1994).

²⁷ Report on Cable Industry Prices, para. 23, Table 1.

Since GTE has more than 7,750 subscribers in the Clearwater/St. Petersburg market, and will have more in the future, the Commission's existing forfeitures are no deterrent to improper behavior. And new entrants have experienced denial and delay of programming by cable-affiliated vendors.²⁸

Since incumbent operators and their affiliated programming vendors have every incentive to thwart the competitive entry of a new entrant -- whether through denial or delay of programming -- it is imperative that the deterrent of economic damages be applied by the Commission. As such, damages should not be applied simply from when a new entrant gives notice of its Section 628 claim or (worse still) from the date the complaint is actually filed, but rather from whatever point in time the defendant programming vendor denied access to programming or offered it only on a discriminatory basis. It is only in this manner that cable-affiliated programming vendors will have an incentive to treat new entrants fairly. Any other rule would incent delay by the cable-affiliated vendor, at least up until the time notice was given. As programming vendors have a myriad of ways to hinder, delay and obfuscate negotiations with new entrants, only the risk that damages are accruing will run counter to their incentives to forestall competition.

The precise claim for damages which may advanced by a new entrant should be left to the discretion of the complainant and adjudicated by the Commission on a case-by-case basis. In some instances, the complainant may seek lost profits. In other instances, the complainant may seek other forms of damages. Since it is the

²⁸ *E.g.*, Ameritech Petition, at 4.

complainant which has been harmed, it should be left to the consideration of the complainant what form of damage claim to advance. Indeed, until discovery is completed, the complainant itself may not know what form of damage claim to advance.²⁹ In any event, if the claim is sound, the Commission will grant it; if the claim is unsound, the Commission will have the opportunity to deny it. It is certainly unnecessary to at this stage -- before a complainant has either filed its claim or had the opportunity to exercise its right of discovery -- to pre-judge what form a damage claim a complainant may advance.³⁰

In summary: The Commission's existing (\$7500/day) forfeiture is a patently inadequate penalty. Incumbent operators and their affiliated programming vendors have every incentive to thwart the competitive entry of a new entrant -- whether through denial or delay of programming -- and therefore it is imperative that the deterrent of economic damages be applied by the Commission.

²⁹ Because a new entrant may not know what form of damage claim to advance prior to the completion of discovery, it would be utterly incongruous to require a complainant to provide to the defendant(s) a detailed computation of its damage claim with the complaint.

³⁰ The incumbent cable industry will, no doubt, urge the Commission to restrict the damages claims (if any) which a new entrant may advance. The Commission should forthrightly reject such self-serving suggestions, as the incumbents have the most to gain from the anti-competitive conduct of their affiliates.

V. Conclusion.

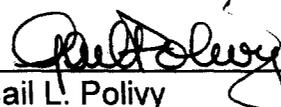
The petition of Ameritech proposing modifications to the Commission's program access rules, together with the proposals advanced by *Americast*, are well-taken and the Commission should expeditiously alter its rules accordingly.

Respectfully submitted,

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