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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of)
)
Implementation of the Cable)
Television Consumer Protection)
and Competition Act of 1992)
)
Petition for Rulemaking of)
Ameritech New Media, Inc.)
Regarding Development of Competition)
and Diversity in Video Programming)
Distribution and Carriage)

CS Docket No. 97-248 FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

RM No. 9097

COMMENTS

**THE WIRELESS CABLE ASSOCIATION
INTERNATIONAL, INC.**

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February 2, 1998

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TABLE OF CONTENTS

EXECUTIVE SUMMARY	i
I. INTRODUCTION	1
II. DISCUSSION	7
A. <i>The Commission Should Amend its Program Access Rules to Provide Complaining Parties With an Automatic Right to Discovery as to Relevant Documents In the Possession of the Defending Party</i>	7
B. <i>The Commission Should Adopt Specific Time Limits for Resolution of Program Access Complaints, Running From Close of the Pleading Cycle Rather Than From the Filing of the Complaint</i>	14
C. <i>The Commission Should Amend Its Rules to Make Damages Available as a Remedy in Program Access Cases.</i>	15
D. <i>The Commission Should Clarify That Denial of Cable Network Programming to Alternative MVPDs by Virtue of Satellite-to-Terrestrial Migration Constitutes an “Unfair Practice” Under Section 628 of the 1992 Cable Act</i>	19
E. <i>The Commission Should Issue a Further Notice of Proposed Rulemaking to Determine Whether The Attribution Standards in Section 73.1000(b) Should Be Modified To Encompass New Relationships Between Programmers and Cable Operators</i>	25
III. CONCLUSION	28

EXECUTIVE SUMMARY

The Commission's *Memorandum Opinion and Order and Notice of Proposed Rulemaking* in this proceeding (the "*NPRM*") represents a critical first step towards ensuring that the Commission's program access rules are revised to protect cable's competitors in the wake of changed market conditions and continuing anticompetitive conduct by programmers either owned by or beholden to incumbent cable operators. As already noted by The Wireless Cable Association International, Inc. ("WCA") on several prior occasions, programmers are taking advantage of procedural and substantive loopholes and ambiguities in the rules solely to delay or avoid selling programming to alternative multichannel video programming distributors ("MVPDs"), thereby forestalling the very competition which Congress and the Commission have declared to be in the public interest. Modification of the program access rules is the only means available to ensure that Congress's vision of a fully competitive marketplace for multichannel video services comes to fruition.

Accordingly, WCA strongly supports procedural rule changes that would give program access complainants a mandatory right to discovery, subject to the model protective order proposed by the Commission. The Commission's existing discovery procedures strain the Commission's limited resources and delay the production of essential material which alternative MVPDs need in order to present their best case. This is particularly true in price discrimination cases, where the evidence necessary to demonstrate discriminatory pricing is exclusively in the hands of the defendant.

WCA also supports the imposition of time limits on resolution of program access cases, but in a manner which minimizes any additional burdens on the Commission's staff. Accordingly, WCA recommends that the Commission establish a timetable for program access cases under which (1) program access complainants are required to submit their discovery requests with their initial complaint; (2) a program access defendant is thereafter required to submit its answer to the complaint and the discovery request within 20 days; and (3) the program access complainant is required to submit its reply within 15 days of the filing of the defendant's answer and response to discovery request (no reply would be permitted where no discovery is requested). To ensure that the Commission's staff has a sufficient opportunity to review the entire record before rendering its decision, the Commission's rules should require that all program access complaints be resolved within 60 days after the close of the formal pleading cycle (including any extensions granted by the Commission).

WCA also urges the Commission to specifically provide for a damages remedy in program access cases. As the Commission recognized during reconsideration of its initial program access rules, Congress specifically gave the agency sufficient latitude to adopt a damages remedy where necessary to deter abuses of the program access rules. The absence of a damages remedy effectively rewards program access defendants for their illegal conduct, since they are able to withhold programming for indefinite lengths of time with the knowledge that they can either settle their cases at the last possible moment or, at worst, receive a Commission sanction that only requires them to

modify their future behavior. Recent program access decisions by the Commission reflect that the cable industry is taking full advantage of this loophole, to the detriment of alternative MVPDs and their subscribers. A damages remedy would break this pattern and promote near-term resolution of program access complaints.

Furthermore, it is clear that vertically-integrated programmers are preparing to avoid their program access obligations by migrating popular cable network programming from satellite to terrestrial delivery. Such conduct falls squarely under the "unfair practices" prohibition in Section 628(b) of the Cable Consumer Protection and Competition Act of 1992 (the "1992 Cable Act"), the plain objective of which is to regulate cable operator *behavior* whose purpose or effect is to keep satellite-delivered cable programming away from cable's competitors.

Finally, WCA submits that while the *NPRM* is a welcome step in the right direction towards ensuring full and fair program access for cable's competitors, it does not address the problem wireless cable operators are having in securing affiliation contracts with the various Fox, Viacom and Microsoft-affiliated cable programming services, all of which technically fall outside the Commission's definition of a "vertically-integrated" programmer. Indeed, as pointed out in the Commission's recent *Fourth Annual Report* regarding the status of competition in the marketplace for delivery of video programming, 60% of all cable programming is not technically "vertically integrated," and thus is not covered by the Commission's program access rules. At the heart of the problem is the fact that the Commission's current attribution standards (47 C.F.R. § 76.1000(b)) do not encompass the extensive relationships that "nonvertically integrated" programmers now have with cable operators. The Commission can address this issue *now*, since the program access provisions of the 1992 Cable Act leave the definition of "vertical integration" and the development of appropriate attribution rules entirely within the Commission's discretion. Thus, WCA believes that the Commission should issue a *Further Notice of Proposed Rulemaking* to explore whether its attribution standards that define "vertical integration" have become outmoded in view of changed market conditions, and whether a modification of those standards is necessary to fully preserve the program access protection Congress intended to give to cable's competitors.

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To: The Commission

COMMENTS

The Wireless Cable Association International, Inc. ("WCA"), by its attorneys, hereby submits its comments with respect to the *Memorandum Opinion and Order and Notice of Proposed Rulemaking* ("NPRM") issued in the above-captioned proceeding.^{1/}

I. INTRODUCTION.

In his separate statement in support of the Commission's *Fourth Annual Report* on the status of competition in the marketplace for delivery of video programming, Chairman Kennard summarized the essence of this proceeding in a single sentence: "New entrants seeking to compete against incumbents must have a fair opportunity to obtain and market programming, and the Commission's program access rules must be enforced swiftly and effectively."^{2/} The Chairman's

^{1/} FCC 97-415 (rel. Dec. 18, 1997).

^{2/} Separate Statement of Chairman William E. Kennard re: *In the Matter of Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, CS Docket No. 97-
(continued...)

observation could not be more timely, since the Commission's findings in the *Fourth Annual Report* reflect that the very same market conditions which gave rise to the program access provisions of the 1992 Cable Act still remain highly unfavorable to cable's competitors:

- The cable industry continues to occupy the dominant position in the MVPD marketplace, serving 87% of all MVPD subscribers nationwide.^{3/} The Commission has observed that “[t]he cable industry’s large share of the MVPD audience is a cause for concern . . . to the extent it reflects an inability of consumers to switch to some comparable source of video programming.”^{4/}
- Nearly 53% of all cable subscribers are served by “clusters” of commonly owned, contiguous cable systems.^{5/} Between 1995 and 1996, the number of clusters with 300,000 to 399,000 subscribers increased by 38% and the number of clusters with at least 500,000 subscribers increased by 20%.^{6/}
- The four largest MSOs now serve 54.3% of all cable subscribers nationwide - Tele-Communications, Inc. (“TCI”) (25.4%), Time Warner (16.0%), MediaOne (7.0%) and Comcast (5.8%).^{7/} These MSOs controlled 84 of the 139 cable system “clusters” serving at least 100,000 subscribers at the end of 1996.^{8/} In addition, these MSOs still hold ownership interests in many of the most popular basic and premium cable networks available today.^{9/}
- TCI, Time Warner and other large MSOs have announced additional “clustering” transactions which will widen their already substantial control

^{2/} (...continued)

141, FCC 97-423 (rel. January 13, 1998) [the “*Fourth Annual Report*“], at 2.

^{3/} *Fourth Annual Report* at ¶ 7.

^{4/} *Id.* at ¶ 8.

^{5/} *Id.* at ¶ 143.

^{6/} *Id.* at ¶ 144.

^{7/} *Id.* at ¶ 151, Table E-5.

^{8/} *Id.* at ¶ 143.

^{9/} *Id.*, Table F-5.

over local markets.^{10/} TCI also proposed to form partnerships with other MSOs in order to restructure its systems into regional clusters.^{11/} The net effect of these transactions will be that the top four largest MSOs will enjoy unprecedented control over distribution of video programming in national, local *and* regional markets.

As the Commission observed in its *Report and Order* applying its program access rules to open video systems, concentration of ownership among cable operators is significant in the program access context both because it demonstrates an increase in the buying power of the major MSOs and because it facilitates the ability of MSOs to coordinate their conduct.^{12/} At the same time, wireless cable operators are in the process of launching digital wireless cable systems in direct competition with the large cable MSOs.^{13/} This new competition, combined with the fact that the Commission's

^{10/} *Id.* at ¶ 145. For instance, TCI has agreed to sell 10 cable systems serving 820,000 subscribers in the New York ADI to Cablevision Systems Corp. ("Cablevision") in exchange for a one-third interest in that company. *Id.* Because Cablevision already owns systems serving 1.7 million subscribers in the New York market, its acquisition of the TCI systems will create a cluster of 2.5 million subscribers, the largest of its kind in the United States. *Id.* TCI has also announced similar transactions with Falcon Cable and Adelphia Communications, the latter of which will create a major cluster in Pennsylvania, New York and Ohio serving 466,000 subscribers. *Id.* Also, it was recently reported that TCI has agreed to sell its Connecticut cable systems to Cablevision and increase its stake in the company to 36%. *Washington Post*, at E4 (Jan. 29, 1998).

^{11/} Fourth Annual Report at ¶ 148.

^{12/} *Implementation of Section 302 of the Telecommunications Act of 1996 - Open Video Systems*, 11 FCC Rcd 18223, 18322 (1996). *See also Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 12 FCC Rcd 4358, 4423 (1997) ["In all but a few local markets for the delivery of video programming the vast majority of consumers still subscribe to the service of a single incumbent cable operator. The resulting high level of concentration, together with impediments to entry and product differentiation, mean that the structural conditions of markets for the delivery of video programming are conducive to the exercise of market power by cable operators."]

^{13/} *See, e.g., Fourth Annual Report* at ¶ 110 (discussing BellSouth's existing and planned digital wireless cable launches in New Orleans, Atlanta, Jacksonville, Orlando and Miami/Ft. Lauderdale).
(continued...)

prohibition on exclusive programming contracts may sunset in less than five years,^{14/} will give MSO-affiliated cable programmers unprecedented incentive to delay selling programming to wireless cable operators for as long as possible. Thus it is absolutely essential that the Commission's program access complaint procedures protect alternative MVPDs from such dilatory tactics, and otherwise facilitate full and fair access to cable programming on reasonable terms and conditions within as short a time as possible.

For these reasons, WCA submits that the proposals offered in this proceeding by Ameritech New Media, Inc. ("Ameritech") represent an excellent template from which to begin reconstructing the Commission's program access rules in a manner that addresses the concerns of cable's competitors *without* creating any unnecessary administrative burdens on the Commission's staff. In particular, as set forth in greater detail herein, WCA supports Ameritech's proposal to modify the Commission's rules to (1) allow complaining parties to obtain discovery as a matter of right, (2) require that program access complaints be resolved within a specific period of time, and (3) impose a damages remedy in program access cases. As to time limits, however, WCA proposes that the time

^{13/} (...continued)

Colman, "BellSouth Rolls in N.O.," *Broadcasting & Cable*, at 49 (Nov. 24, 1997). Equally significant is the fact that the Commission recently issued a *Notice of Proposed Rulemaking* in which it has proposed to adopt rules that will allow wireless cable operators to use MDS and ITFS channels to provide two-way services. *In the Matter of Amendment of Parts 21 and 74 to Enhance the Ability of Multipoint Distribution Service and Instructional Fixed Television Service Licensees to Engage in Fixed Two-Way Transmissions*, MM Docket No. 97-217, FCC 97-360 (rel. Oct. 10, 1997). If adopted, those rules will enable wireless cable operators to supplement their digital multichannel video service with a broad variety of two-way and interactive services, including Internet access and high-speed data transmission.

^{14/} 47 U.S.C. § 548(c)(5).

period for resolving program access complaints commence only after all formal pleadings have been submitted by the parties, so as to assure the staff adequate time to fully consider the facts.

WCA also applauds the Commission's attempt to clarify the circumstances under which a migration of cable network programming from satellite to terrestrial delivery will constitute a violation of the "unfair practices" prohibition in Section 628(b) of the 1992 Cable Act. Recent developments reflect that the long-feared migration of satellite-delivered cable network programming to terrestrial delivery is now a reality, and is being used by vertically-integrated programmers as a means of avoiding their program access obligations. WCA submits that denial of programming to an alternative MVPD in conjunction with a satellite-to-terrestrial migration represents precisely the type of "unfair practice" which Congress intended to prohibit in Section 628(b). The Commission is fully authorized under the existing statutory language to declare that such conduct is a Section 628(b) violation that is actionable under the Commission's program access rules.

Finally, though WCA intends to respect the Commission's determination not to seek comment on the extent to which nonvertically integrated programmers should be subject to the Commission's program access rules, the recent maze of transactions between programmers that are not "vertically integrated" under the Commission's current program access attribution rules suggests that the Commission's attribution standards for purposes of defining "vertical integration" in the program access context have become outmoded. In his testimony during the Commission's recent *en banc* hearing on competition to cable, Matthew Oristano, Chairman of wireless cable operator People's Choice TV Corp., described the problem as follows:

[T]here are today alliances between cable and broadcast TV (NBC, Fox, CBS) which create exclusivity, cable and satellite programmers (Murdoch) which create exclusivity, cable and a software company (Microsoft) which create exclusivity, and cable and former cable operators (Viacom) which create exclusivity. The cable industry control of programming, if diagrammed with all of its equity, licensing, carriage agreement, and *quid pro quo* relationships, creates a web which has the effect of ensnaring all competitors.^{15/}

As currently written, the Commission's attribution standards only cover those situations where a cable operator has a 5% or greater interest in a satellite-delivered cable programming service, and thus encompass none of the relationships described by Mr. Oristano.^{16/} Not surprisingly, alternative MVPDs have been denied access to the cable programming services created by those very same relationships (*e.g.*, Fox News Channel, MSNBC, TV Land, Eye on People). The 1992 Cable Act, however, allows the Commission to address this problem *now* via a rulemaking to determine whether its program access attribution standards should be revised to govern current relationships between cable operators and programmers that do not satisfy the Commission's present definition of "vertical integration" but have the same (if not greater) chilling effect on competition. For the reasons set forth herein, WCA submits that the Commission can and should take such action by issuing a *Further Notice of Proposed Rulemaking* in this docket so that a complete record can be developed on this issue.

^{15/} Testimony of Matthew Oristano, Chairman, People's Choice TV Corp, before the Federal Communications Commission re: Status of Competition in the Multichannel Video Industry, at 6 (Dec. 18, 1997) [the "Oristano Testimony"].

^{16/} See 47 C.F.R. § 76.1000(b).

II. DISCUSSION.

A. The Commission Should Amend its Program Access Rules to Provide Complaining Parties With an Automatic Right to Discovery as to Relevant Documents In the Possession of the Defending Party.

Currently, the Commission's program access rules do not provide a complaining party with a right to discovery. Instead, the Commission's staff has the discretion to order discovery if it determines that the complainant has established a *prima facie* case and that further information is necessary to resolve the complaint.^{17/} The staff then determines what additional information is necessary, and is authorized to develop a discovery process and timetable to resolve the dispute expeditiously.^{18/} Ameritech has proposed that all program access complainants be permitted a right to discovery similar to that provided in the Federal Rules of Civil Procedure, and that the Commission require that all discovery be concluded within 45 days following the initial status conference between the Commission's staff and the parties.^{19/} The Commission has asked parties to comment on how such a discovery right could be structured so as to assure expeditious processing of program access complaints; whether different standards for discovery should be applied to different types of program access complaints; and whether the issuance of a standardized protective order would expedite the necessary disclosure of information.^{20/}

^{17/} *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)*, 8 FCC Rcd 3359, 3420 (1993) ["First Report and Order"]

^{18/} *Id.*

^{19/} *NPRM* at ¶ 7.

^{20/} *Id.* at ¶¶ 42-43.

While WCA understands the staff's reluctance to oversee discovery every time a program access complaint is filed, the fact remains that alternative MVPDs are denied a full opportunity to present their best case to the Commission if they are not given access to certain documents within the defending party's possession that would demonstrate whether a program access violation has occurred. This is particularly true in cases of alleged price discrimination: without access to a programmer's affiliation contracts with similarly situated parties, it is virtually impossible for an alternative MVPD to prove that a programmer has refused to deal on fair and equitable terms.^{21/}

Indeed, as noted by Mr. Oristano:

[N]o matter how much cable competitors are overcharged, there is no ability under the Commission's regulations to bring a complaint without specific information, and there is no ability to get any information about what cable programmers *actually* charge their masters, net of all hidden discounts, marketing subsidies, and *quid pro quos* between deals . . . As it is now, an operator must weigh the chilling proposition of instituting an unsuccessful proceeding against his prime supplier, gaining no information in the process, and the consequences that may have at renewal time. Remember this is a battle where time is on cable's side.^{22/}

None of this should surprise the Commission. Indeed, as the Chairman recently recognized:

As the issues involved in price discrimination cases become more complex and sophisticated, greater amounts of discovery time and resources are necessary to fairly

^{21/} The Commission has already recognized that the analysis of whether another MVPD is similarly situated will involve a consideration of geographic region (proximity), the number of subscribers, the date of entry of contract, the type of service purchased, and specific terms related to distinct attributes of the purchasers or secondary transactions involved in the programming sale itself. *First Report and Order* at 3417 n.224. Virtually all of this information will be in the exclusive possession of the programmer, and thus for all practical purposes cannot be accessed by an aggrieved MVPD in a timely fashion without mandatory discovery. Indeed, as acknowledged by the Commission in the *NPRM*, the only two cases where the Commission's staff has ordered discovery each involved price discrimination complaints. *NPRM* at ¶ 145 n. 125.

^{22/} Oristano Testimony at 10 (emphasis in original).

resolve such matters. In many price discrimination cases, discovery will be essential ... It is a fair general assumption, ..., that discovery will be necessary in a higher percentage of price discrimination program access cases than in other types of program access claims.^{23/}

Moreover, it is difficult to see how giving alternative MVPDs a streamlined, carefully circumscribed right to discovery could be more cumbersome than the staff's existing obligations during the discovery process. The Commission has described the Bureau's current role as follows:

In some cases, we expect that the reviewing staff will itself conduct discovery by issuing appropriate letters of inquiry or require that specific documents be produced. The staff will determine whether it is necessary to file discovery materials with the Commission, or whether they should be provided only to the opposing party. The staff will order that any documents or answers to such inquiries will be submitted to the Commission and to the complainant pursuant to a protective order within a specified time period. . .

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. As in Section 208 common carrier complaint proceedings, the staff will be authorized to issue oral rulings at the status conference which will be confirmed in writing to the parties.^{24/}

In view of this process, it is easy to see why the Bureau rarely orders discovery in program access cases. Because the Commission requires the Bureau to be very heavily involved in the discovery process itself, the Bureau's staff understandably will make every effort to decide a program access complaint "on the papers" rather than become embroiled in elaborate discovery procedures that drain the Bureau's scarce resources and delay a final decision on the merits. This does *not*, however, bear on the real issue here, *i.e.*, the need for alternative MVPDs to have a right

^{23/} Letter from William E. Kennard to the Honorable W.L. (Billy) Tauzin, Responses to Questions at 11 (Jan. 23, 1998) [the "Kennard Letter"].

^{24/} *First Report and Order* at 3421.

to discovery with respect to information unavailable from any source other than the defendant. Rather, it only reflects that the discovery procedures themselves should be modified to minimize any burden on the Commission's staff while preserving full and timely disclosure of all relevant information during the course of a formal program access dispute.

WCA submits that the Commission can address this problem by giving program access complainants an automatic, carefully circumscribed right to discovery, provided that the complaining party submits its discovery request with its initial complaint.^{25/} WCA acknowledges that the Commission has previously refused to provide discovery as of right with respect to formal complaints against common carriers, but submits that the Commission's rationale for doing so in that context does not apply to program access.^{26/} Specifically, the Commission has made a distinction between federal court rules, which require "notice pleading," and the Commission's Rules, which require "fact pleading."^{27/} The Commission has concluded that "[n]otice pleading anticipates the use of discovery to obtain evidence of the facts to support a complainant's claims, while fact pleading requires that a complainant know the specific facts necessary to prove its claim at the time of

^{25/} The Commission has already recognized that requiring essential documents to be produced early in a "paper hearing" achieves the benefits of full disclosure without engendering lengthy and often counterproductive disputes over discovery. *See, Amendment of Parts 65 and 69 of the Commission's Rules to Reform the Interstate Rate of Return Resubscription and Enforcement Processes*, 10 FCC Rcd 6788, 6822 (1995); *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, FCC 96-460, at ¶ 49 (rel. Nov. 27, 1996).

^{26/} *See 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, FCC 97-396, at ¶ 120 (rel. Nov. 27, 1997) [the "Formal Complaint Order"].

^{27/} *Id.*

filing.”^{28/} But that is precisely the problem here: program access complainants often do *not* know all of the facts necessary to prove their claims at the time of filing, particularly in discrimination cases where the required facts are contained in confidential agreements the defendant may have with other third parties. For this reason, the Commission’s notice pleading/fact pleading dichotomy fails in the program access context and actually militates in *favor* of giving program access complainants an automatic right to discovery.

Furthermore, though the Commission has asserted that “the nature of the programming distribution marketplace, and the wide range of sales practices” militate against mandatory discovery in program access cases.^{29/} WCA submits that in fact the opposite is true: mandatory discovery procedures would be beneficial precisely *because* the interrelationships and sales practices among programmers and MSOs are becoming more extensive and complex.^{30/} Given the increasingly complicated nature of the relationships among programmers and cable operators, one cannot hope to prove many potential program access complaints unless essential documents are produced early in the process.^{31/} By allowing mandatory discovery early in the process, the Commission can avoid

^{28/} *Id.*

^{29/} *First Report and Order* at 3421.

^{30/} There is no better example of this than the current labyrinth of relationships between the Fox network and the cable television industry, both on the programming side (*e.g.*, Fox Sports Net) and on the distribution side (*e.g.*, Fox’s proposed \$1 billion investment in the cable-controlled Primestar DBS service). *See, e.g.*, Petition to Deny or, Alternatively, Request for Imposition of Conditions filed by The Wireless Cable Association International, Inc. re: FCC File No. 106-SAT-AL-97, at 7-12 (filed Sept. 25, 1997).

^{31/} Discretionary discovery also is impractical to the extent that it requires a complainant to make a *prima facie* case before being awarded discovery. This places an alternative MVPD in the proverbial “catch-22”: it must present a *prima facie* case to obtain access to critical documents, without which
(continued...)

bogging down the staff with the task of designing and implementing customized discovery procedures for every individual case and entertaining the inevitable objections thereto from defending parties. Given the current limits on the Commission's resources, there is no sensible reason to promote such a result.

Accordingly, WCA recommends that the Commission amend its program access rules to give every program access complainant an automatic right to discovery, provided that the complainant includes with his or her complaint a request for specific documents in the defendant's possession and no more than ten written interrogatories, along with a brief explanation of why the documents and the information requested in the interrogatories are relevant to the dispute and not obtainable from other sources.^{32/} The defendant would then be required to file any objections to the complainant's discovery request within 10 days of its receipt of the complaint; if the defendant has no objections, he or she would be required to include the requested documents and responses to interrogatories with its answer, which, as discussed below, would be filed 20 days after receipt of the complaint. The Commission's staff would be required to rule on the defendant's discovery objections within 15 days of its receipt thereof; the defendant's answer deadline would be suspended temporarily until it receives a ruling on its discovery objections.

^{31/} (...continued)

a *prima facie* case cannot be made. Moreover, awarding program access complainants a right to discovery will eliminate the need for the staff to determine what constitutes a *prima facie* case in each and every program access dispute, thereby facilitating more expedited resolution of program access complaints.

^{32/} The Commission has already adopted the ten-interrogatory limit for common carrier complaints where it allows the complainant to conduct discovery. *Formal Complaint Order* at ¶ 116.

WCA also recommends that the Commission include provisions in its discovery rules that will reduce the number of discovery-related disputes and thereby protect against excessive staff involvement in the discovery process. First, the Commission should clarify that requests of the staff for oral depositions or other additional discovery (*i.e.*, requests for additional documents relating to new matters raised in the defendant's answer) will not be entertained absent a compelling showing of need by the complainant. Second, to prevent "fishing expeditions," the Commission should expressly provide for the imposition of sanctions against complainants who abuse the discovery process.^{33/} Finally, the Commission can avoid becoming embroiled in confidentiality disputes simply by requiring both parties to abide by the model protective order attached as Appendix A to the *NPRM*, thereby facilitating full and timely disclosure while giving the defendant's documents all the protection they are entitled to in an administrative proceeding.^{34/}

^{33/} A possible model for such a provision is Rule 26(g) of the Federal Rules of Civil Procedure, which provides for the imposition of sanctions for abuses of the discovery process. Such sanctions may include an order to pay the amount of the reasonable expenses incurred because of the violation, including a reasonable attorney's fee.

^{34/} WCA's recent experience in attempting to obtain documents from the Outdoor Life and Speedvision networks (the "Networks") in connection with their pending Petition for Exclusivity (CSR-5044-P) is an excellent example of why a model protective order of the sort proposed by the Commission is absolutely essential to an orderly discovery process. In that case, Outdoor Life and Speedvision have requested confidential protection of critical information *that has already been made public by the Networks' MSO investors*. See Response to Reply filed by The Wireless Cable Association International, Inc. re: CSR-5044-P, at 3-5 (filed Aug. 29, 1997). In fact, the Networks have gone so far as to ask that the Commission require WCA to retain an outside lawyer that does not represent any MVPD, network or other program supplier, as a condition of access to necessary information. *Id.* at 10. The Commission can put a stop to such "hide the ball" tactics simply by requiring that all parties in *any* program access case be subject to the model protective order proposed in the *NPRM*.

B. The Commission Should Adopt Specific Time Limits for Resolution of Program Access Complaints, Running From Close of the Pleading Cycle Rather Than From the Filing of the Complaint.

Ameritech has requested that the Commission amend its rules to require that all program access cases be resolved within 90 days of the Commission's receipt of the complaint where there is no discovery and within 150 days where there is discovery.^{35/} Ameritech also recommends that answers to program access complaints be filed within 20 days after service of the complaint (rather than the 30 day period currently provided in the Commission's Rules); that in cases where there is no discovery, the time for filing a reply be reduced from 20 to 15 days; and that replies be eliminated in cases where discovery is conducted.^{36/}

WCA strongly agrees that time limits on resolution of program access complaints would lend greater certainty to the process and mitigate to at least some degree the substantial economic harm caused by violations of the program access rules. However, WCA is also aware that processing delays in the program access arena in some cases are attributable to requests for extensions of time filed by the complaining or defending parties. Running the case resolution deadline from the filing of the complaint thus may not give the staff sufficient time to review the record in such cases. Accordingly, as a compromise proposal, WCA recommends that the Commission adopt the accelerated timeframes proposed by Ameritech, but with one significant modification: the Commission should require that price discrimination cases be decided within 90 days and all other cases within 60 days, measured from the close of the formal pleading cycle (including any pleadings

^{35/} *NPRM* at ¶ 6.

^{36/} *Id.*

filed out of time with the Commission's consent), unless the parties jointly agree to an extension of the case resolution deadline.

C. The Commission Should Amend Its Rules to Make Damages Available as a Remedy in Program Access Cases.

The Commission has already determined that it has the necessary legal authority to award damages as a remedy in program access cases.^{37/} In the *NPRM*, the Commission asks whether the adoption of a damages remedy in addition to forfeitures would be appropriate and in the public interest.^{38/} The Commission also asks for 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.^{39/}

WCA submits that damages are an appropriate and necessary remedy in the program access context given the unique and substantial injury program access violations inflict on alternative MVPDs. On this point, it must be remembered that every day on which a program access complaint remains pending is another day on which an alternative MVPD does not have access to the same programming as its competitors. The MVPD marketplace is *service-oriented*: consumers are buying programming, not the technology used to deliver that programming. Potential wireless cable subscribers will not stand by idly and wait for a wireless cable operator to obtain relief through the

^{37/} *Implementation of the Cable Television Consumer Protection and Competition Act of 1992 - Development of Competition and Diversity in Video Programming Distribution and Carriage (Order on Reconsideration)*, 10 FCC Rcd 1902, 1910 (1994) [the "Program Access Reconsideration Order"].

^{38/} *NPRM* at ¶ 45.

^{39/} *Id.*

program access complaint process, particularly when they can purchase service from an incumbent cable operator in the market who is providing a full slate of the popular cable programming which consumers have come to demand.^{40/} Once a subscriber is lost under these circumstances, he or she invariably is lost for good. Thus, the imposition of a forfeiture paid to the Commission cannot make an alternative MVPD whole, since forfeitures are designed primarily to deter the offending party from violating the Commission's rules in the future.^{41/} While forfeitures should play a role in the Commission's efforts to deter program access violations, a damages remedy separate and apart from forfeitures is the only relief available which adequately addresses the other side of the equation, *i.e.*, the substantial economic harm suffered by cable's competitors due to abuses of the program access rules.

Furthermore, as already noted by Ameritech, in the absence of a damages remedy a defendant in a program access case has little incentive to negotiate with an aggrieved MVPD before a

^{40/} See Kennard Letter, Response to Questions at 14 ("Information gathered in conjunction with the [Fourth Annual Report] does indicate that some commenters and industry analysts continue to perceive that certain established services are more critical than others. Thus, it may not be unreasonable to assume it is important for a video programming provider . . . to carry certain programming services to attract or retain subscribers.").

^{41/} See, *e.g.*, Omnibus Budget Reconciliation Act of 1989, H.R. Conf. Rep. 386, 101st Cong., 1st Sess., at 434 (1989) [stating Congress's intent that forfeitures "serve as both a meaningful sanction to the wrongdoers and a deterrent to others"]; *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, FCC 97-218, at ¶ 19 (rel. Jul. 28, 1997) ["We believe that the increases in our forfeiture authority as well as the accompanying legislative history of our forfeiture authority support our determination that forfeiture amounts should be set high enough to serve as a deterrent and foster compliance with our rules."] [the "Forfeiture Order"]. At the present time, the base forfeiture for a continuing violation of the program access rules is \$7,500 per day, up to a maximum of \$275,000. *Forfeiture Order*, Appendix A. WCA is unaware of any case where the Commission has assessed a forfeiture for a violation of its program access rules.

complaint is filed, nor does it have much incentive to resolve the matter early in the process once the complaint is submitted to the Commission. This is because the Commission's existing remedies for program access violations are by and large prospective only.^{42/} As a result, violations of the Commission's program access rules achieve their intended purpose: competing MVPDs are denied access to programming for extended periods of time, after which defendants either (1) settle their cases at the last possible moment or (2) prosecute their cases to the very end, with the knowledge that if they lose the Commission at most will simply require them to adjust their future behavior to comply with the program access rules.

WCA thus submits that the Commission should amend its rules to specifically provide for a damages remedy in program access cases. To ensure that the damages remedy has maximum effect, damages should be measured from the date on which a complaint is filed until the violation of the program access rules ceases.^{43/} Once a program access defendant is put on notice that it may be subject to damages by virtue of its illegal conduct, it is far less likely to engage in "stonewalling" tactics that merely stall Commission action for the indefinite future until the defendant decides it is

^{42/} For instance, with respect to prohibited exclusive agreements, the Commission "may order the vendor to make its programming available to the complainant on the same terms and conditions, at a nondiscriminatory rate, as given to the cable operator." *First Report and Order*, 8 FCC Rcd at 3392. In price discrimination cases, a vendor who engages in unlawful activity may be ordered "to revise its contracts to offer to the complainant a price or contract term in accordance with the Commission's findings." *Id.* at 3420. See also *CellularVision of New York, L.P.*, 10 FCC Rcd 9273 (CSB, 1995), *recon. denied*, 11 FCC Rcd 3001 (CSB, 1996) [Bureau orders Cablevision to sell its SportsChannel New York programming on non-discriminatory terms within 45 days; no other sanction ordered].

^{43/} The damages "meter" should continue to run through any reconsideration or appeals process unless the defendant obtains a stay of the staff's underlying award of damages. WCA also recommends that the Commission clarify that per-day forfeitures will be calculated in the same fashion.

prudent to settle. By the same token, alternative MVPDs are more likely to receive near-term resolution of their program access complaints, which, regardless of whether they are settled or are disposed of on the merits, will be litigated at a much faster clip by the defendants.

Finally, WCA believes that the Commission's *Formal Complaint Order* is an appropriate model for implementation of a damages remedy in the program access context. Specifically, WCA supports bifurcation of the liability and damages issues into separate proceedings, with the complainant being required to file a supplemental complaint on the damages issue after the liability phase has been completed.^{44/} The Commission should require the damages complaint to include either a detailed computation of complainant's damages or a detailed explanation of what additional information is necessary to complete a computation of damages (including an explanation of why such information is unavailable and an example of how damages would be calculated if such information is produced).^{45/} To give the staff sufficient time to sort through potentially complex damage calculations submitted by the complainant, WCA recommends that the damages phase be completed within 120 days after the complainant's submission of damage calculations (or estimates thereof). As in the *Formal Complaint Order*, the Commission should also declare that it may end an adjudication of damages with a determination that the damages computation method submitted

^{44/} *Formal Complaint Order* at ¶ 179. Under this approach, the Commission's staff would not have to undertake the wasteful process of reviewing a damages complaint where there is a finding of no liability. *See id.* at ¶ 180. The Commission should clarify, however, that a damages complaint will not be time-barred if the liability complaint was filed within the one-year statute of limitations for program access complaints.

^{45/} *Id.* at ¶ 128. Where the Commission's staff makes a finding of liability but the complainant does not file a damages complaint or is unable to demonstrate injury, the imposition of a Commission forfeiture in lieu of damages would be appropriate.

by the complainant is sufficient.^{46/} If the Commission finds the damages computation submitted by the complainant to be unsatisfactory, the Commission may, in its discretion, modify such computation method or require the complainant to resubmit its computation. The Commission should retain the right to determine actual damages only if the parties are unable to agree within 30 days as to the exact amount of damages under the complainant's approved computation method.^{47/}

D. The Commission Should Clarify That Denial of Cable Network Programming to Alternative MVPDs by Virtue of Satellite-to-Terrestrial Migration Constitutes an "Unfair Practice" Under Section 628 of the 1992 Cable Act.

Citing DIRECTV's pending program access complaint against Comcast SportsNet, the Commission asks for comment as to whether a vertically-integrated programmer's migration of programming from satellite to terrestrial delivery, and refusal to sell to cable's competitors on the basis thereof constitutes an "unfair practice" under Section 628(b) of the 1992 Cable Act and is therefore actionable under the program access rules.^{48/} The Commission has already acknowledged that a cognizable program access claim may arise from "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."^{49/} In the *NPRM* the Commission asks for

^{46/} *Id.* at ¶ 194.

^{47/} *Id.* The Commission has tentatively concluded that punitive damages should not be imposed in program access cases. *NPRM* at ¶ 49. There may, however, be instances where the standard damages calculation is insufficient to make the complainant whole, *i.e.*, where the defendant's violation represents such willful and egregious violations of the rules that damages and/or forfeitures are inadequate. To address those types of situations, WCA believes that the Commission should at least leave open the possibility that it will consider assessing punitive damages in egregious cases.

^{48/} *Id.* at ¶ 51.

^{49/} *Implementation of Section 302 of the Telecommunications Act of 1996 — Open Video Systems, (continued...)*

comment as to what types of evidence a complainant may marshal to prevail on a claim that a programmer has moved satellite-delivered programming to terrestrial delivery to evade the program access requirements, and whether satellite-to-terrestrial migration should be actionable based on the effect, rather than the purpose, of the migration.^{50/}

It is clear that the concerns of alternative MVPDs about this issue are no longer theoretical, and that cable operators intend to use satellite-to-terrestrial migration to avoid their program access obligations. For example, it has been reported for some time that Cablevision Systems Corporation, which has a stranglehold over local sports programming in the New York City market, is planning a conversion to fiber delivery for the express purpose of evading the Commission's program access rules.^{51/} The Commission itself has noted that Cablevision has announced in press reports and before Congress that it is currently committing substantial resources to the development of a new programming venture which it intends to offer via terrestrial delivery on an exclusive basis.^{52/} And, Cablevision Chairman Charles Dolan has been quoted as telling colleagues that "he would like to restrict distribution of SportsChannel groups of services . . . to cable systems only."^{53/}

^{49/} (...continued)

Second Report and Order, 11 FCC Rcd 18223, 18325 n.451 (1996).

^{50/} *NPRM* at ¶ 51.

^{51/} Fabrikant, "As Wall Street Groans, A Cable Dynasty Grows," *New York Times*, Financial P.1 (April 27, 1997) ["Even now, Cablevision is 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."].

^{52/} Kennard Letter, Response to Questions at 5.

^{53/} *Satellite Business News*, at 3 (Oct. 8, 1997).