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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

February 23, 1998

BY HAND

Ms. Magalie Salas
Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

**Re: Reply Comments of Ameritech New Media, Inc. in
CS Docket No. 97-248 and RM No. 9097**

Dear Ms Salas:

Enclosed for filing please find the original and nine (9) copies of the Reply Comments of Ameritech New Media, Inc. in the above-referenced dockets.

Please direct any questions that you may have to the undersigned.

Respectfully submitted,

Lawrence R. Sidman

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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 Carriage)
)

CS Docket No. 97-248
RM No. 9097

REPLY COMMENTS OF
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February 23, 1998

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Before the
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REPLY COMMENTS OF
AMERITECH NEW MEDIA, INC.

Ameritech New Media, Inc. ("Ameritech"), by its attorneys and pursuant to Section 1.415 of the Commission's Rules, 47 C.F.R. § 1.415, hereby submits these reply comments to the above-captioned Memorandum Opinion and Order and Notice of Proposed Rulemaking ("NPRM") to amend the Commission's program access rules, 47 C.F.R. § § 76.1000 *et seq.* The record before the Commission clearly warrants the adoption of the rules changes proposed by Ameritech in its February 2, 1998 comments in this proceeding.

I. INTRODUCTION AND SUMMARY

Once again, the motives and interests of the commenters supporting and opposing, respectively, the proposals made by the Commission in the NPRM, serve as telling indicators of the urgent need to reform the program access rules, as proposed by Ameritech. The commenters can be categorized generally in two groups. The first group consists of the defenders of the

current noncompetitive status quo, cable incumbents. They are quite comfortable with program access rules which are falling short of their potential to foster vibrant competition. Indeed, incumbent cable companies claim that the existing status quo is fine,^{1/} that competitive MVPDs are gaining access to the programming they need to be competitive^{2/} and that competition is developing according to Congress's plan.^{3/} Incredibly, commenters representing the cable industry cite the recently released Fourth Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming^{4/} ("Fourth Annual Report") as evidence that sufficient competition exists in the video delivery marketplace.^{5/}

With few exceptions, cable incumbents oppose any changes to the existing rules or the Commission's enforcement of them. Instead, they provide a litany of excuses why the proposed changes should not be adopted, citing everything from the need to conserve Commission

^{1/} See Comments of Liberty Media Corporation at 1-6.

^{2/} See Comments of Time Warner at 3. In its comments, Time Warner makes the incredible statement that "[i]n short, it is evident that competing MVPDs are able to obtain all the programming they need." *Id.* The very existence of this proceeding demonstrates the absurdity of this statement.

^{3/} While the incumbent cable industry states that the program access rules are working as they were intended, apparent disdain for the rules was reflected in the comments of several cable incumbents. Rather than view these rules for what they are -- a Congressionally-mandated mechanism to promote competition and to benefit American consumers -- these incumbents characterize the rules as a type of government-sponsored corporate welfare designed to make it "easy" for competitive providers like Ameritech to offer competitive video programming. Aside from being wrong, this perspective makes it easier to understand why incumbents violate the rules and oppose strengthening mechanisms which would deter them from doing so. *See, e.g.*, Comments of Cablevision at 5, 13.

^{4/} CS Docket No. 97-141, FCC 97-423 (rel. January 13, 1998).

^{5/} Comments of Time Warner at 3; Comments of Comcast at 1.

resources to the possibility that the proposed changes would spawn a rash of frivolous lawsuits designed to strike at the "deep-pockets" of the cable industry. All of these diversionary arguments ignore the central issue: the proposed changes are urgently needed to realize the fundamental goal of Section 628 of the Communications Act -- to promote genuine competition in the delivery of video programming, ultimately benefitting American consumers in the form of lower prices and increased choices.

Standing in contrast to the incumbents are new entrants, such as Ameritech, committed to changing the status quo by introducing true competition to the heretofore monopoly cable industry. These new competitors uniformly support the changes to the rules proposed in the NPRM because they know, through their own real life experiences, that such changes are necessary to bring about meaningful, robust competition in the MVPD marketplace. As Chairman Kennard recently observed:

[I]t is clear that broad-based, widespread competition to the cable industry has not developed and is not imminent . . . [r]ates for regulated cable programming and equipment rose 8.5% in the 12-month period ending July, 1997. . . . Our Report indicates that the presence of true, head-to-head competition to cable has a substantial downward effect on cable rates. Prices, not surprisingly, appear lower where there is competition than where there is none. But the much anticipated competition has yet to arrive.

The loser is the American public. They must pay the higher cable prices yet they have few competitive choices. Policymakers should no longer have high hopes that a vigorous and widespread competitive environment will magically emerge in the next several months to reverse the troubling increase in cable rates. I fear it will not.^{6/}

^{6/} Fourth Annual Report, Separate Statement of Chairman William E. Kennard, at 1 (emphasis added).

This is a far less sanguine assessment of the status of competition in the MVPD marketplace than that offered by the incumbent cable industry and reflects the central message of the Fourth Annual Report. Notwithstanding cable incumbents' continued insistence that there is no new evidence to justify changes in program access rules,^{7/} Chairman Kennard is quite clear that something must be done to promote meaningful competition:

We recently proposed ways to increase the effectiveness of our program access rules. 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.^{8/}

In his statement accompanying the Commission's recently released Third Order on Reconsideration of its rules for local multipoint distribution service ("LMDS"), the Chairman again expressed his view of the importance of developing genuine competition in the provision of multichannel video programming.^{9/} While LMDS and other new technologies unquestionably have the potential to provide real competition to incumbent cable providers, the true key to ensuring that such competition can develop is common among all advanced technologies -- nondiscriminatory access to desirable programming.

The procompetitive objectives for the program access rules described by Chairman Kennard can be attained if the Commission adopts the changes proposed by Ameritech. First, the

^{7/} Comments of Liberty Media Corporation at 1-6; Comments of Time Warner at 3.

^{8/} Fourth Annual Report, Separate Statement of Chairman William E. Kennard, at 2.

^{9/} *Rulemaking To Amend Parts 1, 2, 21, and 25 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, To Reallocate the 29.5-30.0 GHz Frequency Band, To Establish Rules and Policies for Local Multipoint Distribution Service And for Fixed Satellite Services*, FCC 98-15, released February 11, 1998 (*Third Order on Reconsideration* in CC Docket No. 92-297), Separate Statement of Chairman William E. Kennard at 1.

Commission should adopt firm deadlines within which it must resolve all program access complaints. This proposal would benefit all parties by ensuring that disputes are resolved expeditiously and that violations of the program access rules are curtailed as soon as possible. Second, the Commission should ensure that complainants and the Commission itself have access to documents critical to determining whether violations of the rules have occurred. By mandating that such documents are appended to the answer to a program access complaint, the Commission would ensure that relevant documents are produced early in complaint proceedings, thus narrowing the issues to be considered by the parties and reducing the expenditure of scarce Commission resources. Finally, the Commission should, in addition to exercising its forfeiture authority, award damages to complainants upon a finding of a violation of the program access rules by defendants. The imposition of meaningful penalties and damages would give incumbents essential market-based incentives to follow the rules.

II. CONTRARY TO THE CLAIMS OF THE INCUMBENT CABLE INDUSTRY, THE CURRENT PROGRAM ACCESS RULES HAVE NOT SUCCEEDED IN PROMOTING ROBUST COMPETITION IN THE MVPD MARKETPLACE AND WILL NOT DO SO IN THE FUTURE ABSENT THE TARGETED CHANGES PROPOSED BY AMERITECH

The record before the Commission vividly reveals that the incumbent cable industry's view of the status of competition in the MVPD marketplace is absolutely at odds with reality. While companies such as Ameritech have invested millions of dollars in an effort to bring true choice to formerly captive customers of incumbent cable, the ongoing anticompetitive actions of the incumbent cable industry continue to retard the development of genuine competition.^{10/}

^{10/} The National Cable Television Association ("NCTA"), implies that the fact that
(continued...)

Competitive MVPDs provide ample evidence of such anticompetitive behavior, describing their continuing and increasing difficulty in gaining nondiscriminatory access to programming.^{11/} Yet, incumbents claim that the relatively small number of program access complaints filed under the existing rules proves that the current rules are working as intended.^{12/}

Ameritech respectfully submits that, far from being a testament to the effectiveness of the current program access rules, the small number of complaints filed to date demonstrates that the flaws inherent in the current rules -- no deadline for decisions on complaints, difficulty for complainants in gaining access to documents necessary to prove violations, and the lack of any meaningful economic penalties for incumbents' noncompliance with the rules -- have served to dissuade new entrants from filing complaints rather than pursuing meritorious claims. Under the current rules, new entrants face long delays required for decisions, incur significant expenses in attempting to prove allegations dependent upon information which defendants are determined to conceal, and don't obtain the programming during the pendency of these protracted proceedings.

^{10/}(...continued)

Ameritech is growing steadily as a competitor to cable is evidence that the current program access regime is functioning as intended. Comments of NCTA at 3. As Ameritech stated earlier in this proceeding, however, the fact that it has established competitive cable operations in various markets is not an indication that the current rules are working well. Reply of Ameritech to Oppositions to Ameritech's Petition for Rulemaking at 4-5. In fact, Ameritech continues to have difficulty gaining nondiscriminatory access to programming such as local sports which is critical to providing a truly competitive video service. Comments of Ameritech at 6-7.

^{11/} See Comments of Optel, Inc. at 1; Comments of RCN Telecom Services, Inc. at 3; Comments of DIRECTV at 10-11; Joint Comments of American Programming Service, Inc et al. at 3-4; Comments of the National Rural Telecommunications Cooperative at 10-11; Comments of the Wireless Cable Association International, Inc. at 20-21; Comments of BellSouth at 3; Comments of Echostar Communications Corporation at 1-2.

^{12/} Comments of NCTA at 3; Comments of Liberty Media at 3; Comments of Time Warner at 2.

Consequently, it is not surprising that, to date, competitors have filed program access complaints largely to redress only the most egregious violations of Section 628. Thus, these defects in the program access rules have operated perversely to foster an institutional level of anticompetitive behavior by incumbents which has retarded the development of robust MVPD competition.

The relatively small number of complaints is also a reflection of the reality of the marketplace obstacles faced by new competitive entrants rather than a vindication of the effectiveness of the existing rules. As noted by GTE, the massive investment required to create new networks to compete with incumbent cable is a huge hurdle faced by competitive MVPD providers.^{13/} Since Section 628 was first enacted, the efforts of competitors have been focused on simply gaining entry into the MVPD marketplace. Eager to enter this market, many new entrants have faced the Hobson's choice of whether to accept discriminatory terms just to gain access to necessary programming or to pursue a complaint against programmers in a lengthy process which barely rewards victory. It is not surprising, then, that new competitors, desperate to gain access to popular programming from programmers who exert great leverage over them, have "chosen" not to file a large number of complaints.

After successfully gaining a toehold in the MVPD market, the challenges facing competitors shift from building their systems to the daunting task of attracting both new and existing subscribers from entrenched and well-financed cable incumbents. To provide serious competition to incumbents, new entrants must have access to popular programming upon nondiscriminatory rates, terms and conditions. Once they have an established programming service, they will necessarily focus more on obtaining programming on truly nondiscriminatory

^{13/} Comments of GTE at 5.

prices, terms and conditions. Indeed, the Commission has already seen this trend accelerate during the last fifteen months, as the pace of program access complaints filed with the Commission has increased, with many of these recent complaints focusing on discriminatory prices, terms and conditions.^{14/}

III. THE IMPOSITION OF STRICT DEADLINES FOR RENDERING DECISIONS ON PROGRAM ACCESS COMPLAINTS IS CONSISTENT WITH THE COMMISSION'S PROCEDURES FOR HANDLING COMMON CARRIER COMPLAINTS AND WILL PROMOTE COMPETITION

Cable incumbents oppose the imposition of any deadlines for Commission decisions on the resolution of program access complaints. This is not surprising considering that the long delays experienced under the current rules, coupled with the lack of adequate incentives to compel compliance with the rules, allow incumbents to violate the rules throughout the pendency of a complaint proceeding. Incumbents, trying to protect their market position and the benefit they gain from protracted proceedings, mask their true fears about deadlines by voicing great concern

^{14/} See *Corporate Media Partners d/b/a Americast and Ameritech New Media, Inc. v. Rainbow Programming Holdings, Inc.*, CSR-4873-P, DA 97-2040 (rel. Sept. 23, 1997)(complaint alleging discrimination on prices, terms and conditions granted by Cable Bureau); *Bell Atlantic Video Services Company v. Rainbow Programming Holdings, Inc. and Cablevision Systems Corporation*, Order, 12 FCC Rcd 9892 (CSB 1997)(Cable Bureau granted complaint alleging discrimination by Rainbow in the sale of satellite programming); *DIRECTV, Inc. v. Comcast-Corp; Comcast-Spectacor, L.P.; and Comcast SportsNet*, CS No.5112-P, filed September 23, 1997; *EchoStar Communications Corp. v. Rainbow Programming Holdings, Inc.*, CS No.5127-P, filed October 14, 1997 (complaint alleges discrimination in prices, terms and conditions for regional sports programming); *EchoStar Communications Corp. v. Fox/Liberty Networks, L.L.C., Fox Sports Net L.L.C., Fox Sports Direct*, CS No. 5138-P, filed October 28, 1997 (complaint alleges discrimination in prices, terms and conditions for regional sports programming); *EchoStar Communications Corp. v. Fox/Liberty Networks, L.L.C., fX Networks, L.L.C.*, CS No. 5165-P, filed November 24, 1997.

that the proposed deadlines will unduly burden the Commission's scarce resources.^{15/} While Ameritech is mindful that the Commission's resources are limited, these arguments ring hollow and only serve to demonstrate the transparency of incumbents' concerns about deadlines.

The proposed rules changes will in fact facilitate the more efficient use of the Commission's resources. Expedited resolution of program access complaints, coupled with the deterrent effect of substantial penalties for violations of the rules, would have a salutary effect, reducing the number of anticompetitive abuses, and thus conserving Commission resources because there would be fewer Section 628 complaints for the Commission staff to process.

Furthermore, the proposed decision deadlines will promote competition by accelerating the availability of alternative choices of video programming to consumers. This procompetitive effect was recognized by competitive MVPDs who are well aware of the serious anticompetitive consequences delays in gaining access to critical programming can have on their ability to attract new subscribers.^{16/} These commenters agree that the implementation of deadlines is consistent with the statutory mandate that the Commission provide for an expedited review of program

^{15/} Comments of NCTA at 5; Comments of Time Warner at 5; Comments of Encore at 5; Comments of NCTA at 5.

^{16/} See e.g., Comments of Bell Atlantic at 3-4; Comments of Optel at 2-3; Comments of GTE at 6; Comments of BellSouth at 10; Comments of WCA at 14. Ameritech believes strongly that these deadlines should run from the date of the filing of a complaint rather than the close of the pleading cycle, as suggested by some commenters. Setting the deadline date from the end of the pleading cycle may provide incentive for parties to delay the close of the cycle by filing excessive pleadings or motions for extensions. Only a date certain from the date of the filing of a complaint will provide assurance that complaints will be resolved expeditiously. Such firm deadlines also will instill discipline on the parties, as well as the Commission.

access complaints^{17/} and note that the Commission's resolution of program access complaints under the current rules has not reflected the urgency that Congress assigned to program access issues.^{18/} New entrants also agreed that the proposed deadlines would be consistent with the various statutory deadlines imposed by the Congress in the Telecommunications Act of 1996,^{19/} most ranging from 90 to 150 days for resolution of different types of common carrier complaints, which were implemented by the Commission in its recent *Common Carrier Report and Order*.^{20/}

IV. AMERITECH'S PROPOSAL TO REQUIRE DEFENDANTS TO APPEND RELEVANT DOCUMENTS TO THEIR ANSWERS AND TO PERMIT DISCOVERY WITHIN THE DISCRETION OF THE COMMISSION STAFF WILL EXPEDITE THE RESOLUTION OF PROGRAM ACCESS COMPLAINTS AND ACT TO SPUR COMPETITION

Cable incumbents oppose expanding the discovery rules to more readily allow complainants access to documents necessary to prove violations of the program access rules. This reluctance to provide information, even with adequate confidentiality protections, is indicative of the importance to the cable industry of keeping the terms of its contracts from competitors and the Commission. Incumbents contend that expanded discovery would place

^{17/} 47 U.S.C. § 548 (f)(1).

^{18/} Comments of BellSouth at 9. SNET Personal Vision notes that even using the Commission's calculation of its average program access complaint processing time, Ameritech's proposals would shorten the average time to process Section 628 complaints by more than three months. Comments of SNET Personal Vision at 2. Such a reduction would be critically important for new entrants as they struggle to gain a critical mass of subscribers.

^{19/} See 47 U.S.C. § § 208 (b)(1), 260 (b), 271 (d)(6)(B) and 275 (c).

^{20/} *Implementation of the Telecommunications Act of 1996 (Amendment of Rules Governing Procedures to be Followed When Formal Complaints are Filed Against Common Carriers)*, Report and Order in CC Docket No. 96-238, FCC 97-396, (rel. Nov. 25, 1997) [hereinafter *Common Carrier Report and Order*].

undue burdens on Commission resources,^{21/} would delay the resolution of program access complaints and, contrary to Congressional intent,^{22/} would encourage MVPDs to file complaints merely to gain access to confidential information for the purpose of securing an unfair advantage in contract negotiations.^{23/} These claims are baseless.

A. The Document Production and Discovery Proposals Made by Ameritech Are Consistent With the Procedures Recently Adopted by the Commission in the *Common Carrier Report and Order* and Will Lead to More Efficient Resolution of Complaints

The incumbent cable industry's arguments against expanded document production and discovery ring particularly hollow in light of Ameritech's proposal that the Commission conform its document production procedures to those it recently adopted in the *Common Carrier Report and Order*. Under these procedures, defendants would be required to append to their answers certain key documents, including all documents on which they intend to rely in defending against the complaint. This requirement will have several pro-efficiency and procompetitive effects. First, requiring the production of central documents early in the proceeding will narrow the issues at the outset, allowing the Commission to resolve disputes within the time frames suggested by Ameritech. Second, this requirement will reduce the need for subsequent discovery requests and will make any such requests more specific. This will reduce the time and expense of any discovery for both parties while conserving Commission resources.

^{21/} Comments of Liberty Media at 10-11.

^{22/} Comments of HBO at 11; Comments of Cablevision at 25.

^{23/} Comments of Liberty Media at 10; Comments of Cablevision at 26.

Although most key documents should be appended to the answer under Ameritech's proposal, discovery may still be necessary in some program access complaint proceedings, and, as set forth in Ameritech's initial comments, Ameritech urges the Commission to adopt a presumption in favor of granting discovery requests. As noted by BellSouth, Congress anticipated the need for defendants to divulge relevant documentation and directed the Commission to develop procedures to ensure that such data is made available.^{24/} Adopting Ameritech's document production and discovery proposals would ensure that Congress's goal is met.

Concerns expressed by incumbents that expanded discovery will delay the resolution of program access complaints are unfounded and, in any event, would be precluded under the proposed rules. Cablevision makes the incredible claim that telephone companies "[w]ith their deep pockets . . . could use just the threat, of protracted, burdensome and expensive program access disputes as a tactic for wringing concessions from programmers to which they are not entitled." It is unclear what "concessions" Cablevision is referring to. Competitors are entitled under the program access rules to have access to programming at nondiscriminatory prices, terms and conditions. Ameritech seeks only the strict enforcement of the law. In addition, notwithstanding that the behavior described by Cablevision sounds more like the dilatory tactics of incumbent cable operators, it is directly contrary to one of the principal goals of Ameritech and other competitive MVPDs in this proceeding -- the expedited resolution of program access complaints.

^{24/} Comments of BellSouth at 11; *see also* 47 U.S.C. § 548(f)(2).

The argument by cable incumbents that expanded discovery will lead to "fishing expeditions" designed to obtain confidential and other competitive information is a red herring. The threat of such conduct is present and effectively managed in any legal proceeding involving discovery, including Commission proceedings, and should not be a basis for the Commission to decline to adopt expanded discovery procedures. Moreover, under both Ameritech's proposal and under the existing rules, the Commission staff is involved in developing discovery requests at the status conference. This involvement by the Commission staff helps to ensure that discovery requests are legitimate and that complainants will not abuse the discovery process.

B. Cable Incumbents' Concerns With the Disclosure of Confidential Information are Unfounded and are Adequately Addressed by the Commission's Proposed Standard Protective Order

Several cable incumbents object to expanded discovery procedures on the grounds that competitors would use discovery to gain access to confidential information and that the proposed protective order and the Commission's resources are insufficient to protect against the improper disclosure of such important competitive information.^{25/} These concerns are spurious and are a transparent attempt by incumbents to divert attention from their own anticompetitive behavior which is the proper focus of this proceeding. There is not one scintilla of evidence in the record to support the accusations made by incumbents that competitive MVPDs would abuse the discovery process to obtain confidential or proprietary information to be used later against

^{25/} Comments of NCTA at 8; Comments of Liberty Media at 10; Comments of HBO at 14-16.

incumbents in contractual negotiations^{26/} or that competitive MVPDs would use the discovery process for leverage.^{27/}

The concerns expressed by incumbents regarding the potential harm from disclosure of confidential information are addressed adequately by the Commission's proposed protective order. This order was based on a model protective order proposed by the Commission in an earlier proceeding to develop general procedures for the treatment of confidential information submitted to the Commission which falls within an exemption to the Freedom of Information Act, 5 U.S.C. §522 (b).^{28/} The use of the model protective order proposed by the Commission will promote the expeditious resolution of complaint proceedings by freeing Commission staff from having to develop customized orders for each proceeding. Moreover, claims by incumbents that the Commission lacks the ability to handle the disclosure of confidential information^{29/} are baseless in light of the Commission's demonstrated ability to manage successfully the disclosure of confidential information in other types of proceedings.^{30/}

^{26/} Comments of HBO at 12.

^{27/} Comments of Cablevision at 26.

^{28/} *Examination of Current Policy Concerning The Treatment of Confidential Information Submitted to the Commission, Notice of Inquiry and Notice of Proposed Rulemaking*, 11 FCC Rcd 12406 (1996).

^{29/} See Comments of Liberty Media at 12.

^{30/} See 47 C.F.R. § 0.457.

V. THE COMMISSION HAS THE AUTHORITY TO IMPOSE BOTH FORFEITURES AND DAMAGES FOR PROGRAM ACCESS VIOLATIONS AND MUST DO SO TO ENSURE COMPLIANCE WITH THE RULES AND TO PROMOTE COMPETITION

A. The Commission's Exercise of Its Forfeiture Authority is a Necessary But Insufficient Means of Deterring Anticompetitive Activity

The Commission's authority to assess forfeitures for violations of the program access rules was not contested by any commenter. In fact, cable incumbents suggest that the Commission's existing forfeiture remedy has been adequate up to this time to deter violations of the program access rules.^{31/} They claim that the fact that the Commission has never exercised its existing forfeiture authority is proof that strengthened remedies are not necessary and that the existing regime is working as intended. This is a non-sequitur, however, and in reality, just the opposite is true. The Commission's forbearance from imposing forfeitures for violations of the program access rules is a contributor to the lack of robust competition in the MVPD marketplace rather than a sign that the existing regime is functioning as intended. In fact, the knowledge that the Commission has never fined incumbents for violations of the program access rules provides an incentive for incumbents to engage in anticompetitive behavior.

The Encore Media Group asserts that the Commission's existing authority to assess forfeitures of \$7,500 per day, per violation, represents a "most formidable, if not unconscionable,

^{31/} Comments of NCTA at 11; Comments of HBO at 20; Comments of Liberty Media at 14. Liberty Media further states that because Ameritech has advocated that the Commission should impose forfeitures and/or damages for violations that Ameritech has somehow acknowledged that forfeitures are equally capable of deterring anticompetitive behavior and that therefore Ameritech's request for a damages remedy should be dismissed. *Id.* at 15-16. The Commission should ignore this obvious distortion of Ameritech's position which has been crystal clear from the beginning of this proceeding -- that damages and forfeitures are both necessary to curb violations of the program access rules and to spur competition in the MVPD industry.

deterrent to anticompetitive behavior."^{32/} This assertion is belied by the comments of several competitors regarding the insignificant economic impact of forfeitures on incumbents when compared to the benefits they realize from violating the program access rules. These commenters demonstrate that the existing forfeiture amounts are so grossly inadequate that they may be viewed merely as a cost of doing business by well-financed cable incumbents.^{33/}

The incentive for violating the rules is even greater in light of the woefully inadequate statutory caps on forfeitures for cable operators and affiliated programmers. Ameritech concurs with the Consumers Union that the statutory maximum for violations of the Commission's rules by cable companies - \$250,000 - is far too low to deter anticompetitive behavior by incumbent cable operators.^{34/} Moreover, the statutory cap on forfeitures for vertically integrated programmers is only \$75,000.^{35/} These amounts are incredibly low when compared to the sizable economic benefits realized by incumbents when they violate the rules.

To address the inadequate deterrent to anticompetitive behavior these statutory maximums present to large multi-system operators ("MSOs"), Ameritech urges the Commission to explore ways to strengthen its forfeiture authority for program access rules violations. At a minimum, the Commission should recommend to Congress that it enact legislation amending Section 503 to increase the statutory forfeiture caps for violations of the program access rules to \$1 million,

^{32/} Comments of Encore Media Group at 11.

^{33/} GTE Comments at 10-11; RCN Telecom Services, Inc. Comments at 9.

^{34/} Comments of the Consumers Union *et al.* at 11; *see also* 47 U.S.C. § 503 (b)(2)(A).

^{35/} 47 U.S.C. § 503 (b)(2)(C).

commensurate with the maximum penalties for violations of Commission rules by common carriers.^{36/}

B. Damages Must Also be Awarded to Deter Anticompetitive Behavior

Even if the Commission exercises increased forfeiture authority, however, forfeitures alone would be an inadequate deterrent to anticompetitive conduct. As noted by Ameritech, forfeitures are payable to the U.S. Treasury and serve to uphold the Commission's rules and procedures. They do not reflect the full amount of economic and competitive harm inflicted on competitors, and conversely, do not reflect the full economic benefit gained by violators of the Commission's rules. Damages, however, compensate injured competitors by forcing anticompetitive actors to pay for the harm caused by their illegal behavior. Together, the award of damages, and enforcement of the Commission's forfeiture authority, would create the necessary disincentives to deter violations of Section 628.

Predictably, incumbent cable interests oppose the proposal that the Commission impose damages for violations of the program access rules. They contend that the Commission lacks legal authority to award damages,^{37/} that the Commission's existing forfeiture authority is adequate to curb violations,^{38/} that the imposition of damages would be counter to the goals of Congress by reducing the efficiency of the program access rules,^{39/} and that damages would encourage

^{36/} See 47 U.S.C. §503(b)(2)(B).

^{37/} Comments of Liberty Media at 18-23; Comments of Time Warner at 6.

^{38/} Comments of HBO at 20; Comments of Liberty Media at 14.

^{39/} Comments of NCTA at 10; Comments of HBO at 20.

frivolous complaints for the purpose of extorting money from deep pocket incumbents.^{40/} Each of these arguments is wholly without merit on both legal and policy grounds and should be rejected by the Commission. NCTA is right when it states that the "rules are meant to promote competition by providing an expeditious proceeding for ensuring that MVPDs have fair access to satellite-delivered programming," but is completely wrong in claiming that "damages are unnecessary to achieve this objective."^{41/} To the contrary, only the real threat of substantial damages, in concert with forfeitures, will prompt incumbents to comply with the rules and to cooperate in ensuring that program access complaints are resolved expeditiously. In fact, the repeated violations of Section 628 by one company underscore the importance of amending the program access rules to provide for the award of damages.^{42/} The best way to prevent recidivism is to punish the offender.

C. The Commission Has Clear Authority to Award Damages

Both Liberty Media and Time Warner argue that the Commission lacks the authority to award damages.^{43/} While this argument is contrary to both the plain language of Section 628^{44/}

^{40/} Comments of HBO at 3; Comments of Time Warner at 6.

^{41/} Comments of NCTA at 4.

^{42/} *See Bell Atlantic Video Services v. Rainbow Programming Holdings, Inc. and Cablevision Systems Corporation* in CSR-4983-P, *Memorandum Opinion and Order* in DA 97-1452 (rel. July 11, 1997); *Corporate Media Partners d/b/a Americast and Ameritech New Media, Inc. v. Rainbow Programming Holdings, Inc.*, in CSR-4873-P, *Memorandum Opinion and Order* in DA 97-2040 (rel. Sept. 23, 1997); *Classic Sports Network, Inc. v. Cablevision Systems Corporation* in CSR-4975-P (filed Mar. 17, 1997) (settled Dec. 24, 1997).

^{43/} Comments of Liberty Media at 18-23; Comments of Time Warner at 6.

^{44/} *See* 47 U.S.C. §§ 548 (e)(1) and (2).

and the Commission's own considered view of its authority under Section 628,^{45/} it is not surprising given the powerful deterrent effect damages will have on violators of the program access rules. Liberty Media bases its view upon 1) its erroneous reading of the plain language of the statute, 2) a misapplication of a canon of statutory construction and 3) an inapt analogy to the Federal Trade Commission ("FTC") statute.

Ameritech already has demonstrated that the Commission possesses the authority to assess damages under the plain language of Section 628(e) and under the Commission's ancillary authority under Sections 4(i) and 303(r) of the Act,^{46/} and its views are incorporated by reference here. Moreover, Ameritech vigorously disputes Liberty Media's arguments that the application of canons of statutory interpretation and an analogy to the FTC statute dictate that the Commission's remedial authority under Section 628 is limited to prospective relief.

Liberty Media maintains that application of the canon of statutory construction *ejusdem generis* to Section 628 dictates that the general term "appropriate remedies" in Section 628(e) must be limited by the specific terms "the power to establish prices, terms, and conditions of sale of programming to the aggrieved multichannel video programming provider" which follow it.^{47/} In

^{45/} *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, 1910-1911 (1994) (*Memorandum Opinion and Order on Reconsideration of the First Report and Order*), [hereinafter *First Reconsideration Order*]

^{46/} Comments of Ameritech at 18-19.

^{47/} Comments of Liberty Media at 21-22, citing 2A SUTHERLAND STAT. CONST. § 47.07 (5th ed.). Under the *ejusdem generis* canon of statutory construction, "[w]here general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." *Id.*

addition, Liberty Media states that "the `including' qualifier in (e)(1) reinforces that (e)(1) is limited to specific, prospective remedies."^{48/} Liberty Media has misapplied *ejusdem generis* to Section 628.

That principle is only to be applied when other, clearer indications of intent are absent.^{49/} A clearer indication of Congressional intent is found in the use of the term "including" in Section 628. According to the same authority that Liberty Media cites in support of its application of *ejusdem generis* to 628, "It has been said 'the word 'includes' is usually a term of enlargement, and not of limitation . . . It therefore conveys the conclusion that there are other items includable, though not specifically enumerated . . .'"^{50/} Courts have implemented this expansive interpretation of the term "includes" in statutory construction on numerous occasions.^{51/} These cases demonstrate that by using the term "including" in Section 628, Congress was not limiting the "appropriate remedies" the Commission could impose to prospective relief, but was merely stating some of the types of relief the Commission is empowered to order.

^{48/} Comments of Liberty Media at 21.

^{49/} *Leslie Salt Co. v. United States*, 896 F.2d 354, 359 (9th Cir. 1990), *cert. denied* 498 U.S. 1126, 111 S. Ct. 1089 (1991).

^{50/} 2A SUTHERLAND STAT. CONST. § 47.07 (5th ed.) (citing *Argosy Ltd. v. Hennigan*, 404 F.2d 14 (5th Cir. 1968)).

^{51/} *See, e.g., Brooklyn Bridge Coalition v. Port Authority of New York and New Jersey*, 951 F. Supp. 383, 389 (E.D.N.Y. 1997); *Varsity Carpet Services v. Richardson*, 146 B.R. 881 (1992), *aff'd in Colortex Industries, Inc.*, 19 F.3d 1371 (1994).

Liberty Media also argues that the Commission's lack of authority to award damages is supported by analogy to the Federal Trade Commission Act ("FTCA"),^{52/} where the authority to provide "affirmative relief" has been held not to authorize the FTC to award damages for violation of the statute.^{53/} This purported analogy between the FTCA and Section 628 concerning damages fails. Although both Section 628(b) of the Communications Act and Section 5 of the FTCA prohibit "unfair or deceptive acts or practices," the remainder of Section 628 incorporates core principles of the Sherman Act and the Clayton Act.^{54/} The award of damages is a central element of the effective enforcement of the antitrust laws upon which Section 628 was based, with treble damages provided for as an economic deterrent to anticompetitive behavior.^{55/} Simply because the FTCA and Section 628 contain one similar substantive prohibition is not a basis for concluding that Section 628 remedies are limited to FTCA type prospective remedies.

The mistaken precept of the analogy is evident from the language of Section 628 itself. Section 628(e)(2) specifically refers to the Commission's authority under Title V of the Act to impose monetary forfeitures for violations of the rules. This explicit statutory authority to impose

^{52/} 15 U.S.C. § 45 (a).

^{53/} Comments of Liberty Media at 23, citing *Heater v. F.T.C.*, 503 F.2d 321 (9th Cir. 1974).

^{54/} See Robinson-Patman Act Amendments to the Clayton Act, 15 U.S.C. § § 13 *et seq.*, dealing with price discrimination, and §§ 1 and 2 of the Sherman Act, 15 U.S.C. § 1,2, encompassing refusals to deal, including exclusive contracts.

^{55/} While the antitrust laws upon which Section 628 is based provide for the award of treble damages, Ameritech does not believe that such damage awards are necessary for violations of Section 628. Rather, the award of actual damages, direct and consequential, caused to a competitor, combined with the assessment of stiff forfeitures by the Commission, would serve to compensate competitive MVPDs for losses sustained from incumbents' anticompetitive conduct and deter such conduct.