

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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

RM No. 9097

REPLY COMMENTS OF BELL ATLANTIC¹

The vast majority of commenters in this proceeding generally support Ameritech's proposal to amend the program access complaint rules regarding timeframes for resolution, discovery and economic sanctions, in order to put some real teeth in the Commission's ability to enforce compliance with the requirements of Section 628 of the Communications Act of 1934 and the Commission's implementing regulations.² Not surprisingly, the only opposition comes from those parties that would be the subject of

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

² See, e.g., Ameritech New Media at 8-23; Bell Atlantic at 3-9; BellSouth at 9-18; Consumer Satellite Systems et al. at 6-14; Consumers Union et. al. at 11-16; EchoStar Communications Corp. at 3-10; GTE at 6-13; National Rural Telecommunications Cooperative et al. at 5-16; OpTel at 1-4; RCN Telecom Services at 4-11; World Satellite Network at 22-23.

such complaints and sanctions: vertically-integrated incumbent cable operators and programmers, and their trade association (the “Programming Opponents”). The Programming Opponents provide no compelling reason for subjecting program access complaints to different procedural requirements than other formal complaints.

These reply comments address and refute the Programming Opponents’ comments with regard to two issues: (1) that the Commission lacks authority to, and has no need to, award damages for Section 628 violations, and (2) that the Commission may not sanction deliberate attempts to evade Section 628’s requirements by moving programming from satellite delivery to terrestrial delivery.

I. The Commission Has Authority to, and Should, Award Damages for Program Access Violations

The Programming Opponents claim that the Commission should not award damages for program access violations, either because the Commission lacks authority to do so, or because it is “unnecessary” to do so.³

Their first argument is an untimely request for reconsideration of the Commission’s previous determination in 1994 that “its authority [under Section 628] ‘is broad enough to include any remedy the Commission reasonably deems appropriate, including damages.’”⁴ Had these commenters wished to challenge the Commission’s

³ See, e.g., Cablevision at 27-28; Comcast at 7-8; Encore Media Group at 10-14; HBO at 18-24; Liberty at 14-24; NCTA at 10-12; Time Warner at 6-7.

⁴ NPRM ¶ 45, citing Memorandum Opinion and Order on Reconsideration of the First Report and Order, *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*, 10 FCC Rcd 1902, 1911 (1994).

finding regarding the extent of its authority under Section 628, they were required to ask the Commission to reconsider its decision or to appeal the Commission's finding within the required statutory time limits.⁵ The only question raised in this proceeding is whether the Commission should exercise the authority it has already determined it has and award damages as an additional check on anticompetitive behavior under Section 628.⁶

The Programming Opponents claim that an award of damages is unnecessary because existing sanctions provide an adequate deterrent to anticompetitive behavior regarding programming. As evidence, Liberty Media states that "only" 38 program access complaints have been filed in 5 years and 60 % of those complaints have been settled. But the number of complaints actually filed does not represent the full extent of the problem. As Bell Atlantic previously noted, in many cases, evidence critical to establish a complainant's prima facie case is often exclusively in the knowledge and control of the defendant, e.g., in price discrimination cases, the prices charged to other video programming distributors.⁷ In addition, potential complainants may be unwilling to detail publicly the problems they are having in obtaining programming, when they are concerned that they lack sufficient proof to pursue a claim, due to possible retaliation or

⁵ See 47 C.F.R. § 1.106(f) (allowing thirty days from *Federal Register* publication to file a petition for reconsideration with the Commission) and 28 U.S.C. § 2344 (allowing sixty days from *Federal Register* publication to file an appeal with the appropriate court)

⁶ NPRM ¶ 45. The Commission may not entertain requests to alter its interpretation of its statutory authority to award damages without giving notice of its intent to do so, and requesting a full briefing by the parties of the arguments for and against that interpretation. 5 U.S.C. § 706. It has not done so here.

⁷ Bell Atlantic Comments at 5-6.

prejudice in their ongoing negotiations with programmers.⁸ If the Commission were to award damages to compensate the victim of a program access violation, when warranted, for its injuries, victims of such anticompetitive behavior may be more willing to undergo the risks of litigation in order to protect their rights.

Moreover, it is not surprising that significant numbers of these complaints eventually settle, given the 8-12 month lag between filing of the complaint and decisions on the merits by the Commission. Since timely access to this programming is critical to new entrants (without which they may never successfully penetrate the market), complainants often feel compelled to accept a settlement that at least guarantees such access, even on less than satisfactory terms, rather than wait for a possible more favorable resolution by the Commission an uncertain number of months later. In any event, the record in this rulemaking as well as other dockets addressing video competition provide ample evidence that the current program access rules and sanctions are not adequate to ensure timely and nondiscriminatory access by new entrants to critical programming resources, and that stronger economic sanctions are required.⁹

The Programming Opponents contend that, even if stronger sanctions are required, the imposition of forfeitures, which have never previously been imposed by the Commission, will suffice. But as Ameritech observes, forfeitures and damages serve

⁸ See, e.g., Reply Comments of Tele-TV, *Implementation of Section 302 of the Telecommunications Act of 1996: Open Video Systems*, CS Docket No. 96-46 (Apr. 11, 1996) at 10 (“Tele-TV OVS Comments”).

⁹ See, e.g., Ameritech at 6-8; Bell Atlantic at 6-7; BellSouth at 3; Consumer Satellite Systems et al; EchoStar Communications Corp at 1-3; NRTC at 9-12; OpTel at 1-4; World Satellite Network at 11; see also, Tele-TV OVS Comments at 10-13.

“a significantly different purpose in creating the necessary disincentives to prevent violations...[F]orfeitures... vindicate the integrity of the Commission’s rules and processes, ...while damages uniquely redress the concomitant injuries to the complaining party which forfeitures alone would neglect.”¹⁰

Only damages provide the injured party with compensation for its inability to obtain access to programming or to obtain such access on nondiscriminatory rates, terms and conditions.¹¹ Because the accumulating damages suffered by the injured party significantly raises the price of anticompetitive behavior, a damages award provides a stronger disincentive to act unlawfully than the threat of mere administrative fines. Consequently, the Commission should both impose forfeitures and award damages for violations of Section 628.

II. Deliberate Attempts to Evade the Program Access Requirements by Moving Programming From Satellite Delivery to Terrestrial Delivery Violate Section 628

Time Warner contends that the Commission should not determine in this proceeding whether deliberate attempts to evade the program access requirements by moving programming from satellite delivery to terrestrial delivery violates Section 628. Instead, Time Warner urges the Commission simply to resolve the pending complaint filed by DirecTV against Comcast approximately 5 months ago, alleging that Comcast is moving regional sports programming in the Philadelphia area from satellite to terrestrial delivery specifically to evade the program access requirements of Section 628.¹² While

¹⁰ Ameritech at 21-22.

¹¹ BellSouth at 18.

¹² Program Access Complaint, *DirecTV, Inc. v. Comcast Corporation et. al.*, File No. CSR-5112-P (filed Sept.. 23, 1997).

prompt resolution of DirecTV's complaint would provide useful precedent for other injured parties facing similar problems, it does not provide the certainty that would be provided by a Commission rule of general applicability setting clear guidelines for acceptable behavior. The Commission should therefore squarely address the issue in this proceeding, regardless of its particular findings with regard to the DirecTV/Comcast dispute.

Some Programming Opponents argue that switching from satellite to terrestrial delivery of programming, even if done to evade the program access requirements, does not violate Section 628(b) because that provision applies only to "satellite cable programming."¹³ Their narrow reading of Section 628(b) ignores its full text. Section 628(b) prohibits "unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or to prevent any multichannel video programming distributor from providing satellite cable programming...to subscribers or consumers." Moving an existing satellite-delivered programming service to terrestrial delivery in order to evade the program access rules is squarely prohibited by the plain language of that statutory provision: it is an unfair act, the purpose and effect of which is to prevent competitors from providing satellite programming to subscribers or consumers.

While evidence of such an anticompetitive purpose may be difficult to prove, injured parties should not be foreclosed from having the opportunity to try to do so. Prima facie evidence of such motivation is demonstrated by Cablevision's plans to

¹³ See, e.g., Cablevision at 13-16; Comcast at 8-10; Liberty Media at 24-29; NCTA at 15.

“circumvent a Federal requirement to share sports programming,”¹⁴ and Comcast’s plans to “lock up” regional Philadelphia sports programming,¹⁵ by moving such popular programming from satellite to terrestrial delivery. If there is a legitimate business reason for switching a particular programming service to terrestrial delivery, it would be open to the programming defendant to demonstrate that that legitimate business reason existed and was the reason for the move, rather than an anticompetitive motive.

The Programming Opponents also contend that the Commission lacks the statutory authority to find a violation of Section 628 with regard to any programming service that has never been delivered by satellite. They claim that Congress specifically limited its coverage in Section 628 to satellite programming, even though it was aware at the time of enacting Section 628 that the cable industry had initially delivered programming services terrestrially and that terrestrial distribution technologies exist. They miss the point. Congress, according to the Senate report, was seeking to avoid anticompetitive behavior in the market for national and regional, rather than local, cable programming. Virtually all national or regional cable programming was delivered by satellite in 1992; therefore, Congress’ decision to describe the programming it sought to

¹⁴ Bell Atlantic at 10, citing Geraldine Fabrikant, “As Wall Street Groans, a Cable Dynasty Grows,” *New York Times*, Apr. 22, 1997, Sect. 3, p. 1, and “Cablevision Reaches for Sports Exclusivity,” *Multichannel News*, Feb. 10, 1997, p. 1.

¹⁵ DirecTV Complaint at 1-2, citing *Vanity Fair*, October 1997, at 166 (“The question now is whether [Comcast President Brian] Roberts can capitalize on an apparent loophole in the 1996 Telecommunications Act to lock up the Philly area’s sports programming. “We don’t like to use the words ‘corner the market,’ because the government watches our behavior,” Roberts says with a laugh. ‘Let’s just say we’ve been able to do things before they’re in vogue.’”)

protect as “satellite” programming helped delineate national and regional programming from local programming, but did not reflect a Congressional intent to limit more narrowly the scope of the Act’s coverage to a particular technology.

To the extent, however, that the Commission feels that it lacks statutory authority to prohibit anticompetitive behavior with regard to programming that has never been delivered by satellite, Bell Atlantic joins Ameritech in urging the Commission to recommend to Congress that it expeditiously amend Section 628 to clarify that the program access requirements are technology-neutral.¹⁶ The need for such clarification takes on added urgency as programmers allege that the economics of delivering extremely popular and therefore critical regional programming – particularly regional sports programming that provides live coverage of the area professional and college sporting events -- is beginning to favor terrestrial over satellite delivery systems.¹⁷

Cablevision contends that there is no need to extend the program access requirements to non-satellite programming, because “well-financed telephone companies” can simply create their own programming.¹⁸ That flippant response ignores the economics of the market: telephone companies, as new market entrants, do not yet have sufficient viewership on their own to sustain new programming (unlike vertically-integrated programmers), yet cannot penetrate the market without providing the programming that the buying public expects and demands.

¹⁶ Ameritech Comments at 26..

¹⁷ *See, e.g.* Comcast at 15 and n. 10.

¹⁸ Cablevision at 8.

Conclusion

For the reasons stated above, the Commission should award damages for program access violations, and sanction vertically-integrated programmers who move their programming from satellite delivery to terrestrial delivery in order to evade the program access rules. The Commission should also adopt the amendments to its program access rules suggested by Ameritech, with the modifications proposed by Bell Atlantic in its previously filed comments.

Respectfully submitted,

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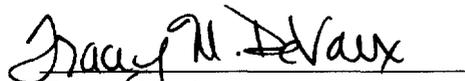
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Dated: February 23, 1998

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of February, 1998 a copy of the foregoing "Reply Comments of Bell Atlantic" was sent by first class mail, postage prepaid, to the parties on the attached list.


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* By hand delivery.

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