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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

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

**REPLY COMMENTS OF
THE NATIONAL RURAL TELECOMMUNICATIONS COOPERATIVE**

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SUMMARY

The National Rural Telecommunications Cooperative (“NRTC”) recognizes that the Commission’s program access rules have been crucial to Multichannel Video Programming Distributors (“MVPDs”) in obtaining popular programming needed to compete with incumbent cable operators. However, because the program access rules lack the regulatory teeth necessary to serve as a deterrent to violations, programming vendors are able to continue discriminatory practices with impunity. Congress provided the Commission with broad discretion to promulgate stronger program access rules that more effectively promote competition in the MVPD market.

NRTC urges the Commission to use its ample regulatory authority to strengthen the program access rules. To that end, NRTC urges the Commission to: (1) impose damages for price discrimination and other program access violations; (2) expedite review of program access complaints; and (3) expand the program access rules to cover terrestrially-delivered programming, formerly delivered by satellite.

BEFORE THE
Federal Communications Commission

WASHINGTON, D.C. 20554

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

**REPLY COMMENTS OF
THE NATIONAL RURAL TELECOMMUNICATIONS COOPERATIVE**

Pursuant to Section 1.415 of the Commission's Rules and Regulations, the National Rural Telecommunications Cooperative ("NRTC"), by its attorneys, hereby submits these Reply Comments in response to the Comments filed in the above-captioned proceeding.¹ NRTC urges the Commission to use the full extent of its authority to promote competition in the Multichannel Video Programming Distribution ("MVPD") market. To that end, it is essential that the Commission strengthen its program access

¹ Notice of Proposed Rulemaking, 64 Fed. Reg. 1943 (released December 18, 1997) ("NPRM").

rules by imposing damages for program access violations, expediting the resolution of program access complaints and deterring evasion of its program access rules.

I. REPLY COMMENTS

A. Damages are Required to Deter Violations of the Program Access Rules and Make Aggrieved MVPD's "Whole."

1. NRTC and its members are MVPDs serving over 800,000 rural households via Direct Broadcast Satellite ("DBS") and C-Band technology. As an MVPD competing with cable for more than 10 years, NRTC has long urged the Commission to deter programmers' discriminatory pricing practices by imposing damages for program access violations.² In the instant proceedings, NRTC, along with DirecTV, Inc. ("DirecTV"); Ameritech New Media, Inc. ("Ameritech"); EchoStar Communications Corporation ("EchoStar"); Consumers Union, Consumer Federation of America and Media Access Project ("CU"); Wireless Cable Association International, Inc. ("WCAI"); Bell Atlantic; BellSouth Corporation ("Bell South"); GTE Service Corporation ("GTE"); Small Cable Business Association ("SCBA"), RCN Telecom Services, Inc. ("RCN"); OpTel, Inc. ("OpTel"); World Satellite Network, Inc. ("WSN");

² See Petition for Reconsideration of NRTC In the Matter of 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, MM Docket No. 92-265, filed June 10, 1993 ("Petition for Reconsideration"); Reply of NRTC in MM Docket No. 92-265, filed July 28, 1993 ("Reply"); Comments and Reply Comments of NRTC corresponding to the 1995, 1996 and 1997 Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming.

American Programming Services, Inc. ("APSI"); and SNET Personal Vision, Inc. ("SNET") urged the Commission to impose damages to compensate complainants proving pricing or other program access discrimination.

2. Despite self-serving arguments to the contrary by the National Cable Television Association ("NCTA"), Liberty Media Corporation ("Liberty"), Time Warner Cable ("Time Warner"), Encore Media Group LLC ("Encore") and Home Box Office ("HBO"), the Commission's authority to impose damages is well established. As noted in NRTC's Comments, and as described by the Commission in the Memorandum Opinion and Order and Notice of Proposed Rulemaking in the instant proceeding, the Commission long ago properly determined that it is authorized by Section 628 of the Communications Act ("Section 628") to afford program access complainants relief in the form of damages.³

3. The Commission made its initial determination that damages are an appropriate remedy to compensate aggrieved MVPDs injured by the discriminatory practices of programming vendors at the urging of NRTC. In its June 10, 1993, Petition for Reconsideration, NRTC first requested the FCC to reverse its determination that it is not authorized by the 1992 Cable Act to award damages to an aggrieved MVPD for injuries caused by a violation of the program access rules.⁴ NRTC noted that Congress

³ 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, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 64 Fed. Reg. 1943 (rel. December 18, 1997)("NPRM"); NRTC Comments at pp. 8-10.

⁴ Petition for Reconsideration at p. 6.

provided the FCC with ample authority to order all “appropriate remedies,” and that damages have traditionally been regarded as an appropriate remedy for violations of the Commission’s non-discrimination requirements. NRTC also noted that complaint proceedings may require a considerable amount of time for successful prosecution at the Commission and that during the pendency of the complaint, the programmer could continue to discriminate with impunity against the complaining MVPD. NRTC contended that it would be patently unfair to require the MVPD to continue paying the discriminatory rates with no hope of ultimately recovering those unfair payments from the programmer in the form of damages. Damages, NRTC argued, are completely warranted to make the aggrieved party whole, and are necessary to provide an incentive to program vendors to discontinue their discriminatory pricing practices.⁵ NRTC’s Petition received the support of the Bell Atlantic Telephone Companies, and the Consumer Federation of America, but was met with opposition from programming vendors and cable operators.⁶

4. In its Reply filed on July 23, 1993, NRTC again argued that the Commission had ample statutory authority to grant an award of damages as an “appropriate remedy” in a particular program access case.⁷ NRTC pointed to well

⁵ Id. at p. 7.

⁶ Opposition to NRTC’s Petition were filed by Discovery, Liberty Media, Superstar, Time Warner, United Video, Viacom and Landmark.

⁷ Reply at 7.

established principles that a remedy is the means employed to enforce a right or redress an injury and that to properly redress an injury, damages must be awarded to make the aggrieved party whole.⁸

5. The Commission agreed with NRTC's analysis that it has ample authority to award damages for violations of the program access rules, although it declined to do so at that time.⁹ On numerous occasions since then, the Commission has recognized its authority under the Communications Act to impose damages for program access violations.¹⁰ In the instant proceeding, the Commission does not question whether it has the authority to order damages, rather, it asks whether "imposition of damages for violations of Section 628 of the Communications Act may now be appropriate and in the public interest."¹¹ NRTC once again urges the Commission to use its broad authority under Section 628 and to order damages for violations of the program access rules.

⁸ Id. citing Chelentis v. Luckenbach S.S. Co., 247 U.S. 372, 384 (1918).

⁹ See Implementation of the Cable Television Consumer Protection and Competition Act of 1992 Development of Competition in Video Programming Distribution and Carriage, Memorandum Opinion and Order, 10 FCC Rcd 1902, 1922 (1994).

¹⁰ See Revision of Rules and Policies for the Direct Broadcast Service, 1B Docket No. 95-168, PP Docket No. 93-253, Report and Order, 11 FCC Rcd 9712 at ¶ 107, note 212 (1995); NPRM at ¶¶ 45-46.

¹¹ NPRM at ¶ 45.

6. Other sanctions, such as requiring the vendor to revise its contracts in the future to comply with program access requirements, are insufficient to deter violations of the program access rules. NRTC agrees with Ameritech, WCAI, Bell Atlantic, GTE and RCN that forfeitures alone will never be enough to deter program access violations, and they will never make the aggrieved MVPD whole. Particularly in unlawful price discrimination cases, there is no legitimate reason to permit the violator to retain monies it was not authorized to charge in the first instance. Restitution in the form of damages is entirely appropriate to return those ill-gotten gains to the MVPD who should never have been required to pay them.

7. Nearly five years ago, in its *Petition for Reconsideration*, NRTC first argued that an award for damages is needed to put regulatory "teeth" in the Commission's program access complaint process and to make the complainant whole. NRTC noted then that it is

unfair to require the MVPD to continue paying the discriminatory rates to the programmer with no hope of ultimately recovering these unfair payments from the programmer in the form of damages. Fines alone will be an inadequate deterrent, and they will not benefit the video distribution market or make the aggrieved MVPD whole.¹²

To this date, the Commission's continued hesitancy to impose damages provides no hope for competing MVPDS to recover damages caused by the defendant's discriminatory practices. Without an obligation to pay competing MVPDs restitution for damages

¹² *Petition for Reconsideration* at pp. 6-7.

caused by their discriminatory behavior, programming vendors are not properly incented to follow the program access rules.

8. The inability of the current program access rules to effectively deter discriminatory pricing practices and other program access violations is clearly evident by the continued stream of program access complaints filed with the Commission.¹³ These complaints may not have been necessary had the Commission required programming vendors found to be in violation of the program access rules to pay the aggrieved MVPDs for damages sustained by the programming vendor's discriminatory pricing or other unfair practices. There is no legitimate reason why aggrieved MVPDs should not obtain restitution for injuries caused by programming vendors found to be in violation of the program access rules. To that end, NRTC urges the Commission to calculate damages and to award them in appropriate cases from the time the violation first occurred.

9. NCTA, Time Warner, HBO and Comcast argued that there is no evidence of widespread violations of the program access rules which would make a deterrent mechanism necessary. These parties supported their assertion by pointing to the number of program access complaints filed with the Commission and the number of complaints

¹³ See Petition of DirecTV, Inc. against Comcast Corp, filed September 23, 1997; Petition of EchoStar complaint against Fox/Liberty Networks LLC, Fox Sports Net LLC, and Fox Sports Direct (Fox), filed October 27, 1997; Petition of EchoStar against F/X, filed November 24, 1997.

where the programmer was found to be in violation of the program access rules. The program access complaints filed with the Commission to date, however, do not represent the entire scope of program access violations. As NRTC and numerous other parties have noted, the prosecution of complaint cases before the Commission is expensive and time consuming. Many competing MVPDs do not have the resources to pursue a program access complaint case with the Commission, and other MVPDs are discouraged from expending their valuable resources in pursuing a program access complaint without the possibility of an award of damages and counsel fees to make them whole at the conclusion of the proceeding.

10. Furthermore, those cases where the Commission has issued an order finding the programmer guilty of program access violations are even less representative of the total scope of program access violations. Without the assurance of being made whole by an award of damages, many competing MVPDs involved in a program access complaint may be willing to settle the complaint, even if the settlement does not provide the MVPD with fair rates, terms and conditions.

11. Ameritech's Petition for Rulemaking, the response to Ameritech's Petition, and the Commission's 1997 Competition Inquiry have made it abundantly clear that the Commission's failure to impose damages for program access violations has substantially delayed the ability of MVPDs across-the-board to compete effectively with cable. NRTC again urges the Commission to open the way for true competition in the

MVPD market by requiring program vendors found to be in violation of the program access rules to pay the aggrieved MVPD damages caused by their unfair and illegal practices.

B. The Commission Should Expedite the Resolution of Program Access Complaints.

12. The Commission's discovery procedures and the Commission's lengthy processing time for program access complaints were cited by competing MVPDs as other substantial barriers to competition in the MVPD market. As noted by DirecTV, the lengthy complaint process, coupled with the inability to access relevant information have often led alternative MVPDs to compromise at the settlement table rather than face the uncertainties of the program access complaint process.¹⁴ Likewise, BellSouth noted that the lag in resolving program access complaints is leading to settlements that may not provide complete access or fair pricing, thereby producing a weaker competitor to cable.¹⁵

13. Cable operators predicably argued that the Commission should not establish deadlines for the resolution of program access complaints.¹⁶ NCTA, Time Warner and Comcast asserted that because Congress did not provide the Commission

¹⁴ DirecTV Comments at p. 24.

¹⁵ BellSouth Comments at p. 10.

¹⁶ See Comments of NCTA, Time Warner, Encore, and Comcast.

with deadlines for the resolution of program access complaints, the Commission should not adopt resolution deadlines.¹⁷ These arguments are self-serving since delays in the resolution of program access complaints delay competition. Furthermore, since the Commission to date has been “reluctant” to impose damages for violations of the program access rules, there is absolutely no incentive for programming vendors to resolve a program access complaints early in the process.

14. The Commission is not precluded from adopting resolution deadlines simply because the Cable Act did not specify deadlines. NRTC agrees that so long as the purpose of the Cable Act, the promotion of competition in the MVPD market, is furthered, and, as noted by HBO, so long as the complaint process is not comprised,¹⁸ the Commission should expedite the complaint process by setting reasonable resolution deadlines.

15. NRTC urges the Commission to adopt blanket rules requiring the automatic submission of all documents upon which the defendant intends to rely upon to establish its defense and other key documents necessarily implicated by the allegations in the complaint. As already noted, NRTC has filed program access complaints in the past and knows well that certain documents within the defendant’s possession are essential for

¹⁷ NCTA Comments at p. 5; Time Warner Comments at p. 5; Comcast Comments at pp. 3-4.

¹⁸ HBO Comments at p. 4.

an MVPD to demonstrate that a program access violation has occurred. NRTC agrees with EchoStar's assertion that discovery is required for the Commission to determine the precise extent of discrimination and to fashion an appropriate remedy.¹⁹ Also, as noted by DirecTV, the required production of relevant programming documents is equally important to ensure that the FCC staff reaches the most fair and factually accurate resolution of issues raised in program access complaints.²⁰

C. The Program Access Rules Should be Expanded to Cover Terrestrially-Delivered Programming.

16. NRTC and others noted in their Comments a trend by program vendors to switch delivery technology of popular sports programming to evade the Commission's program access rules. NRTC cited DirecTV's program recent access complaint against Comcast Corp. for refusal to sell DirecTV its SportsNet programming in Philadelphia. NRTC also noted reports by other competing MVPDs that Cablevision Systems Corp., which controls the rights to virtually all major sports programming in the New York Metropolitan area, would soon migrate its popular SportsChannel New York service from satellite distribution to fiber with the express purpose of evading its program access

¹⁹ EchoStar Comments at p. 4.

²⁰ DirecTV Comments at pp. 25-26.

obligations.²¹ NRTC argued that the inability of competing MVPDs to offer programming, especially popular sports programming as is the case with DirecTV, impedes the growth of competition in the MVPD market. NRTC urged the Commission to reexamine its program access rules and to broaden their scope to apply to the delivery of video programming by terrestrial means under these circumstances.

17. In their Comments, competing MVPDs and cable operators argued over the Commission's authority to extend its program access rules to include satellite programming switched to terrestrial delivery. DirecTV argued that the FCC has authority to address evasion strategies under Section 628(b) which proscribes "unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or prevent any multichannel video programming distributor from providing satellite cable programming . . . to subscribers or consumers."²² Also, DirecTV argued that the term "satellite cable programming" found in Section 628(c) could be interpreted to encompass programming that was formerly delivered by satellite but converted to terrestrial delivery to evade the statutory requirements.²³ We agree.

²¹ See WCAI Comments in CS Docket No. 97-141 at p. 7; Ameritech Comments in CS Docket No. 97-141 at p. 19; BellSouth Comments in CS Docket No. 97-141 at p. 15; Bell Atlantic and NYNEX Comments in CS Docket No. 97-141 at p. 6. *citing to* Geraldine Fabrikant, "As Wall Street Groans, A Cable Dynasty Grows," N.Y. Times, April 27, 1997, at Financial p. 1.

²² DirecTV Comments at p. 6.

²³ Id. at pp. 18-19.

18. Sections 4(i) and 303(r) of the Communications Act were cited by CU and SNET as the source of authority for the Commission to take any action "necessary" to enforce its program access rules. CU reasoned that because switching delivery technologies directly hinders or prevents competing MVPDs from obtaining programming, the FCC has express jurisdiction to apply its program access rules to terrestrially delivered programming switched from satellite. CU argued that broadened enforcement of the program access rules is necessary to ensure that vertically-integrated programmers do not undermine the basic purpose of Section 628 -- to increase competition to cable.

19. On the other hand, NCTA, Cablevision and Comcast generally opposed the expansion of program access rules to programming whose delivery technology has been switched. NCTA, Cablevision and Comcast pointed to the legislative history of Section 628. These parties argued that because the House version of the bill, which had a very broad definition of affected programming, was rejected in favor of the Senate bill, which defined affected programming as "satellite broadcast programming" or "satellite cable programming," Congress intended terrestrially delivered programming to be exempted from the program access rules.

20. NRTC agrees with DirecTV and CU that the Commission has ample authority to require vertically integrated cable programming to be made available to competing MVPDs in accordance with the program access rules - - regardless of delivery

method. Congress made clear that its primary intent in passing the program access provisions of the 1992 Cable Act was to increase competition and diversity in the multichannel video programming market.²⁴ The continued trend of moving to terrestrial delivery to avoid application of the program access rules would unquestionably handicap MVPD competition.

21. Regardless of delivery mode, the Commission should fulfill the Congressional intent of promoting competition to and forbidding anticompetitive behavior by cable operators exercising market power. To that end, NRTC urges the Commission to exercise its authority under Section 628(b) to prohibit the practices of vertically integrated cable programmers that significantly hinder and prevent competing MVPDs from providing consumers access to satellite cable programming or satellite broadcast programming, including the practice of “switching” satellite programming to terrestrial delivery technologies to evade the rules.

IV. CONCLUSION

22. The continuing violations and evasion of the program access rules by vertically-integrated programmers and the continuing domination of the MVPD market by large cable MSOs clearly indicate the need for revisions of the Commission’s program

²⁴ 47 U.S.C. § 548(a).

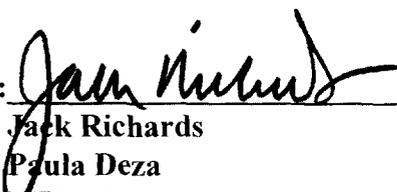
access rules. These shortfalls in the program access rules are caused by inadequate incentives for compliance, by a lengthy, and often ineffective, complaint process and by the ability of vertically-integrated programmers to evade the rules by switching delivery technology.

23. NRTC urges the Commission to take affirmative steps to close these loopholes in the program access rules. NRTC urges the Commission to: (1) authorize the award of damages as a remedy for price discrimination and other program access violations; (2) establish new procedural rules to expedite the resolution of program access complaints; and (3) extend the program access rules to encompass terrestrially-delivered programming that was previously delivered by satellite.

WHEREFORE, THE PREMISES CONSIDERED, the National Rural Telecommunications Cooperative respectfully requests that the Commission encourage the development of competition in the MVPD market by imposing damages for violations of the program access rules, expediting the program access complaint process and extending the program access rules to terrestrially-delivered programming.

Respectfully submitted,

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