

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

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

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

REPLY COMMENTS

THE WIRELESS CABLE ASSOCIATION  
INTERNATIONAL, INC.

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## EXECUTIVE SUMMARY

The initial comments filed in response to the Commission's *Memorandum Opinion and Order and Notice of Proposed Rulemaking* in this proceeding (the "*NPRM*") break down as expected: cable's competitors have demonstrated a pressing need for program access reform, while vertically-integrated cable programmers continue to favor preserving the very same *status quo* that the Commission is trying to change in this proceeding. In so doing, the cable programmers attempt to avoid the relevant issues by declaring that the program access rules are already providing cable's competitors with access to vertically-integrated services, and that any further modifications to the program access rules are unnecessary at this time. This, of course, is plainly inconsistent with both the record and the Commission's own recent statements to Congress regarding the program access problem. Contrary to what the cable programmers suggest in their comments, the *NPRM* is an appropriate and necessary vehicle for examining whether the Commission's current program access rules are giving full effect to the intent of Congress.

None of the cable programmers' arguments militate against the adoption of WCA's proposals *vis-a-vis* mandatory discovery, time limits for resolution of program access cases, and the imposition of a damages remedy where the Commission finds that a program access violation has occurred. In essence, the cable programmers argue that these proposals would convert the program access complaint process into full-blown litigation, preclude thorough staff review of program access disputes, and motivate cable's competitors to burden programmers and the Commission with frivolous complaints. To the contrary, each of WCA's proposals have been carefully designed to *minimize* staff involvement in the discovery process, provide the staff adequate time to review the merits of a complaint *after* the record has been closed, and otherwise provide disincentives for any competitor to abuse the Commission's processes solely to extract a settlement from a cable programmer. WCA's proposals therefore are entirely consistent with the Commission's fundamental objective of ensuring fair and timely resolution of program access complaints without imposing unreasonable burdens on the Commission's staff.

Finally, the cable programmers' arguments as to the alleged inapplicability of Section 628(b) of the 1992 Cable Act to satellite-to-terrestrial migration of programming are unpersuasive. That provision clearly prohibits "unfair practices" in any form; the cable programmers' exclusive focus on the provision's reference to "satellite delivered" programming effectively reads the "unfair practices" language out of the statute, something the Commission cannot and should not do. Moreover, the cable programmers' interpretation is flatly inconsistent with the Commission's own prior statements on this issue, and will only serve to legitimize the very sort of anticompetitive conduct Congress clearly intended to prohibit in Section 628(b).

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To: The Commission

**REPLY COMMENTS**

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

**I. INTRODUCTION.**

The initial comments filed in response to the *NPRM* break down as one would expect: cable's competitors have demonstrated a pressing need for program access reform, whereas incumbent cable operators and programmers swim against the tide and continue to favor preserving the very same regulatory framework which the Commission is trying to change in this proceeding. The broad theme of the cable industry's comments, in a nutshell, is that cable's competitors have adequate

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<sup>1/</sup> See *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, FCC 97-415 (rel. Dec. 18, 1997).

access to vertically-integrated cable networks under the current rules, and that the rule modifications proposed in the *NPRM* amount to nothing more than a solution in search of a problem. This rulemaking, however, is not a referendum on whether cable's competitors have full and fair access to programming: the record before the Commission both here and in prior dockets, as well as before Capitol Hill, demonstrates that alternative multichannel video programming distributors ("MVPDs") do *not* have access to a growing number of cable programming services, and that reforms of the type proposed in the *NPRM* are necessary to ensure that the Commission's program access rules continue to promote competition as intended by Congress. This basic fact, and not cable's disingenuous claims to the contrary, should remain the cornerstone of this proceeding.

The cable industry's comments further attempt to distort the issues here by claiming that the Commission's proposals are something they clearly are not, *i.e.*, an attempt to convert the program access complaint process into full-blown litigation that will impose unreasonable burdens on the Commission's staff. WCA has never advocated such an approach, and in fact has made proposals that are designed to *minimize* the staff's involvement in the discovery process and provide sufficient time for staff review and resolution of a program access complaint *after* the record has been closed. Moreover, cable's concerns about potential delays in the complaint process ring false given that those very same delays work to the decided advantage of programmers who are trying to avoid selling their products to alternative MVPDs. Certain cable programmers also raise concerns about confidentiality which, if taken to their logical extreme, would place *all* critical documents beyond the reach of discovery and thereby cripple a competitor's effort to sustain, for example, a price discrimination complaint. Moreover, the Commission has in prior cases allowed discovery of these same documents on a discretionary basis, with no apparent adverse effect on the cable industry's

ability to conduct its operations and otherwise maintain its overwhelming market power over competing providers of multichannel service. In short, cable's "confidentiality" argument is a predictable red herring disingenuously designed to undermine the merits of providing complainants with a carefully tailored right to mandatory discovery in program access cases.

As to the issue of damages, the initial comments filed by cable's competitors demonstrate that forfeitures are not sufficient to deter program access violations and in fact may encourage such violations to the extent that they allow a programmer to calculate its maximum financial exposure ahead of time. Various cable programmers, however, contend that a damages remedy is unauthorized under the 1992 Cable Act and in any case is unwarranted, since it will supposedly promote the filing of frivolous complaints or, alternatively, deter programmers from charging legitimate differential rates to competing providers. Of course, the Commission has already determined that it has the necessary statutory authority to impose a damages remedy in program access cases, and Section 76.1003(q) of the Commission's Rules allows for sanctions to be imposed against any party who files a frivolous program access complaint. Furthermore, there simply is no merit to the notion that the imposition of a damages remedy might deter programmers from charging permitted differential rates that would not give rise to a program access violation in the first place.

Finally, it is clear that Section 628(b) of the 1992 Cable Act empowers the Commission to prohibit satellite-to-terrestrial migration as an "unfair practice" where the migration has the "purpose or effect" of preventing an alternative MVPD from obtaining access to programming. In their initial comments, various cable programmers argue that Section 628(b) no longer applies once satellite-to-terrestrial migration has been accomplished. This interpretation, however, effectively reads the

“unfair practice” provision out of the statute and is otherwise inconsistent with the legislative history and purposes of Section 628(b). Simply stated, Section 628(b), *as currently written*, covers exactly the sort of satellite-to-terrestrial evasion which is fast becoming a reality in the multichannel video programming marketplace, and the Commission therefore must act now to ensure that such tactics cause no further damage to cable’s competitors.

## II. DISCUSSION.

### A. *Cable’s Arguments As To The Effectiveness of the Existing Program Access Rules Are Misleading As a Factual Matter And Unresponsive To the Issues Raised In This Proceeding.*

Throughout their initial comments, cable programmers repeatedly argue that the existing program access rules already ensure that cable’s competitors have access to vertically-integrated programming, and that the reforms proposed in the *NPRM* therefore are entirely unnecessary.<sup>2/</sup> In support, the cable programmers point to the programming lineups of DBS operators as evidence that the program access rules are having their intended pro-competitive effect.<sup>3/</sup> This argument is not only misleading as a factual matter, but is at absolute odds with recent Commission statements to Congress demonstrating why program access reform is necessary at this time.

In a recent letter to Congress, Chairman Kennard made it clear that “vertical integration” is not the locus of the program access problem: “[i]t is probably fair to say that the general conclusion

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<sup>2/</sup> *See, e.g.*, Comments of The National Cable Television Association, MM Docket No. 97-248, at 2-3 (filed Feb. 2, 1998) [the “NCTA Comments”]; Comments of Comcast Corporation, MM Docket No. 97-248, at 1-2 (filed Feb. 2, 1998) [the “Comcast Comments”].

<sup>3/</sup> *See, e.g.*, Comments of Liberty Media Corporation, MM Docket No. 97-248, at 2-4 (filed Feb. 2, 1998) [the “Liberty Comments”]; Comments of Time Warner Cable, MM Docket No. 97-248, at 2-3 (filed Feb. 2, 1998) [the “Time Warner Comments”].

is that any analysis should focus on the source of any market power involved (the absence of competition at the local distribution level) *rather than on vertical integration itself.*<sup>4/</sup> Indeed, the Chairman confirmed that cable's competitors are being to a growing number of programming services *alleged* not to be "vertically-integrated" under the Commission's current technical definition of that term, *e.g.*, MSNBC, Game Show Network, Eye On People, Fox News, Home & Garden Television and TV Land.<sup>5/</sup> Thus cable programmers grossly oversimplify the problem when they focus entirely on vertically-integrated programming services, since the program access debate arises not from "vertical integration" but from the larger problem of cable's undisputed stranglehold over local distribution of programming and its impact on a programmer's willingness to deal with cable's competitors. The fact that certain of cable's competitors may have access to certain vertically-integrated programming services has no bearing whatsoever on that issue. For this reason, WCA reiterates its call for the Commission to issue a *Further Notice of Proposed Rulemaking* to examine whether its program access attribution standards are sufficiently broad to encompass the wide range of business relationships between programmers and cable operators that have the same anticompetitive effect as "vertical integration" under the Commission's current definition of that term.<sup>6/</sup>

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<sup>4/</sup> Letter from William E. Kennard to the Honorable W.L. (Billy) Tauzin, Responses to Questions, at 3 (Jan. 23, 1998) [emphasis added] [the "Kennard Letter"]. *See also id.* at 7 ("[R]egardless of the method of delivery, where programming is unfairly or anti-competitively withheld from distribution, competition is deterred or impeded.").

<sup>5/</sup>*Id.* at 1.

<sup>6/</sup> *See* Comments of The Wireless Cable Association International, Inc., CS Docket No. 97-248, at 27-29 (filed Feb. 2, 1998) [the "WCA Comments"].

Also, it is not true that all vertically-integrated cable services are now available to cable's competitors on a nondiscriminatory basis. As recently noted by Matthew Oristano, the Chairman of wireless cable operator People's Choice TV Corp., popular new cable services such FX and MSNBC (co-owned by Microsoft, which holds an 11.5% interest in Comcast) remain unavailable to wireless cable operators.<sup>7/</sup>

Moreover, it is no answer to suggest that the programming lineups of certain DBS operators mitigate any concerns the Commission may have with respect to program access. The Commission has stated that its program access rules exist for the benefit of *all* multichannel competitors, and that the availability of programming to DBS does *not* mitigate the broader anticompetitive effects of a programmer's refusal to deal fairly with alternative MVPDs.<sup>8/</sup> And, in any case, DBS operators are still having considerable difficulty obtaining access to programming, as demonstrated in the recent program access complaints filed by EchoStar against the various Rainbow and Fox cable programming networks,<sup>9/</sup> and by DirecTV against Comcast SportsNet.<sup>10/</sup> Simply stated, cable's argument vis-a-vis the availability of programming to DBS is a non-starter and should be rejected.

In sum, Chairman Kennard himself put it best: "New entrants seeking to compete against incumbents must have a fair opportunity to obtain and market programming, and the Commission's

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<sup>7/</sup> See WCA Comments, at 5 [quoting Oristano testimony before the Commission regarding the unavailability of MSNBC and the Fox services to wireless cable operators] [the "WCA Comments"].

<sup>8/</sup> See *Time Warner Cable*, 9 FCC Rcd 3221, 3224 (1994)

<sup>9/</sup> See *EchoStar Communications Corporation v. Fox/Liberty Networks et al.*, FCC File No. CSR-5165; *EchoStar Communications Corporation v. Rainbow Media Holdings, et al.*, FCC File No. CSR-5127-P.

<sup>10/</sup> *DirecTV, Inc. v. Comcast Corporation et al.*, CSR-5112-P.

program access rules must be enforced swiftly and effectively.”<sup>11/</sup> This fundamental principle, and not cable’s disingenuous arguments to the contrary, should continue to be the foundation of any rules adopted in this proceeding.

*B. WCA Has Proposed Discovery Procedures and Procedural Time Limits That Are Designed to Expedite the Program Access Complaint Process Without Imposing Unreasonable Burdens on The Commission’s Staff.*

The Commission has already indicated that, at least in price discrimination cases, discovery is “essential.”<sup>12/</sup> WCA believes this is true with respect to other types of program access cases as well, and thus expressed support in its initial comments for a Commission rule that would give program access complainants a mandatory right to discovery.<sup>13/</sup> At the same time, however, WCA recognized that mandatory discovery procedures will not expedite the processing of program access complaints if they impose unreasonable burdens on the Commission’s staff. Accordingly, WCA recommended that *limited* discovery be initiated early in the process, *i.e.*, by requiring a program access complainant to include 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

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<sup>11/</sup> 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. 97-141, FCC 97-423 (rel. January 13, 1998) [the “*Fourth Annual Report*“], at 2.

<sup>12/</sup> Kennard Letter, Responses to Questions at 11.

<sup>13/</sup> See WCA Comments, at 11-12.

and not obtainable from other sources.<sup>14/</sup> Aside from minor differences as to the details, a number of commenting parties have supported this basic approach.<sup>15/</sup>

WCA therefore submits that the cable industry is simply wrong when it suggests that the discovery proposals at issue in this proceeding will invariably lead to “fishing expeditions” or other abuses of the program access complaint process.<sup>16/</sup> Indeed, the Commission itself has made a point of soliciting discovery proposals that will *expedite* the program access complaint process.<sup>17/</sup> Moreover, WCA also is cognizant of the potential for “fishing expeditions” during the discovery process, and thus has recommended that the Commission adopt additional safeguards to prevent such conduct. Specifically, WCA has asked the Commission to:

- clarify that requests of the staff for oral depositions or other additional discovery (*i.e.*, requests for additional documents relating to new matters

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<sup>14/</sup> See WCA Comments, at 12.

<sup>15/</sup> Comments of OpTel, Inc., CS Docket No. 97-248, at 2-3 (filed Feb. 2, 1998) [the “OpTel Comments”]; Comments of Ameritech New Media, Inc., CS Docket No. 97-248, at 14 (filed Feb. 2, 1998) [the “Ameritech Comments”]; Comments of GTE, CS Docket No. 97-248, at 10 (filed Feb. 2, 1998) [the “GTE Comments”]; Comments of EchoStar Communications Corporation, CS Docket No. 97-248, at 7 (filed Feb. 2, 1998) [the “EchoStar Comments”]; Comments of Bell Atlantic, CS Docket No. 97-248, at 5 (filed Feb. 2, 1998) [the “Bell Atlantic Comments”]; Comments of RCN Telecom Services, Inc., CS Docket No. 97-248, at 4 (filed Feb. 2, 1998) [the “RCN Comments”].

<sup>16/</sup> See, *e.g.*, Comcast Comments, at 5; NCTA Comments, at 8; Liberty Comments, at 8-10.

<sup>17/</sup> See *NPRM*, at ¶ 7. In this regard, it is odd that the cable industry now complains that mandatory discovery would delay the processing of program access complaints. See, *e.g.*, Liberty Comments, at 10; Time Warner Comments, at 7. It is now well established that such delays benefit *programmers* who are seeking to avoid their program access obligations to cable’s competitors. Accordingly, to the extent that such delays occur, they are the complainant’s cross to bear. And, where the potential for delay outweighs the benefit of obtaining additional information from the defendant, the complainant always retains the option of eschewing discovery and prosecuting its complaint with whatever information it is able to gather from other sources.

raised in the defendant's answer) will not be entertained absent a compelling showing of need by the complainant;<sup>18/</sup> and

- expressly provide for the imposition of sanctions against complainants who abuse the discovery process.<sup>19/</sup> 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.<sup>20/</sup>

Certain cable programmers also speculate that mandatory discovery will inspire cable's competitors to file meritless program access complaints for the sole purpose of obtaining access to a programmer's confidential documents.<sup>21/</sup> The Commission, however, already has authority under Section 76.1003(q) of its rules to issue sanctions for frivolous complains, and has proposed to protect a program access defendant's confidential documents via the model protective order attached as Appendix A to the *NPRM*.<sup>22/</sup> In fact, the Commission's rules have always provided for confidential protection of documents produced before and during the program access complaint process (47 C.F.R. § 76.1003(h)), with no ill effect on the cable industry's ability to negotiate programming contracts or otherwise conduct its operations in an orderly manner. In effect, the cable programmers

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<sup>18/</sup> See WCA Comments, at 13.

<sup>19/</sup> See *id.*

<sup>20/</sup> See *id.* at 13 n.33.

<sup>21/</sup> See, e.g., Comments of Home Box Office, Inc., CS Docket No. 97-248, at 13-14 (filed Feb. 2, 1998) [the "HBO Comments"]; NCTA Comments, at 8.

<sup>22/</sup> At least one major cable programmer has already expressed support for adoption of the Commission's model protective order in program access cases. See Comments of Encore Media Corporation, CS Docket No. 97-248, at 7 (filed Feb. 2, 1998) [the "Encore Comments"].

are asking the Commission to declare that their documents should be declared nondiscoverable under *any* circumstances, a position which the Commission has rejected in prior cases.<sup>23/</sup>

Furthermore, WCA has also recognized 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, and that running the case resolution deadline from the filing of the complaint thus may not give the staff sufficient time to review the record.<sup>24/</sup> Accordingly, as a compromise proposal, WCA recommended that the Commission 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 rather than from the filing of the complaint.<sup>25/</sup> Again, with certain minor modifications, other commenting parties have supported this approach.<sup>26/</sup> Also significant is the fact that two major cable

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<sup>23/</sup> See, e.g., *Petition of Public Utilities Commission, State of Hawaii et al.*, 10 FCC Rcd 2359, 2366 (Wir. Tel. Bur. 1995) ["Our finding that substantial competitive harm is probable does not automatically lead to withholding of desired information, because the Commission's Rules and the FOIA provisions they reflect are exemptions from required disclosure; they are not categorical bars to disclosure. Even when information falls within the scope of a FOIA exemption, the government retains discretion to order release based on public interest grounds."]. Moreover, a party requesting confidentiality on the basis of potential competitive harm must provide *specific* examples of how competitors might use the redacted information to their advantage. See *Community TV Corp.*, 11 FCC Rcd 3535, 3536 (1996); *TKR Cable Company of Ramapo*, 11 FCC Rcd 3538, 3539 (1996). The cable programmers' generalized allegations as to what certain competitors *might* do with confidential information in some unidentified market at some unidentified point in the future do not satisfy this standard.

<sup>24/</sup> See WCA Comments, at 14.

<sup>25/</sup> See *id.* at 14-15.

<sup>26/</sup> See, e.g., Comments of BellSouth Corporation, *et al.*, CS Docket No. 97-248, at 5 (filed Feb. 2, 1998) [the "BellSouth Comments"]; OpTel Comments, at 3.

programmers have indicated that they do not oppose the imposition of time limits on processing of program access cases.<sup>27/</sup>

Those cable programmers that oppose time limits on resolution of program access cases allege that such limits would leave too little time for full consideration of the record and would therefore compromise the Commission's decision making process.<sup>28/</sup> In the same breath, however, these programmers allege that the Commission's staff is already processing program access complaints roughly within the same length of time that Ameritech wishes to now incorporate into the Commission's rules.<sup>29/</sup> If, as these commenters suggest, the staff is already handling program access complaints on an expedited basis without prejudice to program access defendants, there is no reason to believe that the staff will not continue to do so where time limits of comparable duration become mandatory. Moreover, under WCA's proposal, the suggested time limits would not begin running until the record has been closed, thereby providing the staff with enough time to digest all evidence and arguments submitted by the parties and write a decision that gives full consideration thereto.<sup>30/</sup>

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<sup>27/</sup> See Liberty Comments, at 30-31; HBO Comments, at 4-5.

<sup>28/</sup> See, e.g., Time Warner Comments, at 5.

<sup>29/</sup> See, e.g., Comcast Comments, at 2; NCTA Comments at 5-6.

<sup>30/</sup> A number of cable programmers also oppose shortening the defendant's answer period from 30 to 20 days. See, e.g., Encore Comments, at 5; Comcast Comments, at 4-5; NCTA Comments, at 7. It should be noted, however, that the Commission has successfully used a 20-day response deadline with respect to petitions for special relief filed under Section 76.7 of its rules. Moreover, in extraordinary cases, WCA would not be opposed to the issuance of, at most, a ten-day extension of the answer deadline in order to give program access defendants sufficient time to prepare and present their case.

C. *The Commission Can and Should Impose a Damages Remedy in Program Access Cases.*

The initial comments filed by cable's competitors in this proceeding demonstrate that program access violations inflict unique and substantial injury on alternative MVPDs, and that such violations can be fully redressed by allowing for a damages remedy in program access cases.<sup>31/</sup> Also, as pointed out by RCN, enforcement of the program access rules solely through forfeitures in effect allows cable programmers to put a price on program access violations, and that price is usually less than the benefit a programmer receives from keeping programming away from a competitor for an extended length of time.<sup>32/</sup> Such anticompetitive cost/benefit analysis can only be eliminated through the threat of a damages remedy.

Notwithstanding the fact that the Commission has already determined that it has the necessary legal authority to award damages as a remedy in program access cases,<sup>33/</sup> Liberty Media asks the Commission to revisit that issue and suggests that no such authority exists.<sup>34/</sup> Specifically, Liberty argues that the phrase "appropriate remedies" cannot be interpreted to "include" any remedy not specifically listed in Section 628(e)(1) of the 1992 Cable Act; otherwise, Liberty alleges, it

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<sup>31/</sup> See WCA Comments, at 15-19; Ameritech Comments, at 21-22; BellSouth Comments, at 17-19; GTE Comments, at 10-12; Echostar Comments, at 7-9; OpTel Comments, at 4-5; Comments of DirecTV, Inc., CS Docket No. 97-248, at 24-25 (filed Feb. 2, 1998) [the "DirecTV Comments"]; Bell Atlantic Comments, at 6-9; RCN Comments, at 8-11.

<sup>32/</sup> See RCN Comments, at 8-10.

<sup>33/</sup> See *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"].

<sup>34/</sup> See Liberty Comments, at 19-23.

would have been unnecessary for Congress to adopt Section 628(e)(2), which states that “[t]he remedies provided in [Section 628(e)(1)] are in addition to and not in lieu of the remedies available under Title V or any other provision of this Act.” As demonstrated below, Liberty is wrong.

At the outset, it must be emphasized that courts give substantial deference to the Commission’s interpretations of federal statutes. Unless statutory language reveals the “unambiguously expressed intent of Congress” on the “precise question at issue,” the Commission’s interpretation of the statute will be accepted as long as it is reasonable and “not in conflict with the plain language of the statute.”<sup>35/</sup> In Section 628, Congress neither specifically authorized nor prohibited the imposition of a damages remedy in program access cases. Thus, the issue here is whether the Commission’s conclusion that Section 628 nonetheless authorizes such a remedy is reasonable and otherwise consistent with the language of the statute. WCA submits that the Commission’s interpretation easily satisfies this standard.

Under Section 628(e)(1), the Commission may “order appropriate remedies, *including*, if necessary, the power to establish prices, terms, and conditions of sale of programming to the aggrieved multichannel video programming distributor.”<sup>36/</sup> As the Commission recognized in its program access decision with respect to exclusive programming contracts in the DBS industry, the use of the term “including” in the program access statute “indicates that the specified list . . . that

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<sup>35/</sup> See *National R.R. Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407, 417 (1992). See also *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984).

<sup>36/</sup> 47 U.S.C. § 548(e)(1) [emphasis added].

follows is *illustrative*, not exclusive.”<sup>37/</sup> Indeed, the United States District Court for the District of Columbia recently reemphasized that the *expressio unius* maxim - - that the expression of one is the exclusion of others - - “has little force in the administrative setting,” where courts defer to an agency’s interpretation of a statute unless Congress has “directly spoken to the precise question at issue.”<sup>38/</sup> As the Commission has already recognized, there is nothing in the 1992 Cable Act or its legislative history which indicates that Congress intended to preempt the Commission from assessing damages as a remedy for program access violations.<sup>39/</sup>

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<sup>37/</sup> *Implementation of the Cable Television Consumer Protection and Competition Act of 1992 - Development of Competition and Diversity in Video Programming Distribution and Carriage (DBS Order)*, 10 FCC Rcd 3105, 3122 n.85 (1994), citing *Puerto Rico Maritime Shipping Authority v. Interstate Commerce Commission*, 645 F.2d 1102, 112 n.26 (D.C. Cir. 1981).

<sup>38/</sup> *Mobile Communications Corp of America v. FCC*, 77 F.3d 1399, 1404-5 (D.C. Cir. 1996) [citations omitted]; see also *Time Warner Entertainment Co., L.P. v. FCC*, 56 F.3d 151, 196 (D.C. Cir. 1995) [holding that because nothing in the 1992 Cable Act precludes the Commission from allowing refunds to remedy unreasonable basic rates, the Commission’s decision to allow franchising authorities to order refunds did not violate the Act.].

<sup>39/</sup> See *Program Access Reconsideration Order*, at 1910. See also *Las Vegas Valley Broadcasting Co. v. FCC*, 589 F.2d 274 (D.C. Cir. 1978) (“[c]ourts ordinarily accord the Commission particular discretion in fashioning remedies to maximize compliance with Commission policy”) [subsequent history omitted]; *Jacob Siegel Co. v. FTC*, 327 U.S. 608 (1946) (holding FTC “has wide discretion in its choice of a remedy deemed adequate to cope with the unlawful practices in this area of trade and commerce”). When viewed in this context, it becomes clear that Liberty’s reading of Section 628(e)(2) as redundant of Section 628(e)(1) must fail. It is well settled that statutory language must be interpreted with a view toward the design of the statute as a whole, in a manner consistent with Congressional intent. See, e.g., *Fort Stewart Schools v. FLRA*, 495 U.S. 641, 645 (1990). Since the broad language of Section 628(e)(1) reflects that Congress intended to give the Commission extensive enforcement power in the program access arena, Section 628(e)(2) is more logically interpreted merely as clarification that the Commission’s authority to impose forfeitures under Title *V* of the Communications Act is in no way limited by the remedies specified in Title *VI* for program access violations.

Moreover, it is well settled that the Commission enjoys significant discretion to choose among a range of reasonable remedies.<sup>40/</sup> In this regard, Section 4(i) of the Communications Act of 1934, as amended, authorizes the Commission to “perform any and all acts, make such rules and regulations, and issue such orders . . . as may be necessary in the execution of its functions.”<sup>41/</sup> The Commission has noted that it “may properly take action under § 4(i) even if such action is not expressly authorized by the Communications Act, as long as the action is not expressly prohibited by the Act and is necessary to the effective performance of the Commission’s functions.”<sup>42/</sup> For this very reason, courts have cited Section 4(i) as a basis for the Commission’s broad authority to fashion appropriate remedies.<sup>43/</sup>

Lastly, the Administrative Procedure Act (“APA”) grants federal agencies, including the Commission, the authority to impose a “sanction” on individuals and businesses subject to its jurisdiction.<sup>44/</sup> The assessment of damages is specifically included in the APA’s definition of

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<sup>40/</sup> *New England Tel. & Tel. Co. v. FCC*, 826 F.2d 1101, 1108 (D.C. Cir. 1987) [subsequent history omitted] [“*New England Tel.*”]; *Lorain Journal Company v. FCC*, 351 F.2d 824, 831 (D.C. Cir. 1965) [“[T]he choice of remedies and sanctions is a matter wherein the Commission has broad discretion.”].

<sup>41/</sup> 47 U.S.C. § 154(i).

<sup>42/</sup> *In the Matter of Implementation of Section 302 of the Telecommunications Act of 1996*, 11 FCC Rcd 18233, 18238 (1996). See also *North American Telecomm. Ass’n v. FCC*, 772 F.2d 1282, 1929-93 (7th Cir. 1985) [Section 4(i) “empowers the Commission to deal with the unforeseen — even if that means straying a little way beyond the apparent boundaries of the Act — to the extent necessary to regulate effectively those matters already within the boundaries.”].

<sup>43/</sup> See *New England Tel.*, 826 F.2d at 1108.

<sup>44/</sup> 5 U.S.C. § 558(b).

“sanction.”<sup>45/</sup> WCA thus submits that for all of the above reasons there is little doubt that the Commission has the necessary statutory authority to impose damages as a remedy in program access cases.

Also unavailing is the suggestion of certain cable programmers that the threat of a damages award might intimidate a programmer into not charging legitimate differential rates for differently-situated customers,<sup>46/</sup> or might otherwise give alternative MVPDs an unfair advantage during the negotiation of cable network affiliation contracts.<sup>47/</sup> If cable programmers are implementing differential pricing in a manner that is truly consistent with the Commission’s rules, or that otherwise reflects a good faith effort to comply with those rules, then it is difficult to see why cable programmers would cower in the presence of a damages remedy for rule violations that do not exist. Moreover, as demonstrated in WCA’s initial comments, it is the *absence* of a damages remedy that gives the *programmer* additional leverage during the negotiating process.<sup>48/</sup> This is because the Commission’s existing remedies for program access violations are by and large prospective only.<sup>49/</sup>

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<sup>45/</sup> The APA defines “sanction” to include any “assessment of damages, reimbursement, restitution, compensation, costs, charges, or fees.” 5 U.S.C. § 551(10)(E).

<sup>46/</sup> See Comments of Cablevision Systems Corporation, CS Docket No. 97-248, at 7 (filed Feb. 2, 1998) [the “Cablevision Comments”].

<sup>47/</sup> See, e.g., HBO Comments, at 3.

<sup>48/</sup> See WCA Comments, at 16.

<sup>49/</sup> 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 (continued...)

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.

*D. The Language of Section 628(b) Authorizes the Commission To Declare That Satellite-to-Terrestrial Migration of Programming Constitutes an "Unfair Practice" Under Certain Circumstances.*

Predictably, the cable programmers vigorously contend that Section 628(b) only applies to satellite-delivered programming, and that satellite-delivered programming falls outside the scope of statute once it is migrated to terrestrial delivery.<sup>50/</sup> This reading, however, is inconsistent both with the express language of the statute and the Commission's own statements on this issue.

It is a fundamental principle of law that when construing a statute the Commission must attempt to give effect to every word Congress used.<sup>51/</sup> Section 628(b) states in relevant part:

It shall be unlawful for a cable operator . . . to engage in unfair methods of competition or unfair or deceptive acts or practices, the purposes *or* effect of which is to hinder significantly or to prevent any multichannel video programming

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<sup>49/</sup> (...continued)

(CSB, 1995), *recon. denied*, 11 FCC Rcd 3001 (Cab. Ser. Bur., 1996) [Bureau orders Cablevision to sell its SportsChannel New York programming on non-discriminatory terms within 45 days; no other sanction ordered].

<sup>50/</sup> *See, e.g.*, Liberty Comments, at 24-26; Comcast Comments, at 8-9; Cablevision Comments, at 13-17.

<sup>51/</sup> *See, e.g., Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979).

distributor from providing satellite cable programming . . . to subscribers or consumers.<sup>52/</sup>

Thus, the language of the statute is clear: if cable programming is delivered to cable headends via satellite, and the cable programmer engages in an “unfair practice” that causes that same satellite-delivered programming to become unavailable to cable’s competitors, the programmer’s conduct is prohibited by the statute. In other words, a programmer cannot rehabilitate a denial of satellite-delivered programming to an alternative MVPD (*i.e.*, an “unfair practice”) simply by successfully migrating that same programming to terrestrial delivery. The only relevant issues under Section 628(b) are: (1) whether the programming in question was satellite-delivered at any point in time, and (2) whether the programmer has taken any action that denies a competitor access to that programming. The fact that the programming is subsequently converted to terrestrial delivery does not factor into the analysis.

The legislative history of the program access statute confirms the thrust of Section 628 is to prevent *conduct* that limits an alternative MVPD’s access to satellite-delivered programming, and Congress’s reference to satellite-delivered programming was not to qualify or limit the Commission’s jurisdiction over such “unfair practices:”

In adopting rules under this section, the conferees expect the Commission to address and resolve the problems of unreasonable cable industry practices, *including restricting the availability of programming* and charging discriminatory prices to non-cable technologies. The conferees intend that the Commission shall encourage arrangements which promote the development of new technologies providing

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<sup>52/</sup> 47 U.S.C. § 548(b).

facilities-based competition to cable and extending programming to areas not served by cable.<sup>53/</sup>

Moreover, cable programmers' wrongheaded focus on the "satellite delivery" language in Section 628(b) is brought into sharper focus by the fact that in 1992 satellite delivery was and still is the primary means of delivering programming to cable headends, and all available evidence indicates that Congress used the term "satellite delivered programming" simply to reflect this fact.<sup>54/</sup> Conversely, there is no evidence that Congress intended to leave certain cable programming outside the scope of the statute solely on the basis of how it is delivered to cable systems. Against this backdrop, and given the unqualified nature of the "unfair practices" provision in the statute, it is a stretch of logic to assume that Congress used the "satellite delivery" language for the hidden purpose of allowing cable programmers to keep satellite programming away from alternative MVPDs by migrating it to terrestrial delivery.

The cable programmers' interpretation of Section 628(b) also is flatly at odds with the Commission's own prior reading of the statute. For example, the Commission clarified in its *OVS Second Report and Order* that it would "not foreclose a challenge under Section 628(b) to 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."<sup>55/</sup> Elsewhere,

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<sup>53/</sup> Conf. Rep. No. 102-862, 102d Cong., 2d Sess., at 93 (1992) [emphasis added].

<sup>54/</sup> See, e.g., Comments of GE Americom, CS Docket No. 97-248, at 8-9 (filed Feb. 2, 1998).

<sup>55/</sup> *Implementation of Section 302 of the Telecommunications Act of 1996*, 11 FCC Rcd 18223, 18325 n.451 (1996).

the Commission has recognized that Section 628 gives it authority to regulate a wide variety of “unfair practices.”

[A]lthough the types of conduct more specifically referenced in the statute, i.e., exclusive contracting, undue influence among affiliates, and discriminatory sales practices, appear to be the primary areas of congressional concern, Section 628(b) is a clear repository of Commission jurisdiction to adopt additional rules or to take additional actions to accomplish the statutory objectives should additional types of conduct emerge as barriers to competition and obstacles to the broader distribution of satellite cable and broadcast video programming.<sup>56/</sup>

Finally, WCA wishes to reemphasize that Section 4(I) of the Communications Act of 1934, as amended, permits the Commission to “perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with [the] Act, as may be necessary in the execution of its functions.”<sup>57/</sup> Thus, even if the Commission were now to reverse the *OVS Second Report and Order* and hold that it does not have express statutory authority under Section 628(b) to adjudicate such complaints, the Commission has more than ample authority to do so under Section 4(I) and its broader statutory mandate to promote competition among multichannel video programming distributors.

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<sup>56/</sup> *Program Access Order*, 8 FCC Rcd at 3374.

<sup>57/</sup> *Telecommunications Services - Inside Wiring*, CS Docket No. 95-184; MM Docket No. 92-260, FCC 97-376, at ¶ 83 (rel. Oct. 17, 1997), *citing* 47 U.S.C. § 154(I).

### **III. CONCLUSION.**

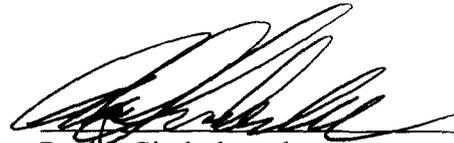
The Commission has correctly recognized that the debate over program access ultimately is a debate over full and fair competition in the multichannel video marketplace, and that the Commission's current rules and procedures for enforcing the program access statute need additional refinement in the wake of recent business and technological developments which Congress could not have anticipated when it passed the 1992 Cable Act. Indeed, both the *NPRM* and the Commission's recent statements to Congress on program access matters are timely reminders that the Commission must at all times ensure that Congressional intent is given full effect under any and all conditions, and not to freeze its rules in time for the benefit of incumbent cable operators and programmers. Accordingly, WCA urges that the Commission continue down the pro-competitive path laid by the *NPRM* and modify its program access rules as recommended by WCA in its comments.

WHEREFORE, WCA respectfully requests that the Commission amend its program access rules in accordance with its comments submitted in this proceeding.

Respectfully submitted,

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