

Federal Communications Commission

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

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

REPLY COMMENTS OF  
TIME WARNER CABLE

Time Warner Cable ("Time Warner"), a division of Time Warner Entertainment, L.P., by its attorneys, hereby submits the following Reply Comments with respect to the Notice of Proposed Rulemaking ("NPRM") in the above-captioned proceeding.

DISCUSSION

In its comments in response to the NPRM in this proceeding (as well as in its opposition to the petition for rulemaking that preceded the NPRM), Time Warner argued not only that it is unnecessary, but also that it would be unwise for the Commission to amend its rules implementing the program access provisions of the Communications Act to establish mandatory decision deadlines, allow discovery as a matter of right, or provide for damages awards. A review of the record compiled in this proceeding confirms Time Warner's position. Try as they might, the parties favoring revision of the current rules have been unable to muster any evidence that the rules are not working as Congress intended. Consequently, Time Warner will not address these issues further.

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Instead, Time Warner will focus these Reply Comments on the issue of whether program access obligations can and should be extended to terrestrial-delivered program services. In its initial comments, Time Warner pointed out that, on its face, Section 628 applies only to satellite delivered programming services and that allegations that programming is being shifted from satellite distribution to terrestrial delivery in order to "evade" the program access rules are best addressed on a case-by-case basis. Other commenters, however, have argued not only that a general rule should be adopted to address the shift of programming from satellite to terrestrial delivery, but also that such rule should extend the requirements of Section 628 to all programming that is delivered terrestrially.<sup>1</sup> And while a few of these commenters concede that imposing program access obligations on terrestrial program services requires Congressional action, others argue that the Commission has the requisite authority to take such action under Section 303(r) and 4(i) of the Communications Act.<sup>2</sup> According to these commenters, the Commission is in no way constrained by the express and exclusive reference to "satellite" programming in Section 628. Rather, the wording of the current program access provision is characterized as nothing more than a historical accident reflective only of the "fact" that satellite delivery was the preeminent means of program distribution at the time the 1992 Cable Act was passed.<sup>3</sup> In

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<sup>1</sup>See, e.g., Comments of GE American Communications, Inc.; Comments of Bell Atlantic at 11; Comments of EchoStar Communications Corporation at n.27.

<sup>2</sup>Compare Comments of DirecTV at n.25; Comments of the Wireless Cable Association International, Inc. at 24; Comments of Ameritech New Media, Inc. at 26 with Comments of Consumers Union *et al.* at 5-7; Comments of RCN Telecom Services, Inc. at 16; Comments of SNET Personal Vision, Inc. at 5.

<sup>3</sup>See, e.g., Comments of GE American Communications, Inc. at 4; Comments of Ameritech New Media, Inc. at 24.

short, it is argued, Congress intended the term "satellite" programming to be construed as synonymous with "all" programming.

The contention that Congress has the authority to extend program access regulation to terrestrial program services notwithstanding the plain language of Section 628 certainly is creative. However, it also is completely without merit. Imposing program access obligations on terrestrial programming runs counter both to the narrow scope of Section 628 and to the underlying policy judgments reflected therein.

First of all, the residual authority conferred on the Commission by Section 303(r) and 4(i) is not unlimited in breadth. Actions taken pursuant to those provisions must be in furtherance of, and not inconsistent with, the execution of Section 628. Yet, as indicated, Section 628, by its very terms, does not reach terrestrial programming and no amount of bootstrapping can alter that fact. The scope of the Commission's authority is settled by the plain language of the Act and that language unequivocally declares that the Commission's program access jurisdiction is limited to satellite delivered programming.<sup>4</sup>

Even if there was a basis for the Commission to look beyond the plain language of Section 628, the contention that Congress did not intend to limit program access regulation to satellite delivered services is demonstrably false. As Liberty Media Corporation noted in its comments, Congress was well aware of the past use of terrestrial-based technologies to

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<sup>4</sup>See, e.g., Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-43 (1984) ("if the intent of Congress is clear, that is the end of the matter"); Louisiana Publ Serv. Comm'n v. FCC, 476 U.S. 355, 374 (1986) ("an agency literally has no power to act . . . unless and until Congress confers power upon it" to do so).

delivery cable programming.<sup>5</sup> Indeed, at the time of the 1992 Act, terrestrial-based technology was being utilized by a variety of local and regional programming services, including the PRISM sports and movie service (launched in 1976), Newschannel 8 (launched in October 1991), Orange County NewsChannel (launched in September 1990), the international program service ITV (launched in 1986), and Time Warner's own New York 1 News, which began service in September 1992, just prior to the passage of the Act.<sup>6</sup>

Furthermore, there is clear evidence in the legislative history of the Act that the specific reference to satellite delivered programming in Section 628 was not inadvertent. In particular, as NCTA and others have pointed out, the Senate version of program access legislation referred to national and regional programming without the qualifying reference to "satellite" delivery.<sup>7</sup> That language, however, ultimately was dropped in favor of the House-passed version which encompasses only "satellite cable programming," a term that Congress has expressly defined as encompassing only programming delivered via satellite

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<sup>5</sup>Comments of Liberty Media Corporation at note 51, citing Competitive Problem in the Cable Television Industry, 1990: Hearing Before the Subcomm. on Antitrust, Monopolies and Business Rights of the Comm. on the Judiciary, 101st Cong., 1st Sess. 111-13 (April 12, 1990) (statement of Gerald M. Levin, Vice Chairman of Time, Inc.); Cable Television 1988: Hearings Before the Subcomm. on Telecommunications and Finance of the Comm. on Energy and Commerce of the House of Rep., 100th Cong., 2nd Sess. 412-13; 459-61 (March 30 and May 11, 1988) (statements of Ralph M. Baruch, Senior Fellow at Columbia Univ.; R.E. "Ted" Turner, Pres. of Turner Broadcasting System, Inc.).

<sup>6</sup>NCTA, Cable Television Developments (Fall 1997).

<sup>7</sup>Comments of the National Cable Television Association at 13 citing S. Rep. No. 102-92, 102d Cong., 2d Sess. 121 (1991). See also Comments of Cablevision Systems Corporation at 15-16.

technology.<sup>8</sup> In addition, the narrow scope of Section 628 was confirmed less than two years after the 1992 Act became law, when Rep. Bryant offered, and then withdrew, an amendment to Section 628 that would have imposed program access obligations on "video programming delivered by any means." *Communications Daily*, Friday July 15, 1994.

According to press reports at the time, Rep. Tauzin, the author of Section 628, commented that Rep. Bryant's amendment raised issues that required additional scrutiny, particularly the issue of whether requiring cable programming to be distributed to in-region competitors would discourage the production of local and regional programming. *Id.*

Implicit in Rep. Tauzin's reaction to the Bryant amendment is an acknowledgement that Section 628, as passed in 1992, was not intended to apply to all programming. But what makes Rep. Tauzin's comments even more noteworthy is that they explain why, as a matter of policy, terrestrial services were (and should continue to be) exempted from the program access requirements -- namely, Congress' concern that the imposition of program access obligations might deter investment in locally and regionally oriented program networks.

Congress' concern about the impact of program access on the development of regional and local services is no less valid today than it was in 1992. Indeed, promoting "localism" -- programming oriented towards the needs and interests of the local audience -- continues to be a preeminent public policy objective. However, localized (or regional) program services tend to be high risk ventures. The audience base over which the costs of developing a new local or regional service can be spread, and from which revenues can be generated, is

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<sup>8</sup>See 47 U.S.C. § 605(d)(1) ("satellite cable programming" means video programming which is "transmitted via satellite").

inherently limited. Consequently, as the Commission has recognized even in the context of satellite-delivered regional services, offering distributors the opportunity to be the exclusive source of such programming is essential to attracting investment, promotion and carriage.<sup>9</sup>

Under the circumstances, the Commission should not generally transform cable programming into a commodity by extending program access obligations to all terrestrial services nor should it recommend that Congress undertake such a course of action. Time Warner has invested millions of dollars to create New York 1, a 24-hour terrestrial news service that covers newsworthy events concerning New York City on a more comprehensive basis than local broadcast stations. Other cable operators have launched similar services oriented towards their local and regional markets. Such ventures, while risky, offer operators a means of increasing their local identity and differentiating themselves from other multichannel providers. If Section 628 is extended to cover these services, it is unlikely that they will be created or funded. Moreover, it will destroy any incentive for competitors to create their own local and regional programming, thereby resulting in a decrease, rather than an increase, in the programming available to the public. In this regard, it should be kept in mind that the underlying subject matter of the news and public affairs programming offered on a service such as New York 1 is largely in the public domain. Nothing prevents any of Time Warner's competitors from creating their own local news channel, except of course the hope that they can free-ride on Time Warner's efforts.

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<sup>9</sup>See New England Cable News, 9 FCC Rcd 3231 (1994); NewsChannel, a Division of Lenfest Programming Servs., Inc., 10 FCC Rcd 691 (1994). See also First Report and Order, MM Docket No. 92-265, 8 FCC Rcd 3359, 3385 (1993).

In sum, Section 628 represents a carefully drawn balance between Congress' concern that the denial of access to certain vertically-integrated broad audience appeal programming networks would frustrate the development of competition and Congress' desire not to unduly restrict legitimate, pro-competitive efforts by cable operators to differentiate their service offerings from those of their competitors, particularly through the development of local and regionally-oriented programming. Satellite technology has been and continues to be the preeminent means of distributing those cable networks whose availability lies at the core of Congress' program access concerns, while terrestrial delivery offers an efficient and effective means of distributing the local and regionally-oriented programming whose development serves important public policy objectives. Recognizing this fact, Congress concluded that the most appropriate means of achieving the desired balance of interests was to limit the program access rules to satellite delivered services and to exempt all terrestrial services. That judgment is expressly embodied in Section 628 and cannot be altered by the Commission, nor is there any basis in the record for the Commission to recommend that Congress reweigh the balance it struck in 1992.

**CONCLUSION**

As Time Warner demonstrated in its initial comments, and as the record in this proceeding confirms, Section 628 of the Communications Act, as implemented and enforced by the Commission, is operating precisely as Congress intended and should not be altered in ways that would effectively transform all cable programming into a commodity or otherwise upset the careful balance of interests reflected in the current law and regulations.

Respectfully submitted,

**TIME WARNER CABLE**



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