

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)
 and Competition Act of 1992)
)
 Petition for Rulemaking of)
 Ameritech New Media, Inc.)
 Regarding Developments of Competition)
 and Diversity in Video Programming)
 Distribution and Carriage)
)

CS Docket No. 97-248

RM No. 9097

REPLY COMMENTS OF FOX/LIBERTY NETWORKS AND FX NETWORKS

Fox/Liberty Networks, LLC and FX Networks LLC (collectively "Fox"), by their attorneys, hereby submit Reply Comments in the above captioned proceeding.^{1/}

Fox did not submit initial comments in this proceeding because its views were persuasively conveyed by other commenting parties, particularly the filings of the National Cable Television Association and Liberty Media Corporation. Fox concurs with these parties and the

^{1/} 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, Memorandum Opinion and Order and Notice of Proposed Rulemaking as Docket No. 97-248, FCC 97-415 (released Dec. 18, 1997) ("Program Access Notice").

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Commission that neither mandatory time limits nor discovery as of right would be appropriate revisions to the procedures administering the program access provisions of the 1992 Cable Act.^{2/}

Fox feels compelled to submit reply comments because its program networks were frequently invoked in the initial comments filed. In particular, EchoStar's two pending program access complaints against Fox-managed networks were cited in support of the agendas of those who wish the Commission to inhibit vertically-integrated program networks from using normal business practices that section 628 on its face permits. We will not respond directly to the merits of the EchoStar proceedings, since we have already responded in the appropriate dockets.

We focus here instead on the comments urging the Commission to reverse itself and award damages in program access cases. There is no basis in the record, nor any support in law or policy, for the changes these commenters request.

ARGUMENT

I. Congress Did Not Authorize Damages Under Section 628

As a threshold matter, despite the Commission's assertion that it may impose a damages remedy, we believe that such a remedy is not authorized under section 628.^{3/} To begin with, Congress did not expressly authorize a damages remedy for program access complaints in the

^{2/} Pub. L. No. 102-385, 106 Stat. 1460 (1992), codified at 47 U.S.C. § 548 et seq.

^{3/} Other commenters have taken a similar position. See Comments of National Cable Television Association at p.11; Comments of Liberty Media at p.14; Comments of Cablevision Systems Corp. at p.27; Comments of Comcast Corp. at p.8; Comments of Time Warner Cable at p.6; Comments of Encore Media Group at p.iii; Comments of Home Box Office at p.18. At best, the Commission's authority to impose a damages remedy is uncertain. See, e.g., Letter of Chairman William Kennard to Hon. W.J. Tauzin, at 17 (Jan. 23, 1998).

1992 Cable Act. Moreover, since a damages remedy was expressly included in another section of the same Act,^{4/} normal canons of statutory construction dictate that Congress must have deliberately excluded it from section 628.^{5/}

Nor is there any indication that Congress intended the Commission to impute a damages remedy into the program access provisions.^{6/} Section 628 only authorizes “appropriate” remedies.^{7/} The only appropriate remedies under section 628 are those that are necessary to accomplish the purposes of the program access provisions, which Congress expressly stated were to:

increas[e] competition and diversity in the multichannel video programming market . . . increase the availability of satellite cable programming . . . to persons in rural areas and other areas not currently able to receive such programming, and . . . spur the development of communications technologies.^{8/}

There is no basis for assuming that the imposition of monetary damages on satellite cable program providers and their affiliates will further these goals. Nor is there any basis for assuming that the Commission’s existing forfeiture powers do not provide a sufficient

^{4/} See 47 U.S.C. § 209.

^{5/} See Russello v. United States, 464 U.S. 16, 23 (1983) (noting general presumption that inclusion or exclusion is deliberate under these circumstances).

^{6/} See California v. Sierra Club, 451 U.S. 287, 297 (1981) (remedies should only be created if Congress specifically intends it); Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11 (1979) (the “dispositive question [is] whether Congress intended to create [a] remedy.”). See also Canon v. University of Chicago, 441 U.S. 677, 731 (1979) (Powell, J., dissenting) (only the most “compelling evidence of affirmative congressional intent” justifies implied remedies); accord Touche Ross & Co. v. Redington, 442 U.S. 560 (1979).

^{7/} 47 U.S.C. § 548(e).

^{8/} 47 U.S.C. § 548(a).

disincentive to violations of the program access rules.^{9/} Without such evidence, it is neither necessary nor appropriate for the Commission to decide now that a damages remedy is particularly appropriate under section 628.^{10/}

II. Even if the Commission Had the Authority, A Damages Remedy is Unwarranted Given the Record Evidence

The Commission correctly recognizes that forfeitures must be presumed to be an effective deterrent unless the record demonstrates otherwise.^{11/} The Commission's recognition is consistent with its legal obligation not to alter its regulatory course without reasoned analysis and the facts to support its conclusion.^{12/} As many commenters point out, the Commission has no record upon which to base a finding that existing remedies have not been sufficient to accomplish the goals of section 628 or that a damages remedy in particular is necessary.^{13/}

^{9/} The Commission virtually never assesses damages as a means of deterring or remedying violations of its cable rules (e.g., must-carry, network non-duplication, synd/ex and sports blackout rules). See Comments of NCTA at p.12.

^{10/} See Program Access Notice at ¶ 45 (noting that available sanctions appear to be sufficient). Certainly, given the current record, the Commission is correct in its tentative conclusion that there is no basis for implementing punitive damages in program access proceedings. See id. at ¶ 49.

^{11/} Program Access Notice at ¶ 45. The Commission has repeatedly determined that whether or not it has statutory power to utilize a damage remedy in program access cases, it would be inappropriate to do so. Implementation of the Cable Television Consumer Protection and Competition Act of 1992 Development of Competition and Diversity in Video Programming Distribution and Carriage, Memorandum Opinion and Order, 10 FCC Rcd. 1902, 1911, ¶ 18 (1994); Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Third Annual Report, 12 FCC Rcd. 4358, 4437, ¶ 160 (1997).

^{12/} See Motor Vehicle Manufacturers Assoc. v. State Farm Mutual Automobile Insurance Co., 463 U.S. 29, 43 (1983) (agency must supply reasoned basis for its rule); Action for Children's Television v. FCC, 821 F.2d 741 (D.C.Cir. 1987) (remanding rule for further elaboration of the record).

^{13/} See, e.g., NCTA Comments at pp.10-12; Liberty Media Comments at pp.14-23; HBO Comments at pp.18-23; Comcast Comments at pp.7-8; Cablevision Comments at pp.27-28.

The initial comments filed by parties supporting damages fail to provide that record.^{14/} Despite the heated rhetoric employed by some parties, the salient facts are clear. First, only thirty-eight program access complaints have been filed in the last five years.^{15/} Second, in those cases that have not settled, the Commission has not even used its existing forfeiture powers.^{16/} In light of this record, the call for additional remedies is unsustainable. The threat of sanctions alone -- as well as the time and expense of litigating program access complaints -- has deterred violations and induced settlement of disputes. No reasonable record exists upon which a damages remedy should be instituted at this time.^{17/} In fact, the record only reinforces the Commission's previous findings that the program access rules are working so that competing MVPD's have access to satellite cable programming services.^{18/}

Despite these facts, some parties claim that the Commission's efforts have been unsuccessful, and cite as evidence potential disputes that have not even crystallized^{19/} or issues

^{14/} See e.g., Ameritech New Media Comments at pp.18-24; Wireless Cable Ass'n Comments at pp.15-19; DirecTV Comments at pp.23-24; EchoStar Comments at pp.7-12.

^{15/} See Letter of William Kennard to Hon. W.R. Tauzin, at Attachment A (Jan. 23, 1998).

^{16/} Id.

^{17/} See Action for Children's Television, 821 F.2d at 746 (requiring justification for rules change).

^{18/} See, e.g., Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Second Annual Report, 11 FCC Rcd. 2060, 2136, ¶ 160 (1995).

^{19/} Certainly, Ameritech's "concern" about the availability of FX, see Ameritech Comments at p.7, is unwarranted in light of Fox's willingness to negotiate in good faith now for carriage of the service, except as specifically prohibited under valid contracts that will expire on their own terms in 1999 (in which case Fox is willing to negotiate now an agreement that would commence in 1999).

that are entirely outside the scope of the rules themselves.^{20/} Assertions such as these do nothing but inflame the debate; they fail to provide a reasoned basis for administrative rulemaking.

III. The Commission Cannot Impose Damages in Pending Cases

EchoStar's request that the Commission create a damages remedy and apply it to pending cases is particularly inappropriate.^{21/} It is well established that rules adopted by an agency in notice and comment rulemaking may only be applied prospectively.^{22/} Simply stated, a rule cannot "alter the past legal consequences of past actions."^{23/} A rule change through this proceeding would have just this proscribed effect if it "increased[defendants'] liability for past conduct, or impose[d] new duties with respect to transactions already completed."^{24/}

Moreover, granting EchoStar's request to apply a damages remedy to pending adjudications would be a dramatic and "abrupt departure from well established practice" that could impose potentially substantial financial burdens on defendants.^{25/} Not only have the parties

^{20/} E.g., Wireless Cable Association Comments at p.6 (arguing that non-vertically integrated program services should be subject to the program access rules). Congress already limited the program access rules to vertically integrated programmers, so comments such as these fall outside the Commission's jurisdictional reach. See generally 47 U.S.C. § 548.

^{21/} EchoStar Comments at p.9.

^{22/} See 5 U.S.C. § 551 (defining a "rule" as "an agency statement of general or particular applicability and future effect") (emphasis supplied). Accord Bowen v. Georgetown Univ. Hospital, 488 U.S. 204, 217 (1988) (Scalia, J., concurring) (noting that a rule "is a statement that has legal consequences only for the future."); Chadmoore Communications, Inc. v. FCC, 113 F.2d 235, 240 (D.C.Cir. 1997) (noting that "the APA requires that [rules adopted pursuant to notice and comment rulemaking] be given future effect only.") (citations omitted).

^{23/} Georgetown Univ. Hospital, 488 U.S. at 219 (Scalia, J., concurring) (noting that "changing the law retroactively is not performable by rule" under the Administrative Procedure Act).

^{24/} Chadmoore, 113 F.3d at 240 (internal citations omitted).

^{25/} Retail, Wholesale & Dep't Store Union v. NLRB, 466 F.2d 380, 390 (D.C.Cir. 1972).

had no prior notice of the remedy's availability,^{26/} but the Commission has pronounced a contrary policy in the past. In this situation, EchoStar's call for "imposition of fines or damages for past actions" should be rejected.^{27/}

^{26/} See Retail Wholesale & Dep't Store Union, 466 F.2d at 390. A damages remedy in particular "counsels caution and pause" before it is imposed. First American Bank of Virginia v. Dole, 763 F.2d 644, 651 (4th Cir. 1985). Defendants must be put on notice before such sanctions are levied. Id. at n.6 (citing U.S. v. Rust Communications Group, Inc., 425 F. Supp. 1029, 1033 (E.D. Va. 1976); Diamond Roofing Co. v. Occupational Safety and Health Review Commission, 528 F.2d 645, 649 (5th Cir. 1976); Montgomery Ward & Co. v. FTC, 691 F.2d 1322, 1332 (9th Cir. 1982); In re Metro-East Mfg. Co., 655 F.2d 805, 810 (7th Cir. 1981)).

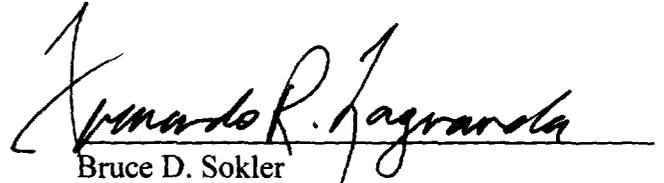
^{27/} See NLRB v. Bell Aerospace Co., 416 U.S. 267, 295 (1974) (prospective application favored when fines or damages are assessed).

CONCLUSION

The drumbeat for the creation of a damages remedy is nothing more than a quest for commercial leverage by parties that have failed to proffer a concrete factual basis for a change in the Commission's current policy. For the reasons set forth above, the Commission should reject proposals to impose a damages remedy under section 628.

Respectfully submitted,

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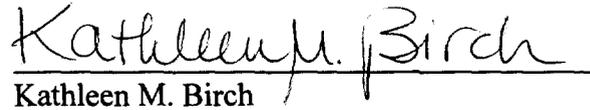
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CERTIFICATE OF SERVICE

I hereby certify that this 23rd day of February, 1998 I have caused a true and correct copy of the foregoing Reply Comments of Fox/Liberty Networks and FX Networks to be served by hand on the persons listed below:


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