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

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of	)	
	)	
Implementation of the Cable Television	)	CS Docket No. 97-248
Consumer 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 BELLSOUTH CORPORATION,  
BELLSOUTH INTERACTIVE MEDIA SERVICES, INC. AND  
BELLSOUTH WIRELESS CABLE, INC.**

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Dated: February 23, 1998

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BellSouth Corporation and its subsidiaries BellSouth Interactive Media Services, Inc. and BellSouth Wireless Cable, Inc. (collectively, "BellSouth") hereby submit these reply comments in the above-captioned proceeding.

**I. INTRODUCTION AND SUMMARY**

The record in this proceeding confirms that the current program access rules, though moderately successful, must be reformed to remain effective in today's multichannel video marketplace. BellSouth and other parties have identified ways in which the Commission's current implementation of the program access statutory provisions can be improved.

While the program access law itself has succeeded in general terms in bringing programmers to the negotiating table with alternative multichannel video programming distributors ("MVPDs"), its implementation has not adequately constrained anticompetitive

behavior by incumbent cable operators who can and do exert market power to thwart MVPD competition. Numerous commenters have cited the difficulties they have experienced in obtaining access to programming on a non-discriminatory basis or at all. Such difficulties naturally adversely affect these alternative MVPDs' competitiveness in the market. Indeed, six program access cases currently are pending before the Commission, and in one of these pending cases the defendant has been declared in violation of the program access rules on at least two prior occasions.<sup>1</sup> The difficulties described by non-cable MVPDs in their attempts to gain non-discriminatory access to programming amply demonstrate the continuing nature of program access problems and the urgent need for the Commission to invigorate its enforcement of the program access law.

Most parties agree with BellSouth that the Commission can and should upgrade its rules and program access enforcement by: (i) establishing a firm and certain deadline for the resolution of program access complaints; (ii) requiring a right to automatic but limited discovery; and (iii) imposing damages in appropriate cases. BellSouth also supports the observation of small cable system interests that competition would be enhanced by eliminating the joint and several liability restriction currently imposed on buying group members dealing directly with programmers.

In addition, there is uniform consensus among the entire range of emerging MVPD competitors to incumbent cable systems that the Commission can and should act promptly to halt cable operator or vertically integrated programmer use of terrestrial distribution

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<sup>1</sup> See Echostar Comments at 8.

as a means of insulation from statutory program access protections. The record compiled to date explains several theories under which the Commission can prevent this so-called "terrestrial evasion" from gutting the effectiveness of the program access law, *e.g.*, via a straightforward application of Section 628(b) of the Communications Act, or via a broad interpretation of Section 628(c).

In this proceeding, the incumbent cable industry expresses the view that the Commission's program access rules are working exactly as intended and should not be reformed. Cablevision, the nation's sixth largest multiple system operator ("MSO"), even contends that the mission of the rules is complete -- that competition has been "jump-start[ed]," and that "multichannel technologies [have] access to all of the cable programming services they need to compete."<sup>2</sup> In BellSouth's view, such claims by themselves stand as evidence of the need for more and vigorous program access enforcement and substantive strengthening of the rules. When Cablevision and the rest of the incumbent cable MSOs cease to control access to 87% of all MVPD subscribers or to exercise market power, and when they truly deal with all MVPDs on a fair, non-discriminatory and technology-neutral basis -- in short, when they become subject to the constraining market forces of effective competition -- there may then (and only then) be a justification for curtailing program access protections.<sup>3</sup>

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<sup>2</sup> Cablevision Comments at 12.

<sup>3</sup> Of course, the downside of the lack of competition to incumbent cable operators in the MVPD market is obvious. Cable rates have risen at *four times* the rate of inflation in the year from July 1996. And although the cable companies blame this rate increase in part on rising programming costs, the "plea sounds self-serving" since "TCI and Time Warner, the two biggest cable companies, make 23% and 12% of cable programming, respectively." *Cable's hold on America*, *The Economist* (Jan. 24, 1998), at 61.

BellSouth urges the Commission to reject the efforts of the cable industry to resist the modest refinements of the rules that have been proposed. The Commission also should renew its commitment to aggressive enforcement of the rules against unfair practices that attempt to divert programming -- the competitive lifeblood of alternative MVPDs -- to cable-exclusive spheres. Such unfair practices in fact are well within the Commission's jurisdictional reach, and if left unaddressed will undercut the Commission's policy mandate to promote MVPD competition.

## II. DISCUSSION

### A. **The Need for Reform and Vigorous Enforcement of Program Access Protections**

The cable industry claims that the program access rules need not be strengthened because, in that industry's view, there is no sign of any problem. The cable interests argue that the programming lineups of competing, non-cable MVPDs show that "competing MVPDs are able to obtain all of the programming they need,"<sup>4</sup> and allege as further evidence that relatively few program access complaints that have been decided by the Commission. Cable operators even suggest that alternative MVPDs have now acquired a "sufficient critical mass of programming"<sup>5</sup> such that further program access protection is unnecessary.

These program access opponents have drawn incorrect and self-serving conclusions. The fact that the channel lineups of certain alternative MVPDs, such as DBS

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<sup>4</sup> Time Warner Comments at 3. *See also* NCTA Comments at 2, 3; Comcast Comments at 14.

<sup>5</sup> NCTA Comments at 19; Cablevision Comments at 12.

operators and large wireless cable providers, reflect the acquisition of a significant amount of programming does not mean that such MVPDs obtained these program rights without disproportionate financial or other cost, or that such MVPDs have achieved the non-discriminatory prices, terms and conditions they are guaranteed under the law. The market power of incumbent cable operators is likely to continue to force alternative MVPDs to compromise significantly more than they would in a competitive marketplace merely to gain access to essential cable networks. In fact, in this proceeding as well as in testimony before the Congress, a variety of emerging cable competitors in addition to BellSouth have expressed difficulty in obtaining access to programming on a non-discriminatory basis.<sup>6</sup> The facts cited speak for themselves and must be addressed by the Commission.

The Commission also should refrain from drawing inferences about the extent of program access impediments from the number of program access complaints that have proceeded through the full adjudication process. The modest number of complaints reaching that stage more likely indicates that aggrieved parties carefully weigh the costs, competitive interests, and lack of a meaningful remedy before filing a program access complaint against a primary supplier so as not to further handicap that supplier relationship. The low number also reflects the many program access cases that are settled without adjudication. Such dynamics suggest that the complaints that actually proceed through the Commission's adjudication process to final decision are only the tip of the iceberg when viewed as a general indicator of the problems that alternative MVPDs have with securing access to programming.

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<sup>6</sup> See, e.g., Ameritech Comments at 6-7; DIRECTV Comments at 11; Echostar Comments at 2.

Finally, the cable industry commenters do not account sufficiently for what is happening right now in the program access arena. Six program access complaints are pending before the Commission. If the current program access process provided the level of deterrence that the cable operators claim, one would expect the number of program access complaints to diminish steadily over time, not, as is happening, to build momentum some five years into the rules' implementation. The more plausible scenario is that alternative MVPDs now are poised to begin offering meaningful competition to cable incumbents and are encountering more resistance than ever before as they become increasingly viable cable competitors.

In the final analysis, the case for refinement and enhancement of program access protections is made by the Commission's own findings. As long as "[l]ocal markets for the delivery of video programming generally remain highly concentrated" and are characterized by "barriers to both entry and expansion by competing distributors,"<sup>7</sup> there is a need for program access. And as long as incumbent cable operators continue to exert their market power to the detriment of MVPD competitors and consumers, the Commission must ensure -- as it has an opportunity to do in this proceeding -- that its rules are as targeted and as effective as possible in guaranteeing meaningful program access.

**B. Commenters On Both Sides Of The Program Access Debate Support A Certain Deadline For Complaint Resolution**

Parties on both sides of the program access debate stress the need for and benefits of swift and certain resolution of program access complaints.<sup>8</sup> Imposing a deadline creates two

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<sup>7</sup> 1997 Competition Report, CS Docket No. 97-141 (released Jan. 13, 1998), at ¶ 11.

<sup>8</sup> See, e.g., Liberty Media Comments at 30; HBO Comments at 4; Wireless Cable Assoc.

important benefits for all parties involved in a program access dispute.

*First*, efficient processing of program access complaints generates cost and resource savings and mitigates to some degree the economic harm suffered by alternative MVPDs.<sup>9</sup> There is little dispute that the current program access decision process normally takes many months, and that during that time the alternative MVPD must seek to enter or compete in the multichannel video market with a severe competitive disadvantage. This delay prejudices not only the program access complainant but also the viewing public, which is denied a full array of competitive offerings from MVPD alternatives to local cable monopolies.<sup>10</sup>

Equally damaging to alternative MVPDs seeking to establish themselves as viable competitors to incumbent cable systems is the uncertainty that stems from the current open-ended program access complaint process. It is extremely difficult to predict in today's program access regime how long the processing of a complaint may take. This uncertainty interferes with an alternative MVPD's ability to plan competitive program offerings and negotiate with other suppliers, and is likely to result in the MVPD settling for less favorable terms rather than face instead a potentially very protracted process.<sup>11</sup>

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Comments at 14. The comments exhibit a consensus that the statute requires expeditious *resolution* of program access complaints, not just an expedited pleading schedule, as NCTA claims. *See* NCTA Comments at 5.

<sup>9</sup> *See* Wireless Cable Assoc. Comments at 14.

<sup>10</sup> *See* Ameritech Comments at 8.

<sup>11</sup> One commenter, for example, notes that it has had a program access complaint pending before the Commission for more than two years with no end in sight. *See* American Programming Service Comments at 4, 6-7.

Because alternative MVPDs and vertically integrated programmers alike have acknowledged the important benefits of swift and certain resolution of disputes, and because competitive injury is only aggravated by delay, the Commission should disregard cable operators' claims that no revision of the current decisional framework is necessary.<sup>12</sup> The fact that Congress amended Section 628 in the 1996 Act without specifying a time limit should not deter the Commission from determining that its mandate to resolve program access complaints expeditiously requires a clear time-frame within which to decide complaints.<sup>13</sup> Far from implying that Congress was satisfied with the Commission's processing of complaints, as Comcast maintains,<sup>14</sup> Congress's failure to specify a time limit instead supports the view that Congress has entrusted to the Commission the primary enforcement authority with which to promote MVPD competition. The Commission should not breach that trust by failing to act, especially given that MVPD competition is an expressed goal of Congress in both the 1992 and 1996 legislation.

Recommendations of parties favoring a time limit on the resolution of program access complaints vary as to the exact length and structure of that. No proposal, however, features a resolution deadline beyond 150 days of the Commission's receipt of the complaint. All deadline proposals are decidedly shorter than the current average complaint processing time and would constitute an improvement over the current process. Where parties call for separate

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<sup>12</sup> See Comcast Comments at 2. Comcast, of course, is a defendant to the program access complaint brought by DIRECTV on the terrestrial distribution issue. See *DIRECTV v. Comcast, et al.*, File No. CSR-5112-P.

<sup>13</sup> See Comcast Comments at 4; Time Warner Comments at 4.

<sup>14</sup> See Comcast Comments at 4.

deadlines, they do so for the most part on the basis of whether discovery has been granted, not on the type of program access complaint that has been filed (*e.g.*, price discrimination, refusal to deal, exclusivity) -- an approach that BellSouth also supports.<sup>15</sup>

BellSouth believes that its proposed decisional framework, and the timelines set forth in its initial comments, represent a sound approach to resolving program access complaints quickly and accurately. With one clear set of pleadings before it that incorporates the relevant discovered facts, the Bureau should be able to resolve even complicated program access cases in a 45-day period<sup>16</sup> without undue strain on staff time or resources.<sup>17</sup>

### **C. The Record Supports a Limited Form of Discovery in Program Access Cases**

The comments received to date bring into sharper focus the problems with the discovery process in today's program access environment. It is difficult for aggrieved alternative MVPDs to make out a discrimination case, for example, when discovery is not automatically granted. This is because program access defendants typically maintain exclusive possession of documentation necessary to prove discriminatory conduct.<sup>18</sup> In addition, the current program

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<sup>15</sup> See Ameritech at 13 (deadline should not differ based on type of complaint); *see also* RCN Telecom Comments at 4; Bell Atlantic Comments at 3; SNET Comments at 2 (supporting Ameritech proposal). *But see* Wireless Cable Assoc. Comments at 14; American Programming Service Comments at 9 (distinguishing between price discrimination cases and simple program access cases).

<sup>16</sup> Like BellSouth, GTE also proposes that all program access complaints be resolved within 45 days of the filing of the complainant's reply. *See* GTE Comments at 8.

<sup>17</sup> BellSouth does not object to timelines being extended for a period of time by express mutual agreement of the parties, *e.g.* for settlement purposes, provided that the extension is for a brief, finite period and that new, specific deadlines are imposed by the Commission in the event that such an extension is granted.

<sup>18</sup> *See* Wireless Cable Assoc. Comments at 9.

access complaint process is fundamentally flawed because it requires a *prima facie* showing by a plaintiff before the possibility of discovery. Thus, even if discovery is awarded, access to the information does not come soon enough to be meaningfully integrated into the complainant's response.<sup>19</sup> Indeed, the need for discovery to come early in the process is compounded by the increasingly complicated interrelationships and sales practices among programmers.<sup>20</sup>

For these reasons, commenters not aligned with cable interests generally agree that the current discovery process hinders a complainant's ability to support, and the Commission's ability to determine, the existence or extent of a program access violation. This in turn adversely affects the Commission's ability to fashion the appropriate remedy. On the other hand, emerging MVPD competitors do not favor injecting further delay into the program access complaint process. Therefore, many of these parties, like BellSouth, have attempted to strike a balance by proposing an automatic but limited right to discovery.<sup>21</sup>

The cable industry of course opposes all forms of discovery. It raises the spectre that discovery as of right will turn program access cases into full-blown litigation proceedings, and asserts that cable competitors will embark upon inappropriate fishing expeditions or breach confidentiality protections for discovered material. The fact is that limiting discovery in the

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<sup>19</sup> See *id.* at 11 n.31; see also Echostar Comments at 3 (discovery required in order to make the *prima facie* showing).

<sup>20</sup> See Wireless Cable Assoc. Comments at 11.

<sup>21</sup> See, e.g., Bell Atlantic Comments at 5 (proposing different standards depending on nature of the complaint); Echostar Comments at 5 (Commission should adapt principles from Federal Rules of Civil Procedure); Wireless Cable Assoc. Comments at 12 (discovery request should be limited to relevant documents and ten interrogatories).

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manner proposed by BellSouth will discourage excessive or frivolous litigation. Furthermore, BellSouth's proposal is consistent with other parties' suggestions that the Commission require a program access plaintiff to submit its discovery request with the complaint. Several commenters propose that the program access defendant produce the requested documents along with its answer.<sup>22</sup> BellSouth believes, however, that the Commission should have a review function and retain an opportunity to strike purely unrelated and extraneous requests when the defendant has objected to the scope of the discovery.

Specifically, under BellSouth's proposal, if the program access defendant does not object to the scope of the discovery request, then it must produce the documentation with its answer, as several other commenters have suggested. On the other hand, if the program access defendant does object, the Commission staff has 10 days in which to review and, if necessary, to narrow the discovery request if it extends beyond documentation that would reasonably be deemed to relate to programming rates, and/or other terms and conditions of access. Giving the staff 10 days in which to review and narrow the scope of the discovery request appropriately balances fears of improper discovery against assurances of an expeditious right to discovery, properly confined, as a matter of course. The defendant would be required to produce the documentation 10 days after the staff's public notice approving or narrowing the scope of discovery.<sup>23</sup>

In adjudicating program access complaints, it is important for the Commission to

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<sup>22</sup> Ameritech Comments at 4, 15; Echostar Comments at 7.

<sup>23</sup> See BellSouth Comments at 14-17.

require the upfront production of relevant documentation so that discovered facts may be incorporated into the initial pleading cycle. Such a requirement would also meet the Commission's goal of reducing the number of extraneous pleadings filed with the agency. BellSouth's discovery proposal accomplishes these objectives and BellSouth urges the Commission to adopt it.

**D. There Is A Demonstrated Need For A Damages Remedy**

Taken as a whole, the record confirms the present need for a compensatory damages mechanism to (i) deter program access violations more effectively and (ii) alleviate actual competitive injury suffered by alternative MVPDs attempting to compete with incumbent cable operators.

First, contrary to the assertions of program access opponents, the current rules have not adequately deterred would-be program access violators. Echostar, for example, has filed a complaint against a programmer that already has been found in violation of the rules on two previous occasions.<sup>24</sup> This fact speaks volumes about the rules' current deterrent effect.

BellSouth is skeptical that forfeitures alone provide a sufficient deterrent to program access violations. It seems clear that the prospect of a forfeiture does *not* adequately constrain such behavior, given the continuing anticompetitive conduct exhibited in today's program access environment and the fact that the Commission has yet to impose forfeitures in this context.<sup>25</sup> The failure of the rules to require an offending party to reimburse a successful

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<sup>24</sup> Echostar Comments at 8.

<sup>25</sup> See Wireless Cable Assoc. Comments at 16; *see also* Ameritech Comments at 22

plaintiff for any injury caused justifies a cost-benefit analysis under which the possibility of a fine simply is too remote to discourage anticompetitive conduct.<sup>26</sup> The prospect of accruing damages will correct this imbalance.<sup>27</sup>

A second, independent purpose of damages is to compensate aggrieved parties for actual competitive harm caused by the unlawful conduct of a cable operator or a vertically integrated programmer. As recent program access cases have shown, and as numerous commenters have observed, the program access environment permits unique and substantial economic harm to be inflicted upon alternative MVPDs emerging as competitors to the incumbent cable industry.<sup>28</sup> Yet the Commission's current rules fail utterly to remedy that harm. Moreover, because program access violations lead to inferior program offerings in a service industry where customers are extremely discerning and sensitive to both service and program quality, the extent and effect of this injury compounds over the many months it takes to litigate a program access complaint.

Cablevision claims that imposing damages will undermine the program access law's allowance of differential pricing by programmers under certain circumstances delineated in the statute.<sup>29</sup> The argument is that the possibility of damages creates an increased risk of litigation that would "effectively deter" programmers from charging otherwise legitimate price

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(arguing that forfeiture alone is an inadequate deterrent).

<sup>26</sup> See Echostar Comments at 10.

<sup>27</sup> See Wireless Cable Assoc. Comments at 16-17; Ameritech Comments at 19.

<sup>28</sup> Wireless Cable Assoc. Comments at 15-16; Echostar Comments at 9;

<sup>29</sup> Cablevision Comments at 27-28.

differentials to requesting MVPDs.<sup>30</sup> Damages under any of the proposals proffered to the Commission, however, can be imposed only for proven program access violations. What Cablevision really objects to is the imposition of stricter penalties for noncompliance with the Commission's rules. While such penalties may indeed deter at the margin some legitimate differential pricing by vertically integrated programmers, the more important policy objective by far in this context is to deter such programmers' anticompetitive conduct. Cablevision's position thus is meritless.

In addition, and contrary to NCTA's interpretation, having the authority to impose damages will not place the Commission in the position of having to prescribe rates, terms and conditions for agreements found to be in violation of the rules. Once liability for a violation is determined, the measurement of damages will be a matter of proof to be proffered by the injured MVPD.<sup>31</sup> Nor should the Commission heed NCTA's contention that a damages remedy somehow is inconsistent with Congress' desire to avoid imposing "undue costs" on either party.<sup>32</sup> Compensation for actual competitive harm inflicted by a competitor or its affiliate can hardly be deemed an "undue cost." In fact, in this proceeding, most parties have argued that such a monetary penalty, even if it simply were a "cost," is indeed "due" under these circumstances.

The cable industry also argues that imposing damages conflicts with the Commission's interpretation that no actual injury need be shown for alternative MVPDs to prove

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<sup>30</sup> *Id.* at 28.

<sup>31</sup> *See* NCTA Comments at 11.

<sup>32</sup> *Id.* at 12.

a Section 628(c) violation.<sup>33</sup> Yet, these two positions are entirely consistent. As the Commission has found, 628(c) *presumes* that competitive harm has occurred if a plaintiff successfully pleads a case under that provision.<sup>34</sup> It does not address the *measurement* of that harm, however.<sup>35</sup> Thus, once the Commission makes a 628(c) liability determination, there is no inconsistency in allowing the successful program access complainant to seek compensatory damages to remedy any actual injury that it can reasonably prove.<sup>36</sup>

Finally, in its initial comments, BellSouth proposed making damages available (when they are awarded) from the date on which the violation first occurred. Having damages measured from the date of first violation would compensate for program access plaintiff incurred actual harm and would deter incumbent cable operators and their affiliated programmers from future violations. Assessing damages from the notice of intent to file a program access complaint or from the complaint filing date ignores the earlier actual competitive harm incurred by

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<sup>33</sup> See 47 C.F.R. § 76.1002.

<sup>34</sup> See Program Access Order, 8 FCC Rcd at 3377, ¶¶ 47-49.

<sup>35</sup> By contrast, in complaints alleging “unfair practices” under Section 628(b), a showing of harm is required: complainants as part of their case must show that the purpose or effect of the conduct complained of was to “hinder significantly or prevent” an MVPD from providing programming to subscribers or customers. *Id.* at 3377-78, ¶ 49.

<sup>36</sup> Several cable operators contend, and BellSouth acknowledges, that in certain cases measuring damages may prove to be a complex and time-consuming process, even if bifurcated from the liability determination. See NCTA Comments at 11. BellSouth therefore supports the proposal to have, where needed, a supplemental damages pleading cycle after liability has been determined within an appropriate, defined time period. See Echostar Comments at 11. Proving program access damages, much like proving antitrust damages, is not “impossibly speculative.” Comcast Comments at 7. The Commission should give alternative MVPDs the opportunity to demonstrate the measure of competitive harm caused by a cable operator or vertically integrated programmer’s unfair business conduct.

aggrieved MVPDs. The Commission should adopt BellSouth's approach, which is supported by other parties.<sup>37</sup>

**E. There Is No Opposition To Removing The Joint And Several Liability Restriction For Buying Groups**

Elimination of the condition that buying group participants that deal directly with programmers agree to joint and several liability makes sense from a financial and policy perspective. BellSouth generally agrees that the current joint and several liability requirement imposes an onerous and unnecessary condition on participants in buying groups, which often are necessary vehicles for MVPDs to gain purchasing power comparable to their cable MSO competitors. The requirement should be eliminated as the Small Cable Business Association has proposed.<sup>38</sup>

**F. The Commission Clearly Has the Authority and Policy Mandate to Address Terrestrial Evasion Through a Number of Alternate Approaches**

Comcast, Cablevision and other large cable MSOs in this proceeding contend that, as a matter of public policy, they should be permitted to refuse to sell programming to alternative MVPDs after such programming has been diverted from satellite to terrestrial distribution.<sup>39</sup> They further argue that even if such behavior violates the Congressional purpose underlying the program access law, the Commission nonetheless is without jurisdiction to address such

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<sup>37</sup> See GTE Comments at 12; Echostar Comments at 9-10; Bell Atlantic Comments at 8. See also Ameritech Comments at 20, 22-23 (urging that forfeitures be assessed from the date of the first violation, and that damages be calculated using antitrust law principles).

<sup>38</sup> See SCBA Comments at 4-7.

<sup>39</sup> Cablevision Comments at 13; Comcast Comments at 8; NCTA Comments at 13.

conduct.<sup>40</sup> Both of these arguments fail, however, and merely serve to highlight the arrogance and impunity with which these incumbent operators believe they can treat the Commission, the public and their competitors.

The cable industry's position that addressing terrestrial evasion is "bad policy"<sup>41</sup> cannot be sustained for the fundamental reason that the programming that has been diverted from satellite to terrestrial facilities remains *the very same programming* that Congress sought to make accessible to cable's competitors on a non-discriminatory basis.<sup>42</sup> The method of delivering the programming does not in any way alter the underlying policy rationale that access to programming for all alternative MVPDs is necessary to curb the incumbent cable industry's ability and incentive to exercise market power. Chairman Kennard recently observed that, "*regardless of the method of delivery, where programming is unfairly or anti-competitively withheld from distribution, competition is deterred or impeded.*"<sup>43</sup> That undeniably correct assertion means that, logically, there can be no policy distinction that justifies permitting cable operators to deny program access merely on the basis of terrestrial distribution.

Unjustified by policy, the cable industry's arguments also fail as a matter of law. The record in this proceeding identifies at least two independent legal bases for the Commission to address terrestrial evasion within the current framework of Section 628 and its own program

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<sup>40</sup> See, e.g., Cablevision Comments at 13; Comcast Comments at 8.

<sup>41</sup> Comcast Comments at 11.

<sup>42</sup> See GE Americom Comments at 8; RCN Telecom Comments at 15.

<sup>43</sup> Letter of William E. Kennard, Chairman, FCC, to Honorable W.J. (Billy) Tauzin, Chairman, House Subcommittee on Telecommunications, Trade, and Consumer Protection (Jan. 23, 1998), at 7 (emphasis supplied).

access rules.

*First*, the FCC has clear authority under Section 628(b) to proscribe conduct that emerges as a barrier to MVPD competition, including the diversion of satellite cable programming to terrestrial facilities.<sup>44</sup> Section 628(b) is directed to certain anticompetitive *behavior* of cable operators or vertically integrated program vendors, and not, as cable commenters claim, to particular methods of program delivery.

The precise issue before the Commission in this proceeding is whether diverting satellite-delivered programming to a terrestrial-based system and then refusing to sell to an MVPD competitor or class of MVPDs on that basis constitutes an “unfair method[] of competition” or an “unfair . . . act[] or practice[]” that is prohibited by Section 628(b).<sup>45</sup> Those commenters opposing Commission oversight and prevention of terrestrial evasion claim that even if the FCC has the power to review the diversion of satellite cable programming to terrestrial delivery modes under Section 628(b), there is nothing “unfair” about that conduct.<sup>46</sup> These parties contend that the use of terrestrial facilities to distribute vertically integrated cable

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<sup>44</sup> See, e.g., DIRECTV Comments at 13; RCN Telecom Comments at 15.

<sup>45</sup> 47 U.S.C. § 548(b).

<sup>46</sup> Cablevision Comments at 17; NCTA Comments at 15. Although the cable operators claim that terrestrial delivery can be the most cost-effective delivery mechanism, BellSouth agrees that the Commission should remain skeptical about the legitimacy of the cost rationale. See Echostar Comments at 12; see also RCN Comments at 15 (“RCN, based on significant experience, is not persuaded that delivering programming [via terrestrial facilities] is less expensive, more efficient, easier to maintain, or provides a higher quality picture than delivery via satellite.”). Moreover, even if the distribution mechanism were cost-effective, that fact would not obviate the anticompetitive effects of allowing terrestrial evasion.

programming does not become unlawful simply because it removes a programming service from Section 628's reach.

Such claims, however, flatly ignore the entire context of the prohibition contained in Section 628(b), as well as the intent of Congress in enacting it. The Commission has generally described an "unfair" practice under Section 628(b) as one that "inhibits the development of multichannel video distribution competition,"<sup>47</sup> or functions as a "barrier[] to competition" or an "obstacle[] to the broader distribution of satellite cable . . . video programming."<sup>48</sup> By this definition, the diversion of satellite-delivered programming to terrestrial delivery facilities and a concomitant refusal to sell that programming to an alternative MVPD or a class of MVPDs is *exactly* the type of anticompetitive behavior that Congress intended to prohibit.

*Second*, BellSouth agrees with DIRECTV and other commenters that consistent with its statutory authority, the Commission can also address terrestrial evasion through a broad interpretation of Section 628(c).<sup>49</sup> Employing the traditional tools of statutory construction, the Commission should construe the term "satellite cable programming" as encompassing programming that has been diverted off-satellite in order to evade the program access requirements. A contrary construction of the term would simply provide incumbent cable interests with another weapon to impede and eliminate alternative MVPD competition.

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<sup>47</sup> Program Access Order , 8 FCC Rcd at 3373, ¶ 40.

<sup>48</sup> *Id.* at 3374, ¶ 41.

<sup>49</sup> See DIRECTV Comments at 18; see also Echostar Comments at 13 (explaining that formerly satellite-delivered programming or programming contained in a satellite feed for out-of-market distribution should be construed as "satellite cable programming," since the statutory language "'transmitted by satellite' is not limited in terms of when the transmission occurred or who effected it").

By enacting Section 628, Congress sought to shield emerging MVPD competitors from potential anticompetitive behavior by a dominant cable industry capable of exerting market power and control over the supply of programming. The statutory scheme accomplishes this purpose by conferring upon the FCC powerful supervisory authority over the development of competition and competitive behavior in the MVPD marketplace through the agency's enforcement of Section 628.

If cable operators capable of exerting market power can exempt themselves from program access requirements simply by altering their delivery mode to a method made more feasible by the industry's intense consolidation and regional clustering, they could effectively eviscerate all program access protections. If terrestrial evasion is allowed to proceed unchallenged, it will present a very real danger of hampering the entire program access law and regulatory scheme. Thus, it is imperative for the Commission to prevent the diversion of previously-accessible programming into sheltered cable-only systems.

### **III. CONCLUSION**

The Commission can significantly further meaningful competition in MVPD markets by ensuring the swift adjudication of all program access violations; refining its discovery process to provide for automatic, but limited, discovery requests; permitting damage awards in appropriate cases; and prohibiting unfair incumbent MSO tactics, such as terrestrial evasion, that deny alternative MVPDs access to the programming they need to succeed in the MVPD market. BellSouth urges the Commission to amend or clarify its rules accordingly.

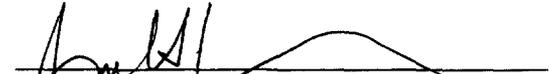
Respectfully submitted,

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