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FEDERAL COMMUNICATIONS COMMISSION
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Before the

FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C.

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

To: The Commission

REPLY COMMENTS OF THE A&E TELEVISION NETWORKS

A&E Television Networks (including the A&E Network and The History Channel) (together, "AETN"), through their attorneys and pursuant to Section 1.415 of the Commission's rules, hereby submits reply comments in response to the *Notice of Proposed Rulemaking* 1/ in the above-captioned proceeding (the "*Notice*").

AETN is a cable programmer that is neither owned nor controlled by any cable operator. It offers both the A&E Network ("A&E"), an established cable network,

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1/ *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 Development of Competition and Diversity in Video Programming Distribution and Carriage, Notice of Proposed Rulemaking*, CS Docket No. 97-248 (released December 18, 1997).

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and a more recently launched service, The History Channel. A&E is currently delivered to more than 71 million cable households throughout the country via cable, TVRO, MMDS, DBS, and SMATV distribution systems. Among other things, A&E is known for its high quality, original programming, such as the acclaimed series BIOGRAPHY®. Given the success of A&E and the interest expressed by television viewers for a network devoted to historical subjects, 2/ the Company launched The History Channel on January 1, 1995. The History Channel features historical documentaries, movies and miniseries placed in historical perspective. Despite the recency of its launch, History has over 45 million subscribers using a variety of distribution systems. As neither A&E nor The History Channel has any affiliation with any cable operator or common carrier, neither should be subject to the program access regulations being considered by the Commission.

I. THERE IS NO REASON TO RECONSIDER THE COMMISSION'S DECISION NOT TO IMPOSE ADDITIONAL REGULATIONS ON NON-VERTICALLY INTEGRATED PROGRAMMERS.

In the *Notice*, the Commission rejected any suggestion that it should expand program access rules to envelope non-vertically integrated programmers. Instead, it reiterated its prior finding in the *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Third Annual Report, 12 FCC Rcd 4358, 4386 (1997) ("1996 Report"), that:

2/ Out of the non-cable subscribers who are most likely to subscribe to cable, the highest number (47 percent) indicated an interest in The History Channel, according to an independent 1994 Beta Research Cable Non-Subscriber Study.

> [t]he evidence . . . is insufficient for us to make any determination concerning the effect, *if any*, that exclusive arrangements involving non-vertically integrated programmers may have. . . .

See Notice at ¶ 36 (reiterating the *1996 Report*) (emphasis added). Accordingly, the Commission declined even to "recommend the issuance of an NPRM on this issue." *See id.*

The unsupported desires of some commenters in this proceeding cannot overcome the Commission's oft-repeated stance that there is no reason to subject non-vertically integrated programmers to access regulation. 3/ According to the Commission's own Annual Reports on the status of competition in video programming, the percentage of vertically integrated programmers is declining yearly. 4/ Nor is there the slightest suggest that a lack of access to non-vertically integrated program services has impeded competition. In such an environment, it is pointless for the Commission to entertain comments on extending the rules to independent program networks, especially when those burdens would be contrary to the plain text of the relevant statute.

3/ *See, e.g.*, Comments of Consumers Union, at 10.

4/ *See Assessment of the Status of Competition in the Market for Delivery of Video Programming*, Fourth Annual Report, FCC 97-423 at ¶ 158 (1998); *1996 Report* at 4429-4430; *Assessment of the Status of Competition in the Market for Delivery of Video Programming*, Second Annual Report, 11 FCC Rcd 2060, 2132 (1996).

II. ACCESS REGULATIONS CANNOT EXCEED THE STATUTORY MANDATE.

Even if the Commission had not already reached this conclusion, it is worth noting that the FCC has no authority to expand the scope of Section 628. Section 628(b), which is the basis for this proceeding and for program access regulations in general, *see Notice* at ¶ 2, applies by its terms only to cable operators, satellite cable programming vendors "in which a cable operator has an attributable interest," and satellite broadcast programming vendors. 47 U.S.C. § 548(b). Non-vertically integrated cable programmers, such as AETN, are not affiliated with any cable operator, and, as such, are not within the scope of the statute.

The slight expansion of Section 628 by the Telecommunications Act of 1996 (the "Telecom Act") did not implicate non-vertically integrated programmers. By adding Section 628(j) to the Act, the Telecom Act added only one category to the entities governed by program access concerns: programming vendors that are affiliated with common carriers which provide video programming to their subscribers. 5/ The FCC does not have the unilateral authority to expand this specific statutory mandate.

5/ *See* 47 U.S.C. § 628(j). If the Commission could target any programmer under Section 628(c), there would have been no reason for Congress to amend the Act. *Cf. Ratzlaf v. United States*, 114 S. Ct. 655, 659 (1994) (noting that one section should not be read in such a way as to render another superfluous).

CONCLUSION

For the foregoing reasons, the Commission should not expand the scope of this proceeding to consider imposing program access regulations on non-vertically integrated programmers.

Respectfully submitted,

A&E TELEVISION NETWORKS,

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CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of February, 1998, a copy of the foregoing Comments of A&E Television Networks was hand delivered to:

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