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Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of:)	
)	
Implementation of the Cable)	CS Docket No. 97-248
Television 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)	

REPORT AND ORDER

Adopted: August 6, 1998

Released: August 10, 1998

By the Commission: Commissioner Furchtgott-Roth dissenting in part and issuing a statement;
Commissioner Powell issuing a statement.

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I. INTRODUCTION

1. In this *Report and Order* ("Order") we adopt rules amending certain of our regulations promulgated pursuant to Section 628 of the Communications Act of 1934, as amended ("Communications Act").¹ The purpose of Section 628 and the amended rules we adopt is to promote the public interest, convenience, and necessity by increasing competition and diversity in the multichannel video programming market, to increase the availability of satellite cable programming and satellite broadcast programming to persons in rural and other areas not currently able to receive such programming, and to spur the development of communications technologies.²

II. BACKGROUND

2. Section 628 of the Communications Act prohibits unfair or discriminatory practices in the sale of satellite cable and satellite broadcast programming.³ Section 628 is intended to increase competition and diversity in the multichannel video programming market, as well as to foster the development of competition to traditional cable systems, by prescribing regulations that govern the access by competing multichannel systems to cable programming services.⁴ Section 628(b) provides that:

it shall be unlawful for a cable operator, a satellite cable programming vendor in which a cable operator has an attributable interest, or a satellite broadcast programming vendor to engage in unfair methods of competition or unfair or

¹Communications Act §628, 47 U.S.C. §548.

²*Id.* §628(a). Section 628 was adopted as part of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act").

³*Id.* §628.

⁴*Id.* §628(a).

deceptive acts or practices, the purpose or effect of which is to hinder significantly or to prevent any multichannel video programming distributor from providing satellite cable programming or satellite broadcast programming to subscribers or consumers.⁵

Section 628(c) instructs the Commission to adopt regulations to identify particular conduct that is prohibited by Section 628(b).⁶ The Communications Act provides parties aggrieved by conduct alleged to violate the program access provisions the right to commence an adjudicatory proceeding before the Commission.⁷ In addition, as part of the Telecommunications Act of 1996(" Act"), Congress expanded program access protection to include common carriers and their affiliates that provide video programming by any means directly to subscribers, and to satellite cable programming vendors in which a common carrier has an attributable interest.⁸

3. In *Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992: Development of Competition and Diversity in Video Programming Distribution and Carriage*, First Report and Order ("*First Report and Order*"), the Commission promulgated regulations implementing the Communication Act's program access provisions.⁹ The Commission determined that a program access complaint process derived from the Section 208 common carrier¹⁰ and Section 315(b) lowest unit charge complaint processes,¹¹ modified to limit discovery procedures, would provide the most flexible and expeditious means of enforcing the anti-discrimination program access provisions through the adjudication process.¹² In *Implementation of Sections 12 and 19 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 on Reconsideration of the First Report and Order ("*Order on Reconsideration*"), the Commission resolved petitions for reconsideration of the *First Report and Order*.¹³

4. In *Implementation of the Cable Television Consumer Protection and Competition Act of*

⁵*Id.* §628(b).

⁶*Id.* §628(c).

⁷*Id.* §628(d).

⁸*Id.* §628(j); see *Implementation of Section 302 of the Telecommunications Act of 1996, Open Video Systems*, Second Report and Order, 11 FCC Rcd 18223, 18314-326 (1996) (discussing program access in the context of open video systems); *Implementation of Section 302 of the Telecommunications Act of 1996, Open Video Systems*, Third Report and Order and Second Order on Reconsideration, 11 FCC Rcd 20227, 20296 - 302 (1996) (same).

⁹*First Report and Order*, 8 FCC Rcd 3359 (1993).

¹⁰Communications Act §208, 47 U.S.C. §208.

¹¹*Id.* §315(b).

¹²*First Report and Order* 8 FCC Rcd at 3416.

¹³*Order on Reconsideration*, 10 FCC Rcd 1902 (1994).

1992: *Petition for Rulemaking of Ameritech New Media, Inc. Regarding Development of Competition and Diversity in Video Programming Distribution and Carriage*, the Commission addressed Ameritech New Media, Inc.'s ("Ameritech") petition for rulemaking requesting that the Commission amend our program access rules.¹⁴ Ameritech requested that the Commission amend its rules in three specific ways: (i) to provide time limits for the resolution of program access complaints; (ii) to provide program access litigants discovery as-of-right; and (iii) to impose damages for adjudicated program access violations.¹⁵ The Commission sought comment on two additional issues: (i) whether to expand program access protections to cover certain satellite-delivered programming that is converted to terrestrially delivered programming; and (ii) whether the Commission should amend the joint and several liability requirement relating to cooperative buying groups.¹⁶ The Commission also asked commenters to address whether such proposed rule changes are consistent with the procedures established by the Commission in *Implementation of the Telecommunications Act of 1996: Amendment of Rules Governing Procedures to be Followed When Formal Complaints are Filed Against Common Carriers* ("Formal Complaint Order").¹⁷

III. SUMMARY

5. This *Order* adopts rules and policies amending our program access rules promulgated pursuant to Section 628 of the Communications Act. The decisions made in this *Order* may be summarized as follows:

- The Commission finds that its existing statutory forfeiture authority can be used in appropriate circumstances as an enforcement mechanism for program access violations. Forfeitures can be

¹⁴*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, 12 FCC Rcd 22840 (1997) ("NPRM").

¹⁵*Id.* at 22855-61.

¹⁶*Id.* at 22861-62.

¹⁷*Id.* at 22854, discussing *Implementation of the Telecommunications Act of 1996: Amendment of Rules Governing Procedures to be Followed When Formal Complaints are Filed Against Common Carriers*, Report and Order, 12 FCC Rcd 22497, 22504 (1997). As part of the 1996 Act, Congress enacted deadlines for the Commission's resolution of complaints alleging unreasonably discriminatory or otherwise unlawful conduct filed against the Bell Operating Companies, local exchange carriers, and other telecommunications carriers that are subject to the requirements of the Communications Act. See Communications Act §§ 208(b)(1), 260(b), 271(d)(6)(B), and 275(c), 47 U.S.C. §§ 208(b)(1), 260(b), 271(d)(6)(B), and 275(c); *Formal Complaint Order*, 12 FCC Rcd at 22499-500. Provisions of the 1996 Act further direct the Commission to establish such procedures as are necessary for the review and resolution of such complaints within the statutory deadlines. See e.g., Communications Act § 271(d)(6)(B), 47 U.S.C. § 271(d)(6)(B); *Formal Complaint Order*, 12 FCC Rcd at 22499. In the *Formal Complaint Order*, the Commission adopted new or amended standards and procedures related to the processing and resolution of formal complaints against common carriers, including, *inter alia*, pre-filing negotiation requirements, service requirements, pleading requirements, pleading cycles, discovery, referral of issues to Administrative Law Judges, status conferences, damages procedures, motions, briefs, *prima facie* claims, and burdens of proof. See *Formal Complaint Order*, 12 FCC Rcd at 22514-17, 22520-29, 22529-38, 22540-41, 22541-54, 22554-56, 22557-63, 22572-87, 22591-96, 22603-607, 22613-14, 22615-18.

an effective deterrent to anti-competitive conduct.

- The Commission affirms its statutory authority to impose damages for program access violations and finds that the imposition of damages at this time is an appropriate next step in the implementation of our program access rules. The Commission recognizes that the law of program access continues to be refined, and it is not appropriate in all instances to impose damages for program access violations. Where there are circumstances through either rulemaking or adjudicatory proceedings, such that a program access defendant knew, or should have known, that it was engaging in conduct violative of Section 628, damages are appropriate and may be awarded.
- The Commission believes that damages can best be calculated on a case-by-case basis and that the most efficient method for determining damage claims in the program access area is to adopt procedures similar to those used by the Commission in adjudicating common carrier formal complaints modified to reflect the program access context.
- The Commission finds that the adoption of time limits for program access disputes serves the public interest. The *Order* finds that denial of programming cases (unreasonable refusal to sell, petitions for exclusivity, and exclusivity complaints) should be resolved within five months of the submission of the complaint to the Commission. All other program access complaints, including price discrimination cases, should be resolved within nine months of the submission of the complaint to the Commission.
- The Commission finds that the adoption of time limits makes it necessary to impose a more streamlined pleading cycle. Program access defendants must file an answer within 20 days of service of the complaint, unless otherwise directed by the Commission. Program access complainants must file a reply within 15 days of service of the answer, unless otherwise directed by the Commission.
- The Commission retains the current system of Commission-controlled discovery. The *Order* clarifies our rules to provide that, to the extent that a defendant expressly references and relies upon a document or documents within its control in defending a program access claim, the defendant must attach that document or documents to its answer. The *Order* adopts, with minor revisions, the standardized protective order for program access matters that was attached to the *NPRM*.
- The Commission finds that the record fails to establish that the movement of programming from satellite to terrestrial delivery to avoid the program access rules is significant and causing demonstrative competitive harm at this time. The *Order* indicates that the Commission will continue to monitor this issue and its impact on competition in the video marketplace.
- The Commission finds that the record justifies adopting an alternative method to joint and several liability that buying groups can satisfy which ensures that programming distributors are adequately protected from excessive financial risk. The *Order* requires that, in lieu of joint and several liability, buying groups maintain liquid cash or credit reserves equal to cover the cost of one month's programming for all of the buying group's members.

IV. DISCUSSION

A. Sanctions

1. Adequacy and Interaction of Forfeitures

6. *Background.* The Commission has existing authority under Title V to impose forfeitures for violations of the program access rules.¹⁸ The Communications Act establishes a baseline forfeiture of up to \$10,000.00 per day for violation of the program access rules not to exceed a total of \$75,000.00.¹⁹ The Commission requested comment on this amount. We also sought comment on the adequacy and clarity of the forfeiture procedures and guidelines set forth in Section 503 of the Communications Act, the Commission's rules,²⁰ and case law. We sought comment on the relation, if any, between damages and the Commission's existing Title V authority.

7. Several commenters argue that the existence of forfeiture authority alone is insufficient to curb anti-competitive activity relating to program access.²¹ Bell Atlantic argues that forfeitures alone are insufficient because they do not reflect the full economic and competitive damage accruing from unlawful behavior.²² Most cable commenters believe that the existing forfeiture amounts and procedures are adequate.²³ Several commenters assert that, in cases which demonstrate repeated and willful violation of the program access rules, the imposition of both damages and forfeitures is justified.²⁴ Ameritech argues that "[t]he key distinction is that forfeitures strictly redress offenses to the governmental interest in protecting consumers and promoting competition, while damages uniquely redress the concomitant

¹⁸Communications Act § 502, 47 C.F.R. § 502.

¹⁹Communications Act § 503(b)(2)(C), 47 U.S.C. § 503(b)(2)(C). The Commission's forfeiture guidelines establish a baseline forfeiture of \$7,500.00 per day for violation of the program access rules. *See The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, 12 FCC Rcd 17087, Appendix A (1997) (Note: Guidelines for Assessing Forfeitures, Section I. Base Amounts for Section 503 Forfeitures).

²⁰47 C.F.R. § 1.80(b)(4) Note.

²¹Consumers Union, Consumer Federation of America and Media Access Project ("Consumers Union") Comments at 11; GTE Service Corporation ("GTE") Comments at 11-12; RCN Telecom Services, Inc. ("RCN") Comments at 8; Ameritech New Media, Inc. ("Ameritech") Comments at 21-22; BellSouth Corporation, BellSouth Interactive Media Services, Inc. and BellSouth Wireless Cable, Inc. ("BellSouth") Reply Comments at 12; DirecTV, Inc. ("DirecTV") Reply Comments at 25.

²²Bell Atlantic Telephone Companies ("Bell Atlantic") Comments at 7.

²³Liberty Media Corporation ("Liberty") Comments at 15; Encore Media Group, LLC ("Encore") Comments at 11; Home Box Office ("HBO") Reply Comments at 3; Fox/Liberty Networks, LLC and FX Networks LLC ("Fox") Reply Comments at 3-4.

²⁴SNET Personal Vision, Inc. ("SNET") Comments at 4-5; GTE Comments at 10-13.

injuries to the complaining party which forfeitures alone would neglect."²⁵

8. Ameritech asserts that the current forfeiture amount of \$7,500 per day, without a cap on the total amount which may be assessed over the course of the violation, is an adequate forfeiture amount.²⁶ Consumers Union asserts that the Commission's existing forfeiture amounts are insufficient to deter anti-competitive activity and proposes raising the forfeiture amount for program access violations from \$7,500 to \$25,000 per day for each single cable television system or franchise.²⁷ Noting that the forfeiture daily penalty of \$7,500 is equal to approximately one millionth of TCI Communications, Inc.'s annual revenue, RCN argues that the current forfeiture amount should be raised to \$27,500 per day.²⁸

9. We believe that the Commission's existing statutory forfeiture authority can be used in appropriate circumstances as an enforcement mechanism for program access violations. Forfeitures can be an effective deterrent to anti-competitive conduct. We intend to make greater use of this authority to sanction unlawful conduct. While statutory changes to the Commission's forfeiture authority could add additional tools for the Commission to use in the enforcement of these statutory provisions, we believe that the Commission's existing forfeiture authority provides an appropriate remedial measure for program access violations. As discussed below, we intend to use damages to further enhance our enforcement efforts. The Commission has the authority to assess forfeitures and damages separately and in combination depending upon the circumstances of a given case. The Commission also retains the authority to issue entirely prospective relief as it has in previous decisions.

2. Damages for Program Access Violations

10. *Background.* The Communications Act provides that the Commission shall have the power to order "appropriate remedies, including, if necessary, the power to establish prices, terms, and conditions of sale of programming."²⁹ In its *Order on Reconsideration*, the Commission stated that this authority "is broad enough to include any remedy the Commission reasonably deems appropriate, including damages."³⁰ In the *Order on Reconsideration*, the Commission declined, however, to exercise its authority to award damages at that time, but reserved the right to revisit the issue in the future.³¹ In response to Ameritech's petition, the Commission sought comment on whether an additional check on anti-

²⁵Ameritech Comments at 22; see DirecTV Reply Comments at 26.

²⁶Ameritech Comments at 20-21. Ameritech also suggests that the Commission recommend to Congress that it enact legislation amending Section 503 to increase the statutory forfeiture caps for violation of the program access rules to \$1 million, commensurate with the maximum caps for common carriers. Ameritech Reply Comments at 16-17.

²⁷Consumers Union Comments at 12-13. A vertically integrated MSO with 100 cable systems daily forfeiture would increase to \$2,500,000. *Id.*

²⁸RCN Comments at 9-11; see Echostar Communications Corporation ("Echostar") Reply Comments at 7.

²⁹Communications Act § 628(e), 47 U.S.C. § 628(e).

³⁰*Order on Reconsideration*, 10 FCC Rcd 1902, 1911 (1994).

³¹*Id.*

competitive conduct such as the imposition of damages for violations of Section 628 of the Communications Act may now be appropriate and in the public interest.

11. *Discussion.* Many commenters favor the imposition of damages for program access violations.³² Other commenters argue that, in light of the fact that there have been relatively few program access complainants most of which have been dismissed or denied, there is no need for the Commission to impose damages for violations of the program access rules.³³ After consideration of the record in this proceeding, we believe that the Commission should impose damages for violations of Section 628 where necessary to remedy the harm stemming from a programmer's anti-competitive conduct. As discussed below, the damages remedy will operate in concert with our existing forfeiture authority which the Commission will enforce in appropriate cases.³⁴

a. Statutory Authority

12. Several commenters argue that the Commission lacks statutory authority to impose damages for program access violations.³⁵ Liberty argues that, if the Commission's expansive interpretation of the term "appropriate remedies" contained in Section 628(e)(1) were correct, then Congress would not have needed to add Section 628(e)(2) to inform the Commission that the remedies provided for in subsection (e)(1) were in addition to other remedies available under the Communications Act.³⁶ Liberty contends that the only way to give effect to the Commission's reading of Section 628(e) is to render Section 628(e)(2) inoperative or superfluous, which the Commission is prohibited from doing.³⁷ Liberty argues that this interpretation is reinforced by the "if necessary" and "including" qualifiers set forth in Section 628(e)(1).³⁸ According to Liberty, the "if necessary" language modifies the phrase "the power to" thus indicating that the Commission has the power to order a remedy under subsection (e)(1) only if such

³²Consumers Union Comments at 11; National Rural Telecommunications Cooperative ("NRTC") Comments at 12; SNET Comments at 4; OpTel, Inc. ("OpTel") Comments at 4; Bell Atlantic Comments at 7; Small Cable Business Association ("SCBA") Comments at 13; American Programming Service, Inc., Consumer Satellite Systems, Inc., Programmers Clearing House, Inc., and Satellite Receivers, Ltd., and Satellite Distributors Cooperative ("Satellite Distributors") Comments at 12-13; GTE Comments at 10-11; Echostar Comments at 7; World Satellite Network, Inc. ("WSN") Comments at 22; RCN Comments at 10; Wireless Cable Association International, Inc. ("WCA") Comments at 15; BellSouth Comments at 17; DirecTV Comments at 23.

³³National Cable Television Association ("NCTA") Comments at 11; Liberty Comments at 16; Comcast Corporation ("Comcast") Comments at 7; HBO Comments at 18; Cablevision Systems Corporation ("Cablevision") Comments at 27-28; Encore Comments at 11; Time Warner Cable ("Time Warner") Comments at 6; Cable News Network, Inc. ("CNN") Reply Comments at 5.

³⁴See *supra* ¶¶6-9, discussing the Commission's program access forfeiture authority.

³⁵Liberty Comments at 19-24; Time Warner Comments at 6; Fox Reply Comments at 2-4.

³⁶Liberty Comments at 19-20.

³⁷*Id.* at 20, citing *Reiter v. Sonotone Corp.* 442 U.S. 330, 339 (1979).

³⁸*Id.* at 21.

remedy is necessary.³⁹ Liberty argues that the record in this proceeding indicates that a damages remedy is not necessary.⁴⁰ In addition, Liberty argues that the doctrine of *ejusdem generis* means that the "including" qualifier reinforces that subsection (e)(1) is limited to specific, prospective remedies.⁴¹ By specifying that the general term "appropriate remedies" includes the power to establish "prices, terms, and conditions," Liberty argues that Congress further indicated that the class of remedies available under Section 628(e)(1) was limited to prospective, injunctive relief.⁴² Liberty also argues that the fact that the Federal Trade Commission has determined that it does not have authority to impose damages under Section 5 of the Federal Trade Commission Act ("FTCA"), a provision related to unfair methods of competition, serves as further evidence that Congress did not intend for the Commission to award damages under Section 628.⁴³

13. Consumers Union argues that the cable commenters interpretation of Section 628(e) as prohibiting the imposition of damages for program access violations is incorrect.⁴⁴ Consumers Union asserts that Sections 628(e)(1) and (e)(2) work in conjunction -- Section 628(e)(1) gives the Commission power to order appropriate remedies, while Section 628(e)(2) clarifies that any such remedy the Commission might impose for program access violations is not limited to those otherwise enumerated in the Communications Act.⁴⁵ With regard to the argument that Congress intended to limit the broad language "appropriate remedies" with the language relating to the "power to establish prices, terms and conditions," Consumers Union argues that the language of Section 628(e)(2) which permits the Commission to adopt remedies "in addition to" those specifically enumerated elsewhere in the Communications Act demonstrates that Congress intended the Commission to have remedial powers that extended far beyond forfeitures and prospective injunctive relief.⁴⁶ Ameritech also notes that the word "including" is generally interpreted as a term of enlargement and not of limitation.⁴⁷ WCA states that, as

³⁹*Id.*

⁴⁰*Id.*

⁴¹*Id.* at 21-22. Liberty argues that, under the doctrine of *ejusdem generis*, a general term is limited by the specific terms which follow it, so that the general term embraces objects similar in nature to the specific enumerations. *Id.*, citing 2A Sutherland Stat. Const. § 47.17 (5th. ed.).

⁴²*Id.* at 22.

⁴³*Id.* at 23-24, citing FTCA §5, 15 U.S.C. § 45.

⁴⁴Consumers Union Reply Comments at 11-12. Bell Atlantic observes that the cable commenters' arguments that the Commission lacks authority to award damages in program access cases is time barred because such arguments should have been as part of an appeal or reconsideration request of the Commission's determination that it had the authority to award damages for program access violations in the *Order on Reconsideration*. Bell Atlantic Reply Comments at 2-3.

⁴⁵Consumers Union Reply Comments at 11-12.

⁴⁶*Id.* at 12-13.

⁴⁷Ameritech Reply Comments at 20, citing 2A Sutherland Stat. Const. §47.07 (5th ed.) (citing *Argosy Ltd. v. Hennigan*, 404 F.2d 14 (5th Cir. 1968)).

the Commission recognized in a program access decision relating to exclusive programming contracts in the direct broadcast satellite ("DBS") industry, the use of the term "including" in another program access provision "indicates that the specified list . . . that follows is illustrative, not exclusive."⁴⁸ Two commenters also cite the Commission's broad authority to fashion appropriate remedies under Section 4(i) of the Communications Act.⁴⁹

14. We disagree with those commenters that argue that the Commission lacks statutory authority to impose damages for program access violations. Section 628(e) of the Communications Act provides:

(1) **Remedies Authorized.** -- Upon completion of such adjudicatory proceeding, the Commission shall have the power to 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.

(2) **Additional Remedies.** -- The remedies provided in paragraph (1) are in addition to and not in lieu of the remedies available under title V or any other provision of the Act.⁵⁰

The Commission has interpreted its authority under Section 628(e) as "broad enough to include any remedy the Commission reasonably deems appropriate, including damages."⁵¹ We reject Liberty's confined interpretation of Section 628(e), and do not agree that determining damages to be an appropriate remedy thereunder renders subsection (e)(2) superfluous. The Commission's interpretation of Section 628(e) is that subsection (e)(1) authorizes the Commission to order appropriate remedies, including damages, while subsection (e)(2) clarifies that the remedies authorized under subsection (e)(1) complement, and may be exercised in tandem with, other remedies permitted under the Communications Act, including forfeitures. With regard to Liberty's *ejusdem generis* argument, we agree with Ameritech and WCA that the appropriate interpretation of the term "including" in Section 628(e)(1) indicates that the phrase relating to prices, terms and conditions is illustrative, rather than exclusive.⁵²

15. We disagree with Liberty's analogy between the program access provisions of the Communications Act and Section 5 of the FTCA. Section 5(a) of the FTCA provides that "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting

⁴⁸WCA Reply Comments at 13-14, citing *Implementation of the Cable Television Consumer Protection Act of 1992 -- Development of Competition and Diversity in Video Programming Distribution and Carriage*, 10 FCC Rcd 3105, 3122 n.85 (citing *Puerto Rico Maritime Shipping Authority v. Interstate Commerce Commission*, 645 F.2d 1102, 1112 n.26 (D.C. Cir. 1981)).

⁴⁹Ameritech Reply Comments at 19; WCA Reply Comments at 15.

⁵⁰Communications Act § 628(e), 47 U.S.C. § 548(e).

⁵¹*Order on Reconsideration*, 10 FCC Rcd 1902, 1911 (1994).

⁵²*See Puerto Rico Maritime Shipping Authority v. Interstate Commerce Commission*, 645 F.2d 1102, 1112 n.26 (D.C. Cir. 1981) ("It is hornbook law that the use of the word 'including' indicates that the specified list [] that follows is illustrative, not exclusive."); *see also* 2A Sutherland Stat. Const. § 47.07 (5th ed.) ("It has been said the word includes is usually a term of enlargement, and not of limitation . . . It therefore conveys the conclusion that there are other items includable, though not specifically enumerated. . . .") (internal quotes omitted).

commerce, are hereby declared unlawful."⁵³ Upon a finding that an entity has engaged in an unfair method of competition or an unfair or deceptive act or practice, Section 5(b) empowers the Federal Trade Commission to issue an order requiring that the entity ". . . cease and desist from using such method of competition or act or practice."⁵⁴ The Federal Trade Commission has conceded that Section 5 of the FTCA does not grant it the power to order damages for violations of Section 5(a).⁵⁵ That Section 5 of the FTCA and Section 628 have certain facial similarities is not a basis to conclude that Section 628 remedies are similarly limited to the remedies under the FTCA. Indeed, the similarities remain facial. By its terms, Section 5(b) limits the Federal Trade Commission to prospective injunctive relief in the form of cease and desist orders. In contrast, Section 628(e) grants the Commission "the power to order appropriate remedies."⁵⁶ In scope and statutory language, we find Liberty's analogy between the two provisions to be unpersuasive. Accordingly, we reaffirm our statutory authority to impose damages in redressing violations of Section 628.

b. Need for a Damages Remedy

16. Several commenters argue that the Commission should continue to refrain from imposing damages, even if it has authority to do so. Fox states that there is no evidence contained in the comments filed in response to the *NPRM*, or elsewhere, to base a finding that existing remedies have not been sufficient to accomplish the goals of Section 628 or that a damages remedy is particularly necessary.⁵⁷ Numerous commenters note that the Commission has never exercised its authority to impose forfeitures for violations of the program access rules. NCTA states that the intent of Section 628 is to promote competition among multichannel video programming distributors ("MVPDs") and that there is no indication that the Commission's existing remedies have been inadequate to enable complaining MVPDs to compete on fair terms in the video marketplace.⁵⁸ Other commenters argue that a damages remedy will reduce the efficiency of the program access provisions by imposing significant delays and additional costs on the resolution of program access cases.⁵⁹ HBO argues that damages are particularly inappropriate in the area of program access where the law is nascent and provides little guidance on actions that will or will not result in a program access violation.⁶⁰ Cablevision argues that the imposition of damages will cause programmers to cease negotiating contracts based on legitimate price differentials because the programmer faces a significant risk that the Commission will simply disagree with its economic analysis

⁵³FTCA §5(a), 15 U.S.C. § 45(a).

⁵⁴*Id.* §5(b).

⁵⁵*See Heater v. FTC*, 503 F.2d 321, 323 n.6 (9th Cir. 1974).

⁵⁶Communications Act §628(e)(1), 47 U.S.C. §548(e)(1).

⁵⁷Fox Reply Comments at 4; Liberty Reply Comments at 3.

⁵⁸NCTA Comments at 12; *see* Fox Reply Comments at 3.

⁵⁹Liberty Comments at 17; HBO Comments at 18-21; Encore Comments at 12; Time Warner Comments at 6-7; NCTA Reply Comments at 9.

⁶⁰HBO Comments at 21-22.

and order a rate reduction.⁶¹

17. When the Commission determined in the *Order on Reconsideration* that it had the authority to impose damages but would, at that time, refrain from doing so, the Commission had no experience in enforcing the program access provisions of the Communications Act.⁶² In the interim, the Commission and the multichannel video programming industry have had almost six years of experience under Section 628, and the Commission believes that sufficient understanding of the parameters of program access exist. It is appropriate to take a logical next step -- the compensation of victims of clear-cut anti-competitive conduct which violates the program access rules. Restitution in the form of damages is an appropriate remedy to return improper gains obtained by vertically-integrated programmers to unjustly injured MVPDs.

18. We also recognize, as argued by HBO, that the law of program access continues to be refined, and it is not appropriate in all instances to impose damages for program access violations. We believe Section 628 permits the Commission to exercise discretion in this area. Section 628(e)(1) authorizes the Commission to order "appropriate" remedies.⁶³ Where a program access defendant relies upon a good faith interpretation of an ambiguous aspect of the program access provisions for which there is no guidance, we do not believe it would promote competition, or otherwise benefit the video marketplace, to require damages from a programming provider in such circumstances. Where, however, there are circumstances through either rulemaking or adjudicatory proceedings, such that a program access defendant knew, or should have known, that it was engaging in conduct violative of Section 628, damages are appropriate and will be imposed. Since the enactment of the program access rules, the Commission has encountered several program access complaints involving repeated conduct involving the same or substantially the same conduct by programming providers. Where encountered in the future, the Commission may impose damages, if appropriate, in such instances.

19. Echostar argues that the Commission should apply any damages remedy adopted in this proceeding to all pending program access cases.⁶⁴ Fox opposes Echostar's proposal as against established precedent that the rules adopted by an agency in notice and comment rulemaking have prospective effect.⁶⁵ We believe that it would be fairer to apply the rules adopted herein only to conduct violative of Section 628 that occurs on or after the effective date of the rules.

c. Punitive Damages

20. *Background.* We tentatively concluded in the *NPRM* that punitive damages should not be imposed in program access cases and sought comment on this tentative conclusion.

⁶¹Cablevision Comments at 28.

⁶²*Order on Reconsideration*, 10 FCC Rcd at 1911.

⁶³Communications Act § 628(e)(1), 47 U.S.C. § 548(e)(1).

⁶⁴Echostar Reply Comments at 10-11.

⁶⁵Fox Reply Comments at 6.

21. *Discussion.* Bell Atlantic advocates that the Commission refrain from adopting a blanket rule that punitive damages will not be awarded in program access cases.⁶⁶ Commenters failed to establish a record regarding the need for the imposition of punitive damages in program access cases. We adopt our tentative conclusion that punitive damages should not be imposed in program access cases at this time.

3. Procedural Considerations

22. *Background.* The Commission sought comment regarding the correct procedures to implement damages or forfeitures in the context of specific program access proceedings. In addition we sought comment on Americast's proposal that, in some cases, the most efficient manner of processing program access cases would be to bifurcate the program access violation determination from the damages or forfeiture determination.⁶⁷ We also sought comment on the calculation of damages, if assessed. We requested that commenters consider whether the Commission should determine damages on a case-by-case basis, or whether there should be a standard calculation for damages in program access matters. Those arguing that damages should be based on a standard calculation were asked to comment on how the Commission should determine such standard calculation.

23. We also sought comment on whether we should adopt the requirement, contained in the *Formal Complaint Order*, that a complainant seeking damages must file with its complaint or supplemental complaint either a detailed computation of damages or a detailed explanation of why such a computation is not possible at the time of filing. Commenters advocating the adoption of such a requirement were advised to address whether the explanatory standards adopted in the *Formal Complaint Order* should be adopted, or whether some other explanation standard should apply.

24. *Discussion.* Several commenters argue that no definitive damages calculation be adopted and that damages be tailored to the specific circumstances of each proceeding and calculated on a case-by-case basis.⁶⁸ Similarly, several commenters favor adopting the case-by-case approach to calculating damages established by the Commission in the *Formal Complaint Order*.⁶⁹ OpTel supports a procedure whereby successful program access complainants be permitted to demonstrate the actual damages attributable to the violation.⁷⁰ In addition, many commenters favor the bifurcation of the violation determination from the damages portion of the proceeding.⁷¹ HBO argues however that bifurcation of the

⁶⁶Bell Atlantic Comments at 8.

⁶⁷The Commission concluded in the *Formal Complaint Order* that it would exercise discretion where appropriate to bifurcate liability and damages issues on its own motion. See *Formal Complaint Order* 12 FCC Rcd at 22575.

⁶⁸GTE Comments at 12; Echostar Comments at 10; BellSouth Comments at 19.

⁶⁹Bell Atlantic Comments at 8; WCA Comments at 18; Ameritech Comments at 23; see Echostar Comments at 11.

⁷⁰OpTel Comments at 5.

⁷¹SNET Comments at 5; OpTel Comments at 4; Bell Atlantic Comments at 9; BellSouth Comments at 19; Ameritech Reply Comments at 22; WSN Reply Comments at 7; Echostar Reply Comments at 10.

violation determination from the damages portion of the proceeding will not alleviate the problem that the imposition and calculation of damages will needlessly mire the Commission in complex damages assessment procedures.⁷²

25. Consumers Union proposes that the Commission adopt a dual approach to calculating damages. For price discrimination cases, Consumers Union suggests that the Commission impose damages based upon the price differential between what the complainant was paying and should have paid for the programming.⁷³ In denial of programming cases, where assessment of damages may be more difficult, Consumers Union advocates standardized damages based on what the programmer charges competing MVPDs for the particular programming at issue.⁷⁴

26. SCBA suggests a liquidated damages approach to the calculation of damages requiring the programmer violating the Commission's rules to provide the disputed programming to the successful complainant at a discounted rate for two years.⁷⁵ Under SCBA's proposal, the Commission would calculate the discounted price as the lower of: (i) 80% of the price charged at the time the complaint was filed; or (ii) 80% of the price charged at the date of the Commission's decision.⁷⁶ Echostar proposes that denial of programming damages be calculated by statistical studies on the percentage of MVPD subscribers who did not purchase the aggrieved MVPD's service based on the inability to provide the denied programming.⁷⁷ WSN asserts that damages should be the higher of: (i) the complainant's loss; or (ii) the programmer's gain, together with attorney's fees and expenses for a prevailing petitioner.⁷⁸ RCN proposes that the Commission adopt a series of escalating penalties which increase throughout the duration of the violation and that are tied to a defendant-specific indicator, such as a percentage of revenue.⁷⁹ Ameritech favors calculating damages on established antitrust principles through which a successful plaintiff is required to demonstrate: (i) that its profits have been reduced due to the defendant's anti-competitive conduct; and (ii) the extent of the loss.⁸⁰

⁷²HBO Reply Comments at 8.

⁷³Consumers Union Comments at 14; see Satellite Distributors Comments at 13. Echostar also agrees with this approach but cautions that successful program access complainants should not be prevented that their harm actually exceeded the price differential. Echostar Comments at 11.

⁷⁴Consumer Union Comments at 14. For example, if a programmer charges competing MVPDs one dollar per subscriber per month for program A and refuses to sell that programming to another competing MVPD with 100,000 subscribers for three months in violation of the program access rules, damages would equal \$300,000. *Id.* at 14-15.

⁷⁵SCBA Comments at 14.

⁷⁶*Id.*

⁷⁷Echostar Comments at 10-11.

⁷⁸WSN Comments at 22.

⁷⁹RCN Comments at 11.

⁸⁰Ameritech Comments at 22.

27. The various proposals for calculating damages offered by commenters, while reflecting some merit in allowing a specific amount to be determined, fall short because they do not provide general guidance for all circumstances and also fail to present a format by which the actual damages experienced can be determined. We agree with those commenters that advocate the position that damages can best be calculated on a case-by-case basis. In particular, we believe the most efficient method for determining damage claims in the program access area is to adopt procedures similar to those used by the Commission in adjudicating common carrier formal complaints.⁸¹ As several commenters have stated, development of the *Formal Complaint Order* damages procedures involved extensive consideration of issues that are substantially similar to the issues that the Commission faces in this proceeding.⁸² Moreover, the record established in this proceeding does not indicate that the adoption of program access damages procedures that are fundamentally different from the *Formal Complaint Order* procedures better serves the public interest. We believe that the damages procedures set forth in the *Formal Complaint Order*, modified to reflect the program access context, provide the most fair and efficient procedure for determining damages.⁸³ It also provides program access litigants with established procedures for complex damages determinations which the adoption of a wholly-new set of procedures would lack. In addition, adopting the damages procedures set forth in the *Formal Complaint Order*, modified to reflect the program access context, lends at least partial symmetry to the treatment of damages issues arising under the Communications Act that, while not statutorily required, adds further consistency to our regulations which better serves the public. If the *Formal Complaint Order* procedures prove to be insufficient or too cumbersome in certain respects when applied in the program access context, the Commission will revisit this issue and further modify our rules.

28. We believe that the most efficient method by which to administer damages is to provide the Commission with discretion to bifurcate the violation determination from any damages adjudication.⁸⁴ We require that a complainant seeking damages for a program access violation must file as part of its complaint either:

- a) A detailed computation of damages, including supporting documentation and materials; or

⁸¹See *supra* n.17, discussing the common carrier formal complaint process.

⁸²See WCA Comments at 18-19, discussing *Formal Complaint Order's* consideration of bifurcation and damages computation procedures; Ameritech Comments at 23, discussing *Formal Complaint Order's* consideration of bifurcation and the need to expeditiously resolve the liability issue and subsequently determining damages issues; Bell Atlantic Comments at 8, discussing *Formal Complaint Order's* consideration of damages computation procedures; EchoStar Comments at 11-12, discussing *Formal Complaint Order's* consideration of damages computation procedures.

⁸³The *Formal Complaint Order* procedures adopted herein include: (i) the damage pleading requirements of Section 1.722(c)(1)&(2), 47 C.F.R. § 1.722(c)(1)&(2); (ii) the damage adjudication procedures of Section 1.722(d)(4), 47 C.F.R. § 1.722(d)(4); and the ability to designate damages issues to an Administrative Law Judge set forth in Section 1.722(d)(1), 47 C.F.R. § 1.722(d)(1).

⁸⁴See Appendix A, §76.1003(s)(3)(i). Where the Commission bifurcates the program access violation determination from the damages determination, the time limits adopted herein shall apply solely to program access violation determination and not to any damages determination. See *infra* ¶ 41, discussing the adoption of time limits for the resolution of program access complaints.

- b) An explanation of:
- (i) What information not in the possession of the complaining party is necessary to develop a detailed computation of damages;
 - (ii) Why such information is unavailable to the complaining party;
 - (iii) The factual basis the complainant has for believing that such evidence of damages exists; and
 - (iv) A detailed outline of the methodology that would be used to create a computation of damages with such evidence.⁸⁵

Where a violation is found, the Cable Services Bureau ("Bureau") will indicate in its order whether the violation is the type for which the Commission will impose damages or forfeitures. As with all program access orders, the parties may file an application for review of the Bureau's decision to the Commission.⁸⁶ The burden of proof regarding damages rests with the complainant, who must demonstrate with specificity the damages arising from the program access violation.⁸⁷ We note that, given the one year limitations period for bringing program access complaints, the Commission will not entertain damages claims asserting injury pre-dating the program access complaint by more than one year.⁸⁸ The Commission cautions potential complainants that grossly overstating the amount of damages incurred will result in a Commission determination that the complainant has failed to meet its burden of proof.⁸⁹

29. As in the *Formal Complaint Order*, we believe this rule strikes the appropriate balance between the need for complainants to be diligent in establishing their claims and a recognition that, in certain instances, a complainant may not possess sufficient facts at the initial stages of a complaint proceeding to prepare a detailed computation of damages alleged. This rule is also consistent with the Commission's policy of encouraging complainants to have damages claims resolved separately from liability issues.⁹⁰

30. The Commission may adjudicate damages by determining the sufficiency of the damages calculation or computation methodology submitted by the complainant.⁹¹ Alternatively, the Commission may find the damages calculation or computation methodology submitted by the complainant

⁸⁵See Appendix A, §76.1003(c)(5); see *Formal Complaint Order*, 12 FCC Rcd at 22579.

⁸⁶See 47 C.F.R. § 1.115, Commission's application for review procedures.

⁸⁷See Appendix A, §76.1003(s)(3)(ii).

⁸⁸See 47 C.F.R. § 76.1003(r), providing one year statute of limitations for program access complaints.

⁸⁹*Id.*

⁹⁰*Formal Complaint Order*, 12 FCC Rcd at 22579-580.

⁹¹See Appendix A, § 76.1003(s)(3)(iii); see *Formal Complaint Order*, 12 FCC Rcd at 22581.

unsatisfactory, or, in its discretion, modify such calculation or computation methodology or require the complainant to resubmit such calculation or computation methodology.⁹² Where the Commission issues a written order approving or modifying a damages calculation, the defendant shall recompense the complainant as directed in the Commission's order.⁹³ Where the Commission issues a written order approving or modifying a damages computation methodology, the parties shall negotiate in good faith to reach an agreement on the exact amount of damages pursuant to the Commission-mandated methodology.⁹⁴ To ensure that the parties are diligent in their negotiations to apply the approved methodology, we shall require that, within thirty days of the date the damages computation method is approved and released, the parties must file with the Commission a joint statement which will do one of the following: (1) detail the parties' agreement as to the amount of damages; (2) state that the parties are continuing to negotiate in good faith and request that the parties be given an extension of time to continue such negotiations, or (3) detail the bases for the continuing dispute and the reasons why no agreement can be reached.⁹⁵ In this way, the Commission will monitor the parties' compliance with its directive to negotiate a resolution of the dispute in good faith using the mandated computation method. We also adopt a rule authorizing the Chief of the Cable Services Bureau to refer damages disputes to administrative law judges ("ALJ") for either decision following a finding of liability or, by agreement of the parties, mediation.⁹⁶ In cases in which the parties cannot resolve the amount of damages within a reasonable time period, the Commission retains the right to determine the actual amount of damages on its own, or through referral to an ALJ.⁹⁷ We also note that our rules require that program access complaints be filed within one year of an alleged violation.⁹⁸

31. This rule permits the Commission to avoid the detailed and time-consuming investigation of the facts necessary to establish an exact amount of damages where such investigation may reasonably be determined by the parties. At the same time, however, it provides a means for parties to return to the Commission for resolution of ongoing disputes if parties are unable to agree to a final amount of damages. This rule encourages good faith negotiation among the parties by requiring parties to provide detailed explanations if they fail to resolve their dispute. We emphasize that the Commission retains the right to determine the actual amount of damages in those cases where the establishment of damages does not lend itself to such a means of resolution. We also conclude that requiring parties to reach an agreement within a limited time addresses the concerns raised by some commenters that the parties would have no recourse if they are unable to apply a damages computation method successfully. Interest on the amount of

⁹²See Appendix A, § 76.1003(s)(3)(iii); see *Formal Complaint Order*, 12 FCC Rcd at 22581.

⁹³See Appendix A, § 76.1003(s)(3)(iii)(A)(1).

⁹⁴See Appendix A, § 76.1003(s)(3)(iii)(A)(2).

⁹⁵See Appendix A, § 76.1003(s)(3)(iii)(B); see *Formal Complaint Order*, 12 FCC Rcd at 22581.

⁹⁶See Appendix A, § 76.1003(s)(3)(iii)(C)(2). Regarding appeals of ALJ decisions, we note that the ALJ hearing rules provide the means for parties to seek review of an ALJ decision. 47 C.F.R. §§ 1.271-1.282. If the parties agree to mediation, however, the right to seek review of the ALJ's mediation resolution would be contained within the terms pursuant to which the parties agreed to such mediation.

⁹⁷See Appendix A, § 76.1003(s)(3)(iii)(C)(1).

⁹⁸See 47 C.F.R. § 76.1003(r), providing one year limitations period for program access complaints.

damages awarded will accrue from either the date indicated in the Commission's written order or the date agreed upon by the parties as a result of their negotiations. Interest shall be computed at applicable rates published by the Internal Revenue Service for tax refunds.⁹⁹

4. Damages Accrual Date

32. *Background.* The Commission sought comment on the date from which damages should be levied for violations of Section 628. Specifically, we sought comment on whether the operative date should be the date of the notice of intent to file a program access complaint, or the date of filing of the program access complaint, or the date on which the violation first occurred.

33. *Discussion.* Commenters disagree regarding the date from which damages should accrue. Several commenters believe that damages should accrue from the date on which cable operators are given notice pursuant to Section 76.1003(a) of the Commission's rules that a complainant intends to file a program access complaint.¹⁰⁰ Other commenters believe that appropriate date is the date on which the violation first occurred.¹⁰¹ Another group of commenters assert that damages should be measured from the date on which a complaint is filed with the Commission.¹⁰² We believe that the appropriate date from which damages should accrue is the date on which the violation first occurred. The burden is on the complainant to establish this date. Whether the complainant has been unfairly denied programming or charged an unfair price for programming received, the injury flows from the date on which the violation first occurred and the complainant should, in appropriate cases, be compensated accordingly.¹⁰³

B. Timing Issues

1. Time Limits for the Resolution of Program Access Cases

34. *Background.* Although Congress did not enact specific time limits for Commission resolution of program access disputes, Congress did provide that "[t]he Commission's regulations shall . . . provide for an expedited review of any [program access] complaints. . . ."¹⁰⁴ In initially implementing Section 628, the Commission did not impose time limits for the resolution of program access complaints.

⁹⁹See 47 C.F.R. § 76.961(d), applying Internal Revenue Service interest rate to cable programming service rate refunds.

¹⁰⁰Consumers Union Comments at 13; Satellite Distributors Comments at 13; RCN Comments at 10, citing 47 C.F.R. §76.1003(a).

¹⁰¹GTE Comments at 12; Echostar Comments at 9-10; BellSouth Comments at 19; NRTC Reply Comments at 7; WSN Reply Comments at 7.

¹⁰²WCA Comments at 17.

¹⁰³We note that, as expressly provided above, the rules adopted herein apply only to conduct violative of Section 628 that occurs on or after the effective date of the rules. See *supra* ¶ 19, discussing prospective application of the amended rules adopted herein.

¹⁰⁴Communications Act §628(f)(1), 47 U.S.C. §548(f)(1).

35. In the *NPRM*, the Commission requested comment on appropriate time limits for the resolution of program access complaints: should the Commission adopt Ameritech's proposed time limits (90 days for cases not involving discovery, and 150 days for cases in which discovery is conducted); should some other time period apply; or should the Commission not adopt time limits. In addition, we sought comment on whether the time limit, if any, should run from the time the complaint was filed, as proposed by Ameritech, or whether the time limit should run from some other point, such as the close of pleadings, or the close of discovery. Recognizing that one universally applicable time limit may not sufficiently take into account all of the circumstances faced by the Commission in resolving program access complaints, the Commission sought comment regarding whether one time limit should apply to all program access complaints, or whether one time limit should be established for cases involving denial of programming, with a longer time limit established for price discrimination cases, which generally involve issues of greater complexity. We also sought comment on any other reasonable distinction between program access cases which would impact the appropriate time limit, if any, for resolution of that type of program access proceeding.

36. *Discussion.* Most commenters favor, or do not oppose, the adoption of some form of time limit for the resolution of program access complaints.¹⁰⁵ Ameritech argues that the absence of firm deadlines undermines the effectiveness of Section 628 as an instrument of competition.¹⁰⁶ Commenters maintain that, from the perspective of injured competitors, "justice delayed is justice denied" and that expeditious resolution of such complaints will, at least partially, alleviate the harm and cost to complainants.¹⁰⁷ Cable commenters generally oppose the adoption of time limits for the processing of program access complaints.¹⁰⁸ Commenters point out that, while it established specific statutory time limits for processing numerous Commission actions in the Communications Act, Congress established no specific time limits for the resolution of program access disputes.¹⁰⁹ These commenters argue that, to now adopt specific time deadlines, the Commission would establish an artificial priority to, and occupy scarce Commission resources for, program access cases which Congress did not intend.¹¹⁰ In addition, commenters argue that the establishment of specific time limits could prevent the Commission from giving adequate consideration to the facts and issues of particular cases increasing the likelihood of an erroneous decision.¹¹¹

¹⁰⁵Ameritech Comments at 8; Liberty Comments at 30; DirecTV Comments at 24; BellSouth Comments at 9; WCA Comments at 14; NRTC Comments at 12; RCN Comments at 4; WSN Comments at 23; Bell Atlantic Comments at 3; HBO Comments at 4; OpTel Comments at 2; GTE Comments at 7; SNET Comments at 2; Satellite Distributors Comments at 6.

¹⁰⁶Ameritech Comments at 8.

¹⁰⁷Ameritech Comments at 8; BellSouth Reply Comments at 7; WCA Comments at 14.

¹⁰⁸NCTA Comments at 5; Comcast Comments at 2; Time Warner Comments at 3; CNN Comments at 2; Encore Comments at 4.

¹⁰⁹NCTA Comments at 5; Comcast Comments at 3-4; Time Warner Comments at 4-5.

¹¹⁰NCTA Comments at 5; Comcast Comments at 4; Encore Comments at 5.

¹¹¹NCTA Comments at 5-6; Time Warner Comments at 5; CNN Comments at 2; Encore Comments at 4.

37. Ameritech continues to propose that a Commission decision in Section 628 proceedings should be required within 90 days from the filing of the complaint in cases where there is no discovery and 150 days from the filing of a complaint in cases where discovery is conducted.¹¹² Commenters argue that Ameritech's proposed deadlines are completely consistent with the various statutory deadlines (ranging from 90 to 150 days) for resolution of different types of common carrier disputes imposed by Congress in the 1996 Act.¹¹³ One commenter argues that any time limits adopted by the Commission must account for the complexities of program access disputes and allow the parties sufficient time to develop and present their positions.¹¹⁴ This commenter asserts that the Commission should be careful that any deadlines adopted not interfere with the opportunity for private settlement of such disputes by the parties.¹¹⁵ Two commenters assert that it would be unwise for the Commission to adopt different time limits based upon the type of program access complaint.¹¹⁶ Ameritech argues that shorter time periods for certain types of program access complaints might lead to the Commission refusing discovery in those cases. One commenter argues that running the time limit from the filing from the date of filing of the program access complaint may not allow the Commission sufficient time to review the record in such cases.¹¹⁷

38. We believe that the adoption of time limits for the resolution of program access disputes can enhance competition in the video marketplace by providing certainty to program access litigants that their complaints will be timely resolved. Of course, we recognize that any time limits imposed must reflect the myriad circumstances and complexity inherent in the program access provisions. We recognize that the expeditious resolution of these complaints is dependent in many circumstances upon the actions of the parties. In this regard, by adopting appropriate time limits, which also impose responsibilities on the parties, the Commission will be afforded sufficient time to analyze fully each program access

¹¹²Ameritech Comments at 9; see NRTC Comments at 14; SNET Comments at 2 (each supporting Ameritech's proposed time limits).

¹¹³Ameritech Comments at 9. One commenter argues that the Commission should adopt the same deadlines for resolving program access complaints as Congress mandated for common carrier formal complaints. Bell Atlantic Comments at 3, discussing *Formal Complaint Order*, 12 FCC Rcd at 22504 (1997) (requiring common carrier formal complaints to be resolved within 5 months of submission to the Commission); see 47 U.S.C. §208(b) (five month requirement). Several commenters propose that a single 45-day time limit which commences at the close of pleadings should suffice for all program access proceedings. BellSouth Comments at 10; OpTel Comments at 3; GTE Comments at 8.

¹¹⁴HBO Comments at 5.

¹¹⁵*Id.* at 6.

¹¹⁶Ameritech Comments at 13; RCN Comments at 5.

¹¹⁷WCA Comments at 14. WCA proposes that the Commission require that price discrimination complaints be resolved within 90 days from the close of the formal pleading cycle (including any pleadings filed out of time with the Commission's consent), while all other program access complaints be resolved within 60 days of the close of pleadings. WCA Comments at 14-15. Another commenter argues that appropriate time limits for the resolution of program access complaints should run from the date of a mandatory initial status conference, suggesting a 150-day time limit for price discrimination cases and a 90-day time limit for all other program access disputes. Satellite Distributors Comments at 9.

complaint. We disagree with those commenters that argue that we are artificially prioritizing program access complaints contrary to Congress' intent, as the law imposes the obligation to resolve complaints expeditiously. If the Commission can fully and fairly adjudicate program access complaints in the time frames discussed below, while also meeting its other statutory duties, we believe that Congress' overall structure for regulation and competition in the video marketplace is better served.

39. In imposing time limits the Commission must ascertain what can be accomplished in all cases on a consistent basis. The specific time limit proposals suggested by certain commenters do not reflect the range of competing priorities faced by the Commission. Many of these competing priorities also serve important roles in promoting competition.¹¹⁸ We agree with those commenters that advocate assigning different time limits for different types of program access disputes. Our experience indicates that, while complex in themselves, denial of programming cases involving refusal to sell or issues of exclusivity can typically be processed more expeditiously than price discrimination cases, which often involve numerous issues requiring legal, economic and accounting expertise.¹¹⁹ We believe that a single time limit would require the Commission to adopt a longer time limit than would be necessary in many cases to account for the time involved in resolving price discrimination disputes.

40. Many commenters argue that any time limits adopted by the Commission should run from the date of filing of a program access complaint. One commenter argues that any time limits which the Commission may adopt for the resolution of program access cases should run from the close of the pleading cycle (including any extensions granted by the Commission).¹²⁰ Consistent with the Commission's other statutory deadlines discussed above, we believe that the time limits adopted herein should commence to run from the time a party submits its complaint to the Commission.

41. We believe that denial of programming cases (unreasonable refusal to sell, petitions for exclusivity, and exclusivity complaints) should be resolved within five months of the submission of the complaint to the Commission.¹²¹ All other program access complaints, including price discrimination

¹¹⁸Congress imparted to the Commission authority to certify open video systems, and mandated that the Commission grant or deny such certifications within 10 days. Communications Act §653(a)(1), 47 U.S.C. §573(a)(1); 47 C.F.R. §76.1502(f). The Commission is also required to resolve open video system disputes within 180 days after notice of such dispute is submitted to the Commission. *Id.* §653(a)(2); 47 C.F.R. §76.1513(a). Congress also required that the Commission resolve "must carry" complaints and Area of Dominant Influence ("ADI") market determinations within 120 days of submission. *Id.* §614(d)(3) & (h)(1)(C)(iv). The Commission also must resolve cable programming services rate complaints within 90 days. *Id.* §623(c)(3). Any time limits imposed for program access must take into account these statutory mandates.

¹¹⁹*See Turner Vision, Inc., Satellite Receivers, Ltd., Consumer Satellite Systems, Inc., and Programmers Clearing House, Inc. v. Cable News Network, Inc.*, DA 98-1295 (CSB rel. June 30, 1998) ("CNN").

¹²⁰Liberty Reply Comments at 9-10. Liberty asserts that starting the time limit at the close of pleadings would motivate parties to include in their pleadings all of the arguments and information needed to accurately argue their case and thereby expedite a Commission decision. Liberty Reply Comments at 10.

¹²¹We note that our decision to resolve denial of programming complaints within five months of their submission to the Commission is consistent with the five month period in which Congress requires the Commission to resolve certain complaints against common carriers. Communications Act §208(b)(1), 47 U.S.C. §208(b)(1); *See Formal Complaint Order*, 12 FCC Rcd at 22499, n.4.

cases, should be resolved within nine months of the submission of the complaint to the Commission. Where the Commission bifurcates the program access violation determination from a damages determination, the time limits adopted herein apply solely to the resolution of the program access violation. These dates reflect not what the Commission would select if afforded unlimited resources, but rather what we believe to be realistic goals that are achievable given the Commission's limited resources and overall statutory duties. These time limits contemplate resolution times applicable to most typical program access disputes which do not involve complex or repeated discovery, pleading extensions or extra pleadings based upon new information, or requests that the Commission stay proceedings pending settlement negotiations. Program access disputes involving these circumstances may impact the Commission's ability to resolve such disputes within the time limits discussed herein. We believe that this certainty, combined with the other actions approved in this *Order*, will provide further incentive for programming providers to avoid scrupulously program access violations, as well as expeditiously resolve program access disputes.

42. Commenters argued that any time limits imposed by the Commission must afford a meaningful opportunity to pursue settlement negotiations. We agree. As the Commission stated in the *NPRM*, "we encourage resolution of program access disputes through negotiated settlements in an effort to avoid time-consuming, complex adjudication. This policy favoring private settlement and alternative dispute resolution conserves Commission resources and is thus in the public interest."¹²² Where the parties to a program access dispute submit a motion to stay proceedings pending settlement discussions, the Commission will afford the parties the time necessary to determine whether a negotiated settlement is possible. If parties choose to pursue negotiations, an alternative that we think provides the most efficient and effective resolution of program access disputes, these time limits will be suspended. We think this properly places on the parties a commensurate responsibility that these matters be resolved expeditiously. We also think it avoids the confusion and delay that inevitably accompanies resetting time periods.

2. Pleading Cycle

43. *Background.* The Commission sought comment on Ameritech's proposal to shorten the answer (from 30 days to 20 days) and reply (from 20 days to 15 days) pleading periods applicable to program access complaints. We tentatively concluded that the pleading cycle should not be shortened.

44. *Discussion.* Several commenters favor the shortening of the pleading cycle for program access proceedings.¹²³ Ameritech requests that a defendant file its answer to a complaint within 20 days after the receipt of service of the complaint.¹²⁴ Commenters assert that the required 10-day notice preceding the filing of a program access complaint, and the discussions between the parties which inevitably ensue, also permit the narrowing of the issues, making 20 days from service of the complaint

¹²²*NPRM*, 12 FCC Rcd at 22855 (internal quotation marks omitted).

¹²³Ameritech Comments at 10-11; NRTC Comments at 14; RCN Comments at 4.

¹²⁴Ameritech Complaint at 10; see NRTC Comments at 14 (supporting Ameritech's proposed abbreviated pleading cycle); RCN Comments at 4-5 (same). RCN proposes that the Commission should require answers to contain copies of programming agreements and other documentary evidence of practices challenged in the complaint. RCN Comments at 5.

sufficient for filing an answer.¹²⁵ Ameritech proposes that within 5 days of the service of the answer, the parties shall advise each other and the Commission whether they intend to seek discovery. If neither party seeks discovery, the complainant shall be permitted to file a reply within 20 days after service of the answer, as currently provided in Section 76.1003(e).¹²⁶

45. Several commenters strongly oppose Ameritech's proposal to shorten the pleading cycle for program access complaints arguing that the benefit of 15 days saved by Ameritech's proposal is outweighed by the need to provide sufficient time for parties to formulate the most effective arguments and evidence.¹²⁷ Commenters assert that the complainant may take as long as necessary to develop and file their complaints (subject to the one year statute of limitations on program access complaints), while defendants currently have only 30 days to prepare an answer which may be the only substantive pleading permitted the defendant.¹²⁸ One commenter notes that unlike civil lawsuits where abbreviated pleadings establish the basic elements of claims and defenses to be later proven at trial, in the case of program access actions the pleadings are the heart of the case and form the basis for the Commission's decision.¹²⁹ One commenter also argues that comparisons between the program access complaint pleading cycle and the common carrier formal complaint process pleading cycle are ill advised because the shorter formal complaint pleading cycle is directly related to the considerable notice and issue clarification aspects of the new pre-filing procedures adopted in the *Formal Complaint Order*.¹³⁰ This commenter observes that, in program access complaints, no formal pre-filing procedures exist and a complainant need only give prospective defendants 10 days' notice prior to filing a complaint.¹³¹ One commenter argues that such concerns can be alleviated by also adopting the *Formal Complaint Order* pre-filing procedures for program access complaints.¹³² In response, another commenter states that "[o]ther than to provide aesthetic symmetry, however, it is not evident why [the] wholly different rules and processes [of the *Formal*

¹²⁵Ameritech Comments at 11.

¹²⁶Ameritech Comments at 11, citing 47 C.F.R. §76.1003(e). If either party requests discovery, the Commission will convene a status conference within 10 days of the service of the answer to determine the scope and amount of discovery. Ameritech Comments at 12. All discovery would be completed within 45 days following the status conference. If discovery is permitted, within 15 days following the completion of discovery, both complainant and defendant would be required to submit briefs containing proposed findings of fact and conclusions of law, including evidentiary exhibits, and, if possible, a joint stipulation of facts not in dispute. *Id.* The parties would be permitted to file reply briefs within seven days of the service of briefs. *Id.* One Commenter supports a 20 day answer period coupled with a 7 day reply period. OpTel Comments at 2.

¹²⁷Liberty Comments at 31; HBO Comments at 6; Satellite Distributors Comments at 7; NCTA Comments at 7; Comcast Comments at 4-5; Encore Comments at 5.

¹²⁸NCTA Comments at 7; Comcast Comments at 5; Encore Comments at 5-6; *see* 47 C.F.R. §76.1003(r) (one year statute of limitations for program access complaints).

¹²⁹Satellite Distributors Comments at 7.

¹³⁰Liberty Comments at 31-32.

¹³¹*Id.* at 32.

¹³²Bell Atlantic Comments at 4.

Complaint Order and program access] should be conformed."¹³³

46. We stated in the *NPRM* "[w]e believe that the benefit of the 15 days saved by Ameritech's proposal is outweighed by the need to provide sufficient time for the parties to best marshal their arguments and evidence."¹³⁴ In light of our decision to impose time limits for the resolution of program access disputes, however, we believe that it is necessary to adopt a more streamlined pleading cycle.¹³⁵ As discussed above, the adoption of time limits for the resolution of program access disputes requires that we impose additional responsibilities not just on the Commission, but on the parties as well. Program access defendants must file an answer within 20 days of service of the complaint, unless otherwise directed by the Commission.¹³⁶ Program access complainants must file a reply within 15 days of service of the answer, unless otherwise directed by the Commission.¹³⁷ We disagree with commenters who assert that defendants will be overly-burdened by having to file answers within 20 days of the date of service. The pre-filing notice will provide the defendant at least 10 days, and often more than 10 days, notice of the existence of a programming dispute, as well as alert the defendant of the basis of the dispute. We believe that the 10 day reduction in the answer period will not adversely impact a program access defendant's ability to establish and support its defense. Ameritech also proposes significant additional procedures related to status conferences, discovery, and briefing. We note that our existing regulations already encompass sufficiently each of these areas.¹³⁸

C. Discovery

1. Discovery Rights

47. *Background.* The Commission sought comment on several means of expediting the discovery process. While tentatively concluding that the Commission should retain its existing discovery procedures, we sought comment on whether it would speed the discovery process to have complainants submit proposed discovery requests with their program access complaints and require defendants to submit their proposed discovery requests and objections to complainants' discovery requests with their answer. Complainants would then submit their objections to defendants' discovery requests with their reply. The Commission also sought comment on any other change in the procedures applicable to program access complaints that would result in the necessary information disclosure in the most efficient, expeditious

¹³³NCTA Reply Comments at 6.

¹³⁴*NPRM*, 12 FCC Rcd at 22856-57.

¹³⁵Our decision to shorten the pleading cycle is consistent with the action taken by the Commission in revising the rules applicable to common carrier formal complaints. See *Formal Complaint Order*, 12 FCC Rcd at 22541, reducing answer period from 30 to 20 days. We note that Section 76.1002 of our rules imposes a slightly different pleading cycle for petitions for exclusivity (oppositions within 30 days of public notice, responses to oppositions due 10 days after receipt of opposition). See 47 C.F.R. § 76.1002(c)(5). Our decision today does not affect this pleading cycle.

¹³⁶See Appendix A, §76.1003(d)(1).

¹³⁷See Appendix A, §76.1003(e).

¹³⁸47 C.F.R. §§76.1003(g),(j)&k) (Commission's rules relating to discovery, status conferences and briefs).

fashion possible. Specifically, we sought comment on whether different standards for discovery should be applied to different types of program access complaints, such as price discrimination, exclusivity, and denial of programming.

48. *Discussion.* Several commenters support the amendment of the Commission's program access rules to provide parties discovery as-of-right.¹³⁹ These parties argue that an automatic right to discovery in a form that, at a minimum, ensures that program access plaintiffs have access to the programming contracts and agreements involved in the dispute is necessary to counteract the structural bias working against aggrieved parties under current Commission practice.¹⁴⁰ Several commenters argue that granting a right of discovery will lead to fewer program access cases because vertically-integrated programmers facing a complainant with discovery rights will be far more likely than current programmers to negotiate a pre-complaint settlement to program access disputes.¹⁴¹ Numerous commenters also believe that it would speed the discovery process if the parties filed their discovery requests and objections as part of the pleading process.¹⁴²

49. Cable commenters generally agree with the Commission's tentative conclusion to retain Commission-controlled discovery and oppose expanding the program access discovery process arguing that doing so will only encumber and lengthen the process.¹⁴³ These commenters assert that expanded discovery rights are unnecessary as the Commission-controlled discovery procedures currently provide complainants with the opportunity to obtain all relevant information to prove their claims.¹⁴⁴ HBO asserts that discovery as-of-right would destroy a programmer's ability to fashion individual agreements through good faith negotiations, arguing that "[t]he most advantageous term of each negotiated agreement would, if disclosed, become the lowest common denominator of the next negotiation with another party, whether warranted or not."¹⁴⁵ Moreover, assert cable commenters, expanded discovery rights would lead to "fishing expeditions" for the purpose of: (i) obtaining confidential terms and conditions from competitor's agreements; (ii) harassing programmers into granting more favorable prices, terms, and conditions not required by the program access rules; and (iii) determining whether any of their affiliation agreements

¹³⁹DirecTV Comments at 25; Satellite Distributors Comments at 9; Bell Atlantic Comments at 4-5.

¹⁴⁰DirecTV Comments at 25, stating that program access complainants are frequently disadvantaged by the inability to access critical documentation; RCN Comments at 6, stating that lack of access to programming information hampers the establishment of price discrimination; Echostar Comments at 4, stating that, without a right of discovery, complainants must rely on voluntary or public disclosures of information by program access defendants.

¹⁴¹Echostar Reply Comments at 4; BellSouth Reply Comments at 11; RCN Reply Comments at 10.

¹⁴²RCN Comments at 8; Echostar Comments at 7; DirecTV Reply Comments at 28. Several commenters advocate permitting the complainant to make additional discovery requests at the time of its reply in order to respond to information or documents revealed in the defendant's answer. Echostar Comments at 7; Satellite Distributors Comments at 11.

¹⁴³NCTA Comments at 7; Time Warner Comments at 5-6; Liberty Comments at 7-8; Comcast Comments at 5; Cablevision Comments at 25-26; Encore Comments at 6; CNN Reply Comments at 6; HBO Reply Comments at 8.

¹⁴⁴NCTA Comments at 9-10; Liberty Comments at 8.

¹⁴⁵HBO Comments at 12-13.