

might conceivably be discriminatory under the program access rules.<sup>146</sup> Liberty quotes the *Formal Complaint Order* in which the Commission decided not to adopt expanded discovery procedures for common carrier formal complaints, stating "[i]n our experience, discovery has been the most contentious and protracted component of the formal complaint process. . . . Discovery is inherently time-consuming and often fails to yield information that aids in the resolution of the complaint."<sup>147</sup>

50. Echostar argues that the Commission should adopt the discovery as-of-right principles contained in the Federal Rules of Civil Procedure.<sup>148</sup> Bell Atlantic argues that limited discovery should apply to denial of programming and exclusivity complaints, while discovery as-of-right should be afforded to price discrimination complaints.<sup>149</sup> OpTel supports limited discovery, for example, 30 interrogatories and five requests for the production of documents.<sup>150</sup>

51. BellSouth proposes that the Commission adopt a right of discovery limited to contracts and documentation concerning programming rates, and/or other terms and conditions of access.<sup>151</sup> BellSouth asserts that the Commission should modify its rules to require that a program access complainant file with its complaint any discovery requests, limited to contracts or other documents that relate to programming rates, and/or other terms and conditions of access in dispute.<sup>152</sup>

52. Ameritech now favors a limited form of discovery similar to that adopted in the *Formal Complaint Order*.<sup>153</sup> Specifically, Ameritech proposes that the Commission amend its rules to provide that certain documents be appended to a defendant's answer, including: all documents that the defendant

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<sup>146</sup>NCTA Comments at 8; Liberty Comments at 10-11; Encore Comments at 6-7; Cablevision Comments at 26; Comcast Comments at 6; HBO Reply Comments at 10.

<sup>147</sup>Liberty Comments at 8-9, quoting *Formal Complaint Order*, 12 FCC Rcd at 22541; see also Comcast Comments at 6.

<sup>148</sup>Echostar Comments at 5. WSN supports Echostar's proposal to use the Federal Rules of Civil Procedure discovery model for program access disputes. WSN Reply Comments at 8.

<sup>149</sup>Bell Atlantic Comments at 4-5.

<sup>150</sup>OpTel Comments at 4.

<sup>151</sup>BellSouth Comments at 13.

<sup>152</sup>*Id.* at 13. Under BellSouth's proposal, the defendant would file its requested discovery and/or objections, if any, to the scope of the discovery requests with its answer. *Id.* If the defendant provides the requested discovery, or if no discovery is requested, the plaintiff files its reply within the standard 20 days provided for by the Commission's rules and the Commission proceeds to decision. *Id.* at 13-14. Where the defendant objects to the scope of discovery, BellSouth proposes that the Commission, within a 10-day period, either approve, reject, or narrow the discovery request as described in a public notice. *Id.* at 14. The defendant would then have 10 days to produce the approved or narrowed discovery request. *Id.* BellSouth also proposes a mechanism whereby the Commission can permit more extensive discovery when the unique circumstances of a particular dispute so warrant. *Id.*

<sup>153</sup>Ameritech Comments at 13-14, discussing *Formal Complaint Order*, 12 FCC Rcd at 22536. SNET supports Ameritech's discovery proposal. SNET Comments at 4.

intends to rely on in establishing its defense; in exclusivity cases, the exclusive contract, or a statement that no such contract exists; in price discrimination cases, all contracts between the defendant and all competing MVPDs in all Designated Market Areas ("DMAs") the complainant serves or reasonably expects to serve; all other documents, such as side letters, affecting the prices, terms and conditions of such service and all relevant rate cards.<sup>154</sup> Ameritech asserts that the production of documents with the defendants answer may not be sufficient, and complainants should be permitted, following a status conference, to request depositions or propound written interrogatories.<sup>155</sup> Ameritech argues that the Commission should establish a presumption in favor of granting such requests.<sup>156</sup> WCA also advocates a limited form of discovery requiring a complainant to submit its discovery requests with its complaint.<sup>157</sup> GTE proposes that the complaint and discovery request be served on a designated Commission staff member who must within 10 business days permit the discovery if the complainant has made a *prima facie* case.<sup>158</sup>

53. Liberty opposes Ameritech's limited discovery proposal because it institutionalizes a discovery process in every program access dispute regardless of its complexity.<sup>159</sup> Moreover, Liberty complains that Ameritech's proposed procedures grant a right to discovery even before the Commission has determined that a complainant has established a *prima facie* case that a program access violation has occurred.<sup>160</sup>

54. We affirm our tentative conclusion that the current system of Commission-controlled discovery be retained. We do not believe that discovery as-of-right, or expanded discovery, would improve the quality or efficiency of the Commission's resolution of program access complaints. We reiterate our belief first stated in the *NPRM* that, given the sensitive and proprietary nature of the information involved in program access matters, expanded discovery would inevitably devolve into

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<sup>154</sup>Ameritech Comments at 15. GTE proposes amending Section 76.1003(d)(6)(iii) to require that "... the defendant *shall* submit an alternative contract. . . ." GTE Comments at 9, discussing 47 C.F.R. §76.1003(d)(6)(iii) (emphasis added).

<sup>155</sup>Ameritech Comments at 16.

<sup>156</sup>*Id.*

<sup>157</sup>WCA Comments at 10. The discovery request will be limited to relevant documents in the defendant's possession and no more than 10 written interrogatories, along with a brief explanation of why the information is relevant to the dispute and unavailable from any other source. *Id.* at 12. The defendant would be required to file objections within 10 days of receipt of the complaint. The Commission must rule on the objections with 15 days, and the time period for the defendant's answer would be suspended until the Commission rules on the objections. *Id.* All unobjectionable or Commission sanctioned discovery must be provided when the defendant files its answer. *Id.* WCA also suggests prohibiting requests for oral depositions or additional discovery absent a showing of compelling need. *Id.* at 13. In addition, to prevent "fishing expeditions," WCA suggests that the Commission adopt express sanctions related to abuse of the discovery process. *Id.*

<sup>158</sup>GTE Comments at 10.

<sup>159</sup>Liberty Comments at 13.

<sup>160</sup>*Id.*

Commission-controlled discovery.<sup>161</sup> We do not believe that expanded discovery will necessarily lend greater focus to program access disputes. In this regard, the Bureau recently discussed the limitations of discovery in the program access context, stating that "... we are unsure that a broader and more extensive process to ascertain [certain] factors, with more information and analysis, would bring a more precise resolution, as we do not think the parties purposefully avoided providing more specific information."<sup>162</sup> Later in its decision the Bureau also stated "[w]e have had to balance requests for additional information, and the burden these entail, against the need to bring this matter to resolution. This has proven to be a difficult process. The information received is not conducive to resolve this matter from a strictly cost-accounting perspective."<sup>163</sup> We agree with commenters who assert that expanded discovery would be more likely to encumber and lengthen resolution times for program access proceedings, which directly contradicts commenters' views that program access cases should be resolved expeditiously. The record does not indicate that expanded discovery would enhance the process of substantively adjudicating these cases. We are not persuaded by any of the commenters that their proposals would be preferable to the current system of discovery.

55. We decline to adopt different standards of discovery for different types of program access complaints, such as limited discovery for unreasonable refusals to sell and exclusivity complaints, or discovery as-of-right for price discrimination matters. In many program access matters, the record is sufficient for the Commission to make a determination. In matters where the Commission determines that the record is not sufficient, the current rules allow the Commission to seek additional information. The Commission has ordered discovery in two price discrimination proceedings, and the Commission will continue to order parties to provide the information necessary to resolve complaints at issue.<sup>164</sup>

56. We agree with Ameritech that it would be useful to adopt a procedure whereby defendants are required to attach certain documents to their pleadings similar to that adopted in the *Formal Complaint Order*.<sup>165</sup> Our rules already provide that program access defendants must support any defense to program access allegations with written documentation.<sup>166</sup> We clarify our rules to provide that, to the extent that a defendant expressly references and relies upon a document or documents within its control in responding to a program access complaint, the defendant must attach that document or documents to its answer.<sup>167</sup> We decline, however, to adopt Ameritech's specific proposals regarding the type of documents which a

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<sup>161</sup>NPRM, 12 FCC Rcd at 22858.

<sup>162</sup>CNN, DA 98-1295 at ¶6; see also *Formal Complaint Order*, 12 FCC Rcd at 22541.

<sup>163</sup>CNN, DA 98-1295 at ¶27.

<sup>164</sup>See *NRTC v. EMI*, 10 FCC Rcd 9785(1995); CNN, DA 98-1295 at ¶3.

<sup>165</sup>See *Formal Complaint Order*, 12 FCC Rcd at 22534-38. This requirement is also consistent with the Commission's recent decision in *Implementation of the Telecommunications Act of 1996: Amendment of Rules Governing Procedures to be Followed When Formal Complaints are Filed Against Common Carriers*, Second Report and Order, FCC 98-154 at ¶¶ 48-58 (July 14, 1998).

<sup>166</sup>47 C.F.R. §76.1003(d).

<sup>167</sup>See Appendix A, §76.1003(d)(2).

defendant must attach to its answer for specific program access complaints.<sup>168</sup> Our rules require that program access defendants defend each allegation contained in a *prima facie* program access complaint or face default judgement by the Commission.<sup>169</sup> Once a *prima facie* complaint has been determined, the burden of proof is on the defendant to establish that it did not violate the program access provisions of the Communications Act.<sup>170</sup> We leave to the discretion of the defendant how best to defend against such allegations, requiring only that any documents expressly referenced and relied upon in responding to a program access complaint be attached to the answer, or other responsive pleading permitted by the Commission.<sup>171</sup>

## 2. Standardized Protective Order

57. *Background.* The Commission sought comment on whether the issuance of a standardized protective order applicable to program access complaints would expedite the necessary information disclosure.<sup>172</sup>

58. *Discussion.* Numerous parties support the adoption of the standardized protective order for program access proceedings attached to the *NPRM* with little or no alteration.<sup>173</sup> Ameritech proposes that the protective order permit an individual that may be involved with programming decisions and negotiations to have access to materials covered by the protective order where such individual's involvement is essential to the analysis of the defense.<sup>174</sup> Ameritech asserts that such individuals, like all individuals subject to the protective order, must certify that they will use such information solely for purposes of resolving the program access complaint.<sup>175</sup> Ameritech argues that aspiring competitors to cable often have small staffs with employees serving the company in multiple capacities. Ameritech asserts that, absent this amendment, complainants will be faced with the decision of involving key personnel in a program access dispute, and foregoing their abilities in the purchasing of future programming, or not involving the best-situated employees to analyze program access defenses.<sup>176</sup>

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<sup>168</sup>See *supra* n.154 and accompanying text, discussing Ameritech's proposal.

<sup>169</sup>47 C.F.R. §76.1003(d)(2).

<sup>170</sup>*First Report and Order*, 8 FCC Rcd at 3405, 3419-20.

<sup>171</sup>Any material may be submitted by the defendant with a claim of confidentiality. See 47 C.F.R. §76.1003(h).

<sup>172</sup>See *e.g.*, *Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission*, Notice of Inquiry and Notice of Proposed Rulemaking, 11 FCC Rcd 12406 (1996) (Appendix A: Model Protective Order and Declaration).

<sup>173</sup>Ameritech Comments at 16-17; WCA Comments at 13; RCN Comments at 6-7; Echostar Comments at 7; Satellite Distributors Comments at 11; DirecTV Reply Comments at 28.

<sup>174</sup>Ameritech Comments at 17.

<sup>175</sup>*Id.*

<sup>176</sup>*Id.*

59. Encore also supports the adoption of the proposed standardized protective order with three amendments.<sup>177</sup> First, Encore proposes that the Commission amend Section 0.457(d)(1) to include a specific reference to materials for which a party has requested that confidential treatment in a program access case be included among the types of materials for which it is unnecessary to submit a special request for confidentiality.<sup>178</sup> Second, Encore proposes that the standardized protective order be clarified that consultants under contract to the Commission be granted access to confidential information only if they have executed the Declaration attached to the protective order.<sup>179</sup> Third, Encore proposes that the protective order be clarified that at the termination of a proceeding all copies of confidential materials be returned to the submitting party, or destroyed by the reviewing party, at the discretion of the submitting party.<sup>180</sup> Encore also asks that the Commission designate as part of the instant proceeding the appropriate sanctions to be imposed on individuals who violate the protective order.<sup>181</sup>

60. Cable commenters argue that the standardized protective order proposed by the Commission will not adequately protect programmers and it would be highly likely that any confidential business information revealed would ultimately be used in an improper manner unrelated to the program access dispute at issue.<sup>182</sup> These commenters argue that the imposition of sanctions for breaching a protective order will provide little comfort for the programmers whose confidential information is divulged.<sup>183</sup> In response to Ameritech's proposal to modify the proposed protective order to permit employees involved in programming negotiations access to confidential materials subject to a protective order, HBO states that "Ameritech does not and cannot offer any justification for why persons involved in negotiating programming contracts must have access to a programmer's confidential contracts in order for the Commission to resolve a program access dispute."<sup>184</sup>

61. We adopt the standardized protective order that was attached to the NPRM for program access matters with several minor revisions.<sup>185</sup> The Commission has used the standardized protective order in other situations and we are confident that it affords adequate protection to all parties involved. We also believe that the adoption of a standardized protective order will facilitate the resolution of program access matters. In one recent program access petition, resolution was delayed when the parties had difficulty

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<sup>177</sup>Encore Comments at 7-9.

<sup>178</sup>*Id.* at 8.

<sup>179</sup>*Id.* at 9.

<sup>180</sup>*Id.*

<sup>181</sup>*Id.* at 10.

<sup>182</sup>Liberty Comments at 12; HBO Comments at 14.

<sup>183</sup>Liberty Comments at 12; HBO Comments at 14.

<sup>184</sup>HBO Reply Comments at 10.

<sup>185</sup>See Appendix B: Standard Protective Order and Declaration for Use in Section 628 Program Access Proceedings.

negotiating a satisfactory protective order.<sup>186</sup> Had a standardized protective order been adopted for program access proceedings, we believe the petition would have been resolved in a more expeditious manner.

62. We decline to adopt Encore's proposal that we establish blanket confidential treatment for all materials submitted as evidence in a program access proceeding. In the Commission's experience, a portion of such materials do not require confidential treatment, and the Commission's existing procedures for confidentiality have thus far sufficiently protected confidential materials submitted by program access litigants. We agree with Encore and clarify the protective order to reflect that, at the termination of the proceeding, all copies of confidential materials be returned to the submitting party, or destroyed by the reviewing party, at the discretion of the submitting party.<sup>187</sup> We decline to adopt Ameritech's proposal that the protective order permit an individual that may be involved with programming decisions and negotiations to have access to materials covered by the protective order where such individual's involvement is essential to the analysis of the defense. We think that the circumstances to which Ameritech refer can best be considered, on a case-by-case basis, through waiver requests.

#### D. Terrestrial-Delivery of Programming

63. *Background.* Section 628 of the Communications Act is applicable to cable operators, satellite cable programming vendors where a cable operator has an attributable interest, and satellite broadcast programming vendors, and generally applies to the delivery of "satellite cable programming and satellite broadcast programming."<sup>188</sup> In the *NPRM* the Commission stated that, on its face, Section 628 does not preclude a programmer from altering its distribution method from satellite-distribution to terrestrial-distribution.<sup>189</sup> The *NPRM* sought comment on the statutory basis for Commission action if a vertically-integrated programmer moves from satellite-delivered programming to terrestrial-delivered programming for the purpose of evading the program access requirements. The *NPRM* also sought comment on the need for legislation to address such circumstances. Where commenters contend that Commission action is appropriate, the *NPRM* sought comment on what evidence a complainant may marshal to prevail on a claim against a programmer that has moved satellite-delivered programming to terrestrial delivery to evade the program access requirements.<sup>190</sup>

64. *Discussion.* Numerous commenters assert that the Commission has the statutory authority under Section 628 of the Communications Act to enforce remedial measures upon a vertically-integrated

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<sup>186</sup>See *Outdoor Life Network and Speedvision Network*, DA 98-1241 at ¶29 (CSB rel. June 26, 1998).

<sup>187</sup>Encore proposes that consultants under contract to the Commission be granted access to confidential information only if they have executed the Declaration attached to the protective order. We clarify that, to the extent they have not signed, as part of their employment contract, a non-disclosure agreement covering the confidential material in question, consultants under contract to the Commission will be granted access to confidential information only if they have executed the declaration attached to the protective order.

<sup>188</sup>Communications Act §628(a), 47 U.S.C. §548(a).

<sup>189</sup>*NPRM*, 12 FCC Rcd at 22861.

<sup>190</sup>*Id.* at 22862.

programmer that moves from satellite-delivered programming to terrestrial-delivered programming for the purpose of evading the program access requirements.<sup>191</sup> Commenters state that the nation's largest cable operators have been clustering their systems so that terrestrial distribution of national or regional cable programming services has become a feasible option.<sup>192</sup> Moreover, commenters describe the increasing importance of the availability of regional sports and other regional programming for alternative MVPDs to be able to compete for subscribers.<sup>193</sup> These commenters maintain that as regional networks proliferate and consolidate, it is clear that the cable industry intends to use terrestrial distribution as a means to replicate the exclusive dealing practices that warranted intervention by Congress and the Commission in 1992.<sup>194</sup> Cable commenters stress that non-cable MVPDs increasingly have their own exclusive access to a growing variety of sports and entertainment programming that is unavailable to incumbent cable operators.<sup>195</sup> Cable commenters also assert that there is no evidence of restricted programming availability that would justify extending the scope of the program access rules to terrestrially-delivered programming.<sup>196</sup>

65. Several commenters argue that terrestrial-delivery for purposes of evading the program access rules is directly addressable under Section 628(b) of the Communications Act.<sup>197</sup> In such circumstances, commenters argue that a cable operator or its affiliated programming provider would unfairly refuse to provide a competing MVPD nondiscriminatory access to programming that it has made available to other MVPDs and that the purpose or effect of such refusal hinders significantly or prevents that MVPD from providing satellite cable programming to its subscribers.<sup>198</sup> One commenter asserts that

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<sup>191</sup>See BellSouth Comments at 19-29, Reply Comments at 16-20; Consumer Union Comments at 3-11, Reply Comments at 4-10; Ameritech Comments at 24-26, Reply Comments at 23-26; Echostar Comments at 12-15, Reply Comments at 11-15; Bell Atlantic Comments at 9-11, Reply Comments at 5-8; DIRECTV Comments at 9-23, Reply Comments at 6-23; WCA Comments at 19-24, Reply Comments at 17-20; RCN Comments at 12-17, Reply Comments at 4-8; NRTC Comments at 16-18, Reply Comments at 11-14; WSN Comments at 23-24; OpTel Reply Comments at 2-3.

<sup>192</sup>DIRECTV Comments at 9-10; Ameritech Reply Comments at 24; Consumer Union Comments at 8-9; Bell Atlantic Comments at 11; WCA Comments at 22.

<sup>193</sup>DIRECTV Reply Comments at 21-22; BellSouth Comments at 20; WCA Comments at 21; RCN Comments at 13; NRTC Comments at 17.

<sup>194</sup>DIRECTV Reply Comments at 22.

<sup>195</sup>Comcast Comments at 14, discussing programming agreements which permit DirecTV to exclusively provide an NFL programming package, an NCAA college basketball package, a weekly music magazine, original, first-run television movies and series, and the Channel Earth programming; Cablevision Reply Comments at 12-13, discussing programming agreements which permit DirecTV to exclusively provide Major League Baseball, NBA and NHL programming packages; NCTA Comments at 17.

<sup>196</sup>Comcast Comments at 13; Cablevision Reply Comments at 8; Time Warner Comments at 8.

<sup>197</sup>DIRECTV Comments at 13; Echostar Reply Comments at 12.

<sup>198</sup>DIRECTV Comments at 14; BellSouth Comments at 22-23; Consumer Union Comments at 4-5; Echostar Comments at 14; Bell Atlantic Comments at 10; WCA Comments at 22; RCN Comments at 14; NRTC Comments at 17.

the anti-competitive conduct arises not from the use of an exclusively terrestrial delivery method, but rather "from the intentional migration of satellite-delivered programming to terrestrial facilities (or purposeful bypass of satellite-delivery in the first instance) to deny MVPD competitors access to programming without any legitimate business justification."<sup>199</sup> Commenters assert that a vertically-integrated programming provider that has converted its programming to terrestrial delivery is in no way exempted from Section 628(b)'s proscription against unfair practices if a cable operator has taken action that has the "purpose or effect" of denying or eliminating a competing MVPD's access to satellite delivered programming.<sup>200</sup> Commenters also argue that the Commission can address terrestrial evasion under its authority pursuant to Sections 4(i) and 303(r) of the Communications Act.<sup>201</sup>

66. Other commenters argue that the general prohibition contained in Section 628(b) by its express language applies only to satellite delivered service.<sup>202</sup> These commenters argue that because Congress expressly opted to exclude terrestrial programming from the reach of the program access provisions, a programmer's decision to utilize terrestrial delivery cannot constitute an unfair method of competition or an unfair or deceptive act or practice.<sup>203</sup> Commenters also argue that where a programming provider has legitimate reasons for switching to terrestrial delivery, there is no basis for treating the switch as an unfair method of competition or an unfair practice.<sup>204</sup> Cable commenters argue that terrestrial delivery has become an efficient alternative to satellite delivery in certain circumstances, making it likely that such a switch has a legitimate business justification.<sup>205</sup>

67. NCTA argues that the fact that certain programmers cannot obtain access to some terrestrially delivered programming does not constitute a harm recognized by Section 628(b) of the Communications Act.<sup>206</sup> NCTA asserts that the test is not whether the denial of a particular programming service to an MVPD significantly hinders or prevents the MVPD from providing that programming

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<sup>199</sup>BellSouth Comments at 23; Echostar Reply Comments at 14.

<sup>200</sup>DIRECTV Comments at 17-18; WCA Reply Comments at 18.

<sup>201</sup>DIRECTV Reply Comments at 14 (Section 4(i) only); Ameritech Comments at 25-26; Consumer Union Comments at 5-7; Echostar Reply Comments at 13; NRTC Reply Comments at 13.

<sup>202</sup>NCTA Comments at 15; Comcast Comments at 8; Cablevision Comments at 13-14; Liberty Comments at 26; Viacom, Inc. ("Viacom") Reply Comments at 2; A&E Television Networks ("A&E") Reply Comments at 4.

<sup>203</sup>Cablevision Comments at 17.

<sup>204</sup>NCTA Comments at 15-16.

<sup>205</sup>Comcast Comments at 15, discussing Comcast's assertion that its Philadelphia regional sports network, Comcast SportsNet, saves between \$310,000 and \$1,680,000 per year, depending on the type of satellite delivery method selected, by using existing terrestrial delivery methods instead of satellite delivery; NCTA Reply Comments at 15, discussing Comcast's cost savings related to the terrestrial distribution of Comcast SportsNet. Commenters also assert that terrestrial-delivery for purposes of evading the program access rules is directly addressable under Section 628(c) of the Communications Act. DIRECTV Comments at 18; BellSouth Reply Comments at 19; Echostar Reply Comments at 12; NRTC Reply Comments at 12.

<sup>206</sup>NCTA Reply Comments at 16.

service. The test is whether the unavailability of a service has a significant adverse effect on the ability to compete in the provision of video programming to subscribers or consumers.<sup>207</sup> NCTA states that it is extremely unlikely that the loss of any particular service that may switch from satellite to terrestrial delivery would inflict significant competitive harm on an MVPD.<sup>208</sup>

68. Several commenters argue that the legislative history of the 1992 Cable Act demonstrates that Congress specifically considered whether to extend the program access requirements to terrestrially-delivered programming and declined to do so.<sup>209</sup> These commenters note that the Senate version of the program access provisions applied to all vertically-integrated national and regional programmers regardless of how they were distributed.<sup>210</sup> Conversely, the House provisions applied only to satellite delivered programming. The program access provisions of the conference agreement which was enacted as the 1992 Cable Act adopted the narrower House version.<sup>211</sup> Other commenters claim that there is no evidence that Congress made an affirmative determination to limit program access solely to satellite delivered programming, and that the use of the term "satellite-delivered" should not carry the dispositive weight that the cable industry ascribes to such term.<sup>212</sup> Commenters argue that Congress selected the term "satellite delivered" because in 1992 virtually all cable programming, particularly the national and regional programming to which Congress was seeking to protect access, was delivered by satellite.<sup>213</sup>

69. Cable commenters maintain that, as a matter of policy, the Commission should not extend Section 628 to terrestrially-delivered cable programming.<sup>214</sup> Such action would involve the Commission in lengthy, fact-intensive disputes concerning the motives underlying the programmer's decision thereby forcing the Commission to second-guess the business judgement exercised by programmers.<sup>215</sup> The terrestrial delivery program access exception, argue commenters, strengthens incentives for cable operators to invest in the development of local and regional cable programming because it permits them to utilize

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<sup>207</sup> *Id.*

<sup>208</sup> *Id.*

<sup>209</sup> NCTA Comments at 13; Cablevision Comments at 16; Time Warner Reply Comments at 4; Liberty Reply Comments at 7.

<sup>210</sup> NCTA Comments at 13; Cablevision Comments at 16; Time Warner Reply Comments at 4; Liberty Reply Comments at 7.

<sup>211</sup> NCTA Comments at 13-14; Cablevision Comments at 16; Time Warner Reply Comments at 4; Liberty Reply Comments at 7.

<sup>212</sup> DIRECTV Reply Comments at 19; Ameritech Reply Comments at 25; Consumer Union Comments at 7.

<sup>213</sup> Ameritech Reply Comments at 25; Consumer Union Reply Comments at 5; Bell Atlantic Comments at 11, Reply Comments at 7; WCA Reply Comments at 19; RCN Reply Comments at 7.

<sup>214</sup> Cablevision Comments at 17; Time Warner Reply Comments at 5-6.

<sup>215</sup> Cablevision Comments at 17-18.

the full range of programmer distribution strategies, including exclusivity.<sup>216</sup> Some commenters argue that such programming is an essential means of increasing their local identity and differentiating themselves from other MVPDs.<sup>217</sup>

70. In response, certain commenters argue that the so called "bad policy" argument propounded by the cable operators cannot be sustained for the reason that the programming that has been, and will be, diverted from satellite to terrestrial delivery remains the very same programming that Congress in the 1992 Cable Act sought to make accessible to cable's competitors on a non-discriminatory basis.<sup>218</sup> In addition, commenters assert that extending the program access requirements to terrestrial delivered programming will not discourage development of new local and regional programming.<sup>219</sup> Ameritech argues that proving terrestrial delivery for purposes of evading the program access rules will be extremely difficult to prove.<sup>220</sup>

71. The record developed in this proceeding fails to establish that the conduct complained of, *i.e.*, moving the transmission of programming from satellite to terrestrial delivery to avoid the program access rules, is significant and causing demonstrative competitive harm at this time. The Commission has received only two complaints against the same vertically-integrated programmer related to moving the transmission of programming from satellite to terrestrial delivery to avoid the program access rules.<sup>221</sup> Where the record fails to indicate a significant competitive problem, we are reluctant to promulgate general rules prohibiting activity particularly where reasonable issues are raised regarding the scope of the statutory language.<sup>222</sup> In circumstances where anti-competitive harm has not been demonstrated, we perceive no reason to impose detailed rules on the movement of programming from satellite delivery to terrestrial delivery that would unnecessarily inject the Commission into the day-to-day business decisions of vertically-integrated programmers. While the record does not indicate a significant anti-competitive impact necessitating Commission action at this time, we believe that the issue of terrestrial distribution of programming could eventually have substantial impact on the ability of alternative MVPDs to compete in the video marketplace. We note that Congress is considering legislation which, if enacted, would introduce important changes to the program access provisions, including clarification of the Commission's

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<sup>216</sup>Cablevision Comments at 18; Time Warner Reply Comments at 5-6.

<sup>217</sup>Time Warner Reply Comments at 6; Liberty Comments at 27-28.

<sup>218</sup>BellSouth Reply Comments at 17; RCN Reply Comments at 8.

<sup>219</sup>Consumer Union Reply Comments at 9-10; Echostar Reply Comments at 15; RCN Reply Comments at 8. RCN notes that the inability to offer exclusive deals for new programming did not deter cable MSOs from launching 38 new offerings since 1992. RCN Reply Comments at 8.

<sup>220</sup>Ameritech Comments at 26.

<sup>221</sup>*See DirecTV, Inc. v. Comcast Corporation, et. al* (filed September 23, 1997); *Echostar Corporation v. Comcast Corporation, et. al* (filed May 19, 1998).

<sup>222</sup>Because we conclude that the record does not justify action under Section 628, we need not address commenters arguments regarding action under Sections 4(i) and 303(r).

jurisdiction over terrestrially-delivered programming.<sup>223</sup> The Commission will continue to monitor this issue and its impact on competition in the video marketplace.<sup>224</sup>

#### E. Buying Groups: Joint and Several Liability

72. *Background.* In the *First Report and Order*, the Commission determined that members of buying groups must agree to joint and several liability for commitments of the group to require vertically-integrated programmers to negotiate collectively with the group.<sup>225</sup> SCBA argued that there is no legal or practical need for joint and several liability if a buying group maintains sufficient financial reserves to ensure its ability to pay programmers. The *NPRM* sought comment on SCBA's proposal. Specifically, the *NPRM* sought comment on what type of financial assurances cooperative buying groups can provide to programming distributors such that joint and several liability is not necessary, while adequately protecting programming distributors from the financial risks associated with such arrangements.<sup>226</sup>

73. *Discussion.* The majority of those commenting on this issue favor the elimination of joint and several liability for buying groups that provide adequate financial assurances to safeguard programming providers.<sup>227</sup> HBO does not oppose the elimination of the joint and several liability requirement, but urges the Commission to protect vertically-integrated programmers ability to demand, to its satisfaction, sufficient assurances of creditworthiness and financial stability as required by the Commission's rules.<sup>228</sup> The commenters differ on what requirements the Commission should impose, in lieu of the joint and several liability requirement. SCBA argues that the Commission should establish a dual requirement based upon buying group size and financial reserves.<sup>229</sup> SCBA asserts that a buying group must have sufficient size in order to diversify the risk of individual member default.<sup>230</sup> SCBA recommends that qualified buying groups serve an aggregate of at least 5 million subscribers.<sup>231</sup> SCBA's second proposed requirement is that a buying group must have liquid cash or credit reserves (*i.e.*, cash,

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<sup>223</sup>Video Competition and Consumer Choice Act of 1998, HR 4352 (July 29, 1998).

<sup>224</sup>See *Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, Notice of Inquiry, FCC 98-137 at ¶ 21 (June 26, 1998), seeking information on cases of MVPDs being denied programming when a satellite-delivered service becomes terrestrially-delivered.

<sup>225</sup>*First Report and Order*, 8 FCC Rcd at 3412.

<sup>226</sup>*NPRM*, 12 FCC Rcd at 22862.

<sup>227</sup>SCBA Comments at 2-9; Satellite Distributors Comments at 14-15; HBO Comments at 8; Comcast Comments at 16; BellSouth Reply Comments at 16.

<sup>228</sup>HBO Comments at 8, citing 47 C.F.R. §76.1002(b)(1).

<sup>229</sup>SCBA Comments at 7. BellSouth argues that the joint and several liability requirement should be eliminated and supports SCBA's proposed approach. BellSouth Reply Comments at 16.

<sup>230</sup>SCBA Comments at 7.

<sup>231</sup>*Id.*

cash equivalents, or letters or lines of credit) equal to cover the cost of one month's programming upon the default of the buying group's largest member.<sup>232</sup> SCBA argues that its dual approach provides a simple and objective measure that avoids involving the Commission in subjective disputes regarding the creditworthiness of specific buying groups.<sup>233</sup>

74. Satellite Distributors argue that vertically-integrated programming providers should not be permitted to refuse to deal with a buying group provided that the members of the buying group each guarantees to the programming provider its individual, pro-rata share of the programming license fees.<sup>234</sup> Satellite Distributors maintain that its approach ensures that the responsibility for payment of fees is no different than if the programming providers were dealing with the buying group members on an individual basis.<sup>235</sup>

75. WSN is the sole commenter to oppose the elimination of the joint and several liability requirement. WSN argues that SCBA's approach actually seeks a special exemption for the National Cable Television Cooperative ("NCTC").<sup>236</sup> Because it is a cooperative that will not assume the full responsibility for the obligations of its programming contracts, WSN argues that NCTC is undeserving of such special assistance from the Commission.<sup>237</sup> WSN asserts that NCTC merely needs to assume full responsibility for its obligations as a programmer to eliminate the joint and several liability requirement.<sup>238</sup> According to WSN, if NCTC becomes a buying group by allocating one month's programming fees as an adequate financial reserve, then all similarly situated MVPDs must be permitted to also limit their contractual liability to one month's programming fees.<sup>239</sup>

76. We believe 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. We reject Satellite Distributors proposed approach because it does not adequately protect programming providers. The reason smaller MVPDs enter buying groups is to obtain programming at a discount resulting from the group's aggregate purchasing power. In return for this discount, programming providers are entitled to protection that dealing with such groups will not be exposed to excessive financial risk or excessive expense such as having to routinely collect delinquent programming fees from individual buying group members. While Satellite Distributors proposed approach affords buying groups the advantages of aggregate purchasing power, it affords the programming provider

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<sup>232</sup>*Id.*

<sup>233</sup>*Id.* at 7-8. SCBA asserts that the refusal of a vertically-integrated programmer to contract with or through a qualified buying group should constitute an unreasonable refusal to sell. *Id.* at 8-9.

<sup>234</sup>Satellite Distributors Comments at 14.

<sup>235</sup>*Id.* at 15.

<sup>236</sup>WSN Comments at 18.

<sup>237</sup>*Id.*

<sup>238</sup>*Id.*

<sup>239</sup>*Id.* at 19.

with no more protection or cost savings than if the programming provider had contracted individually with each buying group member.

77. We also reject SCBA's dual approach as inconsistent with the Commission's objectives. First, SCBA's proposal that a qualifying buying group maintain at least 5 million subscribers is excessive and would limit the alternative financial assurances method to far too few buying groups. In addition, we believe the proposal that such group maintain liquid reserves equal to one month's programming fees for only the largest buying group member does not adequately protect programming providers from financial risk.

78. We believe that the most reasonable approach is a modified combination of the approaches proposed by both SCBA and Satellite Distributors. To qualify for the alternative to joint and several liability, we will require that buying groups maintain liquid cash or credit reserves (*i.e.*, cash, cash equivalents, or letters or lines of credit) equal to cover the cost of one month's programming for all of the buying groups members. In addition, each member of the buying group will remain liable to the programmer for its pro-rata share of the buying group's programming. Under this approach, the alternative financial assurances method is available to buying groups of all sizes. At the same time, programming providers are adequately protected from the catastrophic default by multiple members of a buying group. If multiple members of a particular buying group default on their obligations to the buying group, and the buying group is unable to meet its obligations with existing resources, the programming provider is ensured payment for all programming thus far provided. At such point, the programming provider would have the option of terminating its contract with the buying group, retaining the one month's programming fees, and contracting with buying group members on terms negotiated between the programmers and the individual MVPDs. Alternatively, the programming provider could retain only the portion of the one month's programming fees that were actually defaulted upon, continue providing programming to the buying group, and look to the individual member for the balance of its pro-rata share of the buying groups contractual obligations. We believe that this approach addresses WSN's concerns that the approach proposed by SCBA artificially caps the financial obligations of certain buying groups through government regulation. For those buying groups that cannot, or will not, satisfy the financial requirements of this alternative approach, we clarify that the options to provide joint and several liability, or separately negotiate financial assurances satisfactory to the programming provider, remain effective.

#### F. Miscellaneous Issues

79. *Discussion.* WSN argues that all vertically-integrated programmers should be required to promulgate a publicly available rate card.<sup>240</sup> WSN also argues that the program access rules should be expressly amended to expressly prohibit discrimination based on the use of KU Band technology.<sup>241</sup> WSN asserts that the five cent per subscriber price differential necessary to establish a *prima facie* price discrimination case should be eliminated.<sup>242</sup> Several commenters argue that the Commission should

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<sup>240</sup>*Id.* at 13.

<sup>241</sup>*Id.* at 10.

<sup>242</sup>*Id.* at 20, discussing 47 C.F.R. §1003(d)(6) (five cent price differential requirement).

support the expansion of the program access rules to non-vertically-integrated programmers.<sup>243</sup> SCBA strongly urges the Commission to require vertically-integrated programmers to disclose program cost information that would facilitate private resolution of price discrimination complaints.<sup>244</sup> We decline to adopt each of these proposals. The Commission did not seek comment on these issues in the *NPRM*. Accordingly, there is no record upon which to base any action regarding these proposals.

## V. REGULATORY FLEXIBILITY ANALYSIS AND PAPERWORK REDUCTION ACT OF 1995 ANALYSIS

80. The regulatory flexibility analysis is attached to this order as Appendix C. The requirements adopted in this Report and Order have been analyzed with respect to the Paperwork Reduction Act of 1995 (the "1995 Act") and found to impose new or modified information collection requirements on the public. The Commission, as part of its continuing effort to reduce paperwork burdens, invites the general public to take this opportunity to comment on the information collection requirements contained in this Order, as required by the 1995 Act. Public comments are due 60 days from date of publication of this Order in the Federal Register. Comments should address: (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

81. Written comments by the public on the new or modified information collection requirements are due 60 days from date of publication of this Order in the Federal Register. Comments on the information collections contained herein should be submitted to Judy Boley, Federal Communications Commission, Room 234, 1919 M Street, N.W., Washington, DC 20554, or via the Internet to [jboley@fcc.gov](mailto:jboley@fcc.gov). For additional information on the information collection requirements, contact Judy Boley at 202-418-0214 or via the Internet at the above address.

## VI. PROCEDURAL PROVISIONS

82. Effective Date. Upon approval by the Office of Management and Budget ("OMB"), the rules adopted in this *Order* shall become effective. The Commission will publish a notice in the Federal Register announcing the effective date.

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<sup>243</sup>WSN Comments at 24; WCA Comments at 25; GE American Communications, Inc. ("GE American") Comments at 6.

<sup>244</sup>SCBA Comments at 10.

**VII. ORDERING CLAUSES**

83. **IT IS ORDERED** that, pursuant to authority found in Sections 4(i), 303(r) and 628 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r) and 548, the Commission's rules **ARE HEREBY AMENDED** as set forth in Appendix A.

84. **IT IS FURTHER ORDERED** that the rules as amended in Appendix A shall become effective upon approval by the Office of Management and Budget.

85. **IT IS FURTHER ORDERED** that the Commission's Office of Public Affairs, Reference Operations Division, shall send a copy of this *Report and Order*, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

**FEDERAL COMMUNICATIONS COMMISSION**



Magalie Roman Salas  
Secretary

## Appendix A

Part 76 of Title 47 of the Code of Federal Regulations is amended as follows:

## PART 76 -- MULTICHANNEL VIDEO AND CABLE TELEVISION SERVICE

1. The authority citation for Part 76 continues to read as follows:

AUTHORITY: 47 U.S.C. 151, 152, 153, 154, 301, 302, 303, 303a, 307, 308, 309, 312, 315, 317, 325, 503, 521, 522, 531, 532, 533, 534, 535, 536, 537, 543, 544, 544a, 545, 548, 549, 552, 554, 556, 558, 560, 561, 571, 572, 573.

2. Section 76.1003 is amended by adding paragraph (c)(5) and amending paragraphs (d), (e) and (s) as follows:

**§ 76.1003 Adjudicatory proceedings.**

\*\*\*\*\*

(c) \*\*\*

(5) *Damages requests.* (i) In a case where recovery of damages is sought, the complaint shall contain a clear and unequivocal request for damages and appropriate allegations in support of such claim in accordance with the requirements of subpart (iii) of this section.

(ii) Damages will not be awarded upon a complaint unless specifically requested. Damages may be awarded if the complaint complies fully with the requirement of subpart (iii) of this section where the defendant knew, or should have known that it was engaging in conduct violative of Section 628.

(iii) In all cases in which recovery of damages is sought, the complainant shall include within, or as an attachment to, the complaint, either:

(A) A computation of each and every category of damages for which recovery is sought, along with an identification of all relevant documents and materials or such other evidence to be used by the complainant to determine the amount of such damages; or

(B) An explanation of:

(1) The information not in the possession of the complaining party that is necessary to develop a detailed computation of damages;

(2) The reason such information is unavailable to the complaining party;

(3) The factual basis the complainant has for believing that such evidence of damages exists;

and

(4) A detailed outline of the methodology that would be used to create a computation of damages when such evidence is available.

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(d) *Answer.* (1) Any cable operator, satellite cable programming vendor or satellite broadcast programming vendor upon which a program access complaint is served under this section shall answer

within twenty (20) days of service of the complaint, unless otherwise directed by the Commission.

(2) The answer shall advise the parties and the Commission fully and completely of the nature of any and all defenses, and shall respond specifically to all material allegations of the complaint. To the extent that a cable operator, satellite cable programming vendor or satellite broadcast programming vendor expressly references and relies upon a document or documents within its control in asserting a defense or responding to a material allegation, such document or documents shall be included as part of the answer. Collateral or immaterial issues shall be avoided in answers and every effort should be made to narrow the issues. Any defendant failing to file and serve an answer within the time and in the manner prescribed by these rules may be deemed in default and an order may be entered against defendant in accordance with the allegations contained in the complaint.

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(e) *Reply.* Within fifteen (15) days after service of an answer, unless otherwise directed by the Commission, the complainant may file and serve a reply which shall be responsive to matters contained in the answer and shall not contain new matters. Failure to reply will not be deemed an admission of any allegations contained in the answer, except with respect to any affirmative defense set forth therein. Replies containing information claimed by defendant to be proprietary under paragraph (h) of this section shall be submitted to the Commission in confidence pursuant to the requirements of § 0.459 of this chapter and clearly marked "Not for Public Inspection." An edited version removing all proprietary data shall be filed with the Commission for inclusion in the public file within five (5) days from the date the unedited reply is submitted, and shall be served on the defendant.

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(s) *Remedies for violations -- (1) Remedies authorized.* Upon completion of such adjudicatory proceeding, the Commission shall order appropriate remedies, including, if necessary, (i) the imposition of damages, and/or (ii) the establishment of prices, terms, and conditions for the sale of programming to the aggrieved multichannel video programming distributor. Such order shall set forth a timetable for compliance, and shall become effective upon release.

(2) *Additional sanctions.* The remedies provided in paragraph (s)(1) of this section are in addition to and not in lieu of the sanctions available under title V or any other provision of the Communications Act.

(3) *Imposition of Damages.* (i) *Bifurcation.* In all cases in which damages are requested, the Commission may bifurcate the program access violation determination from any damage adjudication.

(ii) *Burden of Proof.* The burden of proof regarding damages rests with the complainant, who must demonstrate with specificity the damages arising from the program access violation. Requests for damages that grossly overstate the amount of damages may result in a Commission determination that the complainant failed to satisfy its burden of proof to demonstrate with specificity the damages arising from the program access violation.

(iii) *Damages Adjudication.* (A) The Commission may, in its discretion, end adjudication of damages with a written order determining the sufficiency of the damages computation submitted in accordance with subpart (c)(5)(iii)(A) or the damages computation methodology submitted in accordance with subpart (c)(5)(iii)(B)(4), modifying such computation or methodology, or requiring the complainant to resubmit such computation or methodology. (1) Where the Commission issues a written order approving or modifying a damages computation submitted in accordance with subpart (c)(5)(iii)(A),

the defendant shall recompense the complainant as directed therein.

(2) Where the Commission issues a written order approving or modifying a damages computation methodology submitted in accordance with subpart (c)(5)(iii)(B)(4), the parties shall negotiate in good faith to reach an agreement on the exact amount of damages pursuant to the Commission-mandated methodology.

(B) Within thirty days of the issuance of a subpart (c)(5)(iii)(B)(4) damages methodology order, the parties shall submit jointly to the Commission either:

(1) A statement detailing the parties' agreement as to the amount of damages;

(2) A statement that the parties are continuing to negotiate in good faith and a request that the parties be given an extension of time to continue negotiations; or

(3) A statement detailing the bases for the continuing dispute and the reasons why no agreement can be reached.

(C) (1) 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 the procedures described in subpart (s)(3)(iii)(C)(2) of this section.

(2) Issues concerning the amount of damages may be designated by the Chief, Cable Services Bureau for hearing before, or, if the parties agree, submitted for mediation to, a Commission Administrative Law Judge.

(D) Interest on the amount of damages awarded will accrue from either the date indicated in the Commission's written order issued pursuant to subpart (s)(3)(iii)(A)(1) or the date agreed upon by the parties as a result of their negotiations pursuant to subpart (s)(3)(iii)(A)(2). Interest shall be computed at applicable rates published by the Internal Revenue Service for tax refunds.

**Appendix B**

**STANDARD PROTECTIVE ORDER AND DECLARATION FOR USE IN  
SECTION 628 PROGRAM ACCESS PROCEEDINGS**

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

In the Matter of )  
 )  
 [Name of Proceeding] )  
 )  
 )  
 )

**PROTECTIVE ORDER**

This Protective Order is intended to facilitate and expedite the review of documents containing trade secrets and commercial or financial information obtained from a person and privileged or confidential. It reflects the manner in which "Confidential Information," as that term is defined herein, is to be treated. The Order is not intended to constitute a resolution of the merits concerning whether any Confidential Information would be released publicly by the Commission upon a proper request under the Freedom of Information Act or other applicable law or regulation, including 47 C.F.R. § 0.442.

1. Definitions.

a. Authorized Representative. "Authorized Representative" shall have the meaning set forth in Paragraph seven.

b. Commission. "Commission" means the Federal Communications Commission or any arm of the Commission acting pursuant to delegated authority.

c. Confidential Information. "Confidential Information" means (i) information submitted to the Commission by the Submitting Party that has been so designated by the Submitting Party and which the Submitting Party has determined in good faith constitutes trade secrets and commercial or financial information which is privileged or confidential within the meaning of Exemption 4 of the Freedom of Information Act, 5 U.S.C. § 552(b)(4) and (ii) information submitted to the Commission by the Submitting Party that has been so designated by the Submitting Party and which the Submitting Party has determined in good faith falls within the terms of Commission orders designating the items for treatment as Confidential Information. Confidential Information includes additional copies of, notes, and information derived from Confidential Information.

d. Declaration. "Declaration" means Attachment A to this Protective Order.

e. Reviewing Party. "Reviewing Party" means a person or entity participating in this proceeding or considering in good faith filing a document in this proceeding.

f. Submitting Party. "Submitting Party" means a person or entity that seeks confidential treatment of Confidential Information pursuant to this Protective Order.

2. Claim of Confidentiality. The Submitting Party may designate information as "Confidential Information" consistent with the definition of that term in Paragraph 1 of this Protective Order. The Commission may, *sua sponte* or upon petition, pursuant to 47 C.F.R §§ 0.459 & 0.461, determine that all or part of the information claimed as "Confidential Information" is not entitled to such treatment.

3. Procedures for Claiming Information is Confidential. Confidential Information submitted to the Commission shall be filed under seal and shall bear on the front page in bold print, "CONTAINS PRIVILEGED AND CONFIDENTIAL INFORMATION - DO NOT RELEASE." Confidential Information shall be segregated by the Submitting Party from all non-confidential information submitted to the Commission. To the extent a document contains both Confidential Information and non-confidential information, the Submitting Party shall designate the specific portions of the document claimed to contain Confidential Information and shall, where feasible, also submit a redacted version not containing Confidential Information.

4. Storage of Confidential Information at the Commission. The Secretary of the Commission or other Commission staff to whom Confidential Information is submitted shall place the Confidential Information in a non-public file. Confidential Information shall be segregated in the files of the Commission, and shall be withheld from inspection by any person not bound by the terms of this Protective Order, unless such Confidential Information is released from the restrictions of this Order either through agreement of the parties, or pursuant to the order of the Commission or a court having jurisdiction.

5. Access to Confidential Information. Confidential Information shall only be made available to Commission staff, Commission consultants and to counsel to the Reviewing Parties, or if a Reviewing Party has no counsel, to a person designated by the Reviewing Party. Before counsel to a Reviewing Party or such other designated person designated by the Reviewing Party may obtain access to Confidential Information, counsel or such other designated person must execute the attached Declaration. Consultants under contract to the Commission may obtain access to Confidential Information only if they have signed, as part of their employment contract, a non-disclosure agreement the scope of which includes the Confidential Information, or if they execute the attached Declaration.

6. Counsel to a Reviewing Party or such other person designated pursuant to Paragraph 5 may disclose Confidential Information to other Authorized Representatives to whom disclosure is permitted under the terms of paragraph 7 of this Protective Order only after advising such Authorized Representatives of the terms and obligations of the Order. In addition, before Authorized Representatives may obtain access to Confidential Information, each Authorized Representative must execute the attached Declaration.

7. Authorized Representatives shall be limited to:
- a. Counsel for the Reviewing Parties to this proceeding including in-house counsel actively engaged in the conduct of this proceeding and their associated attorneys, paralegals, clerical staff and other employees, to the extent reasonably necessary to render professional services in this proceeding;
  - b. Specified persons, including employees of the Reviewing Parties, requested by counsel to furnish technical or other expert advice or service, or otherwise engaged to prepare material for the express purpose of formulating filings in this proceeding, except that disclosure to persons in a position to use this information for competitive commercial or business purposes shall be prohibited;
  - c. Any person designated by the Commission in the public interest, upon such terms as the Commission may deem proper.

8. Inspection of Confidential Information. Confidential Information shall be maintained by a Submitting Party for inspection at two or more locations, at least one of which shall be in Washington, D.C. Inspection shall be carried out by Authorized Representatives upon reasonable notice not to exceed one business day during normal business hours.

9. Copies of Confidential Information. The Submitting Party shall provide a copy of the Confidential Material to Authorized Representatives upon request and may charge a reasonable copying fee not to exceed twenty five cents per page. Authorized Representatives may make additional copies of Confidential Information but only to the extent required and solely for the preparation and use in this proceeding. Authorized Representatives must maintain a written record of any additional copies made and provide this record to the Submitting Party upon reasonable request. The original copy and all other copies of the Confidential Information shall remain in the care and control of Authorized Representatives at all times. Authorized Representatives having custody of any Confidential Information shall keep the documents properly secured at all times.

10. Filing of Declaration. Counsel for Reviewing Parties shall provide to the Submitting Party and the Commission a copy of the attached Declaration for each Authorized Representative within five (5) business days after the attached Declaration is executed, or by any other deadline that may be prescribed by the Commission.

11. Use of Confidential Information. Confidential Information shall not be used by any person granted access under this Protective Order for any purpose other than for use in this proceeding (including any subsequent administrative or judicial review), shall not be used for competitive business purposes, and shall not be used or disclosed except in accordance with this Order. This shall not preclude the use of any material or information that is in the public domain or has been developed independently by any other person who has not had access to the Confidential Information nor otherwise learned of its contents.

12. **Pleadings Using Confidential Information.** Submitting Parties and Reviewing Parties may, in any pleadings that they file in this proceeding, reference the Confidential Information, but only if they comply with the following procedures:

- a. Any portions of the pleadings that contain or disclose Confidential Information must be physically segregated from the remainder of the pleadings and filed under seal;
- b. The portions containing or disclosing Confidential Information must be covered by a separate letter referencing this Protective Order;
- c. Each page of any Party's filing that contains or discloses Confidential Information subject to this Order must be clearly marked: "Confidential Information included pursuant to Protective Order, [cite proceeding];" and
- d. The confidential portion(s) of the pleading, to the extent they are required to be served, shall be served upon the Secretary of the Commission, the Submitting Party, and those Reviewing Parties that have signed the attached Declaration. Such confidential portions shall be served under seal, and shall not be placed in the Commission's Public File unless the Commission directs otherwise (with notice to the Submitting Party and an opportunity to comment on such proposed disclosure). A Submitting Party or a Reviewing Party filing a pleading containing Confidential Information shall also file a redacted copy of the pleading containing no Confidential Information, which copy shall be placed in the Commission's public files. A Submitting Party or a Reviewing Party may provide courtesy copies of pleadings containing Confidential Information to Commission staff so long as the notation required by subsection c. of this paragraph is not removed.

13. **Violations of Protective Order.** Should a Reviewing Party that has properly obtained access to Confidential Information under this Protective Order violate any of its terms, it shall immediately convey that fact to the Commission and to the Submitting Party. Further, should such violation consist of improper disclosure or use of Confidential Information, the violating party shall take all necessary steps to remedy the improper disclosure or use. The Violating Party shall also immediately notify the Commission and the Submitting Party, in writing, of the identity of each party known or reasonably suspected to have obtained the Confidential Information through any such disclosure. The Commission retains its full authority to fashion appropriate sanctions for violations of this Protective Order, including but not limited to suspension or disbarment of attorneys from practice before the Commission, forfeitures, cease and desist orders, and denial of further access to Confidential Information in this or any other Commission proceeding. Nothing in this Protective Order shall limit any other rights and remedies available to the Submitting Party at law or equity against any party using Confidential Information in a manner not authorized by this Protective Order.

14. **Termination of Proceeding.** Within two weeks after final resolution of this proceeding (which includes any administrative or judicial appeals), Authorized Representatives of Reviewing Parties shall, at the direction of the Submitting Party, destroy or return to the Submitting Party all Confidential Information as well as all copies and derivative materials made, and shall certify in a writing served on the Commission and the Submitting Party that no material whatsoever derived from such Confidential

Information has been retained by any person having access thereto, except that counsel to a Reviewing Party may retain two copies of pleadings submitted on behalf of the Reviewing Party. Any confidential information contained in any copies of pleadings retained by counsel to a Reviewing Party or in materials that have been destroyed pursuant to this paragraph shall be protected from disclosure or use indefinitely in accordance with paragraphs 9 and 11 of this Protective Order unless such Confidential Information is released from the restrictions of this Order either through agreement of the parties, or pursuant to the order of the Commission or a court having jurisdiction.

15. No Waiver of Confidentiality. Disclosure of Confidential Information as provided herein shall not be deemed a waiver by the Submitting Party of any privilege or entitlement to confidential treatment of such Confidential Information. Reviewing Parties, by viewing these materials: (a) agree not to assert any such waiver; (b) agree not to use information derived from any confidential materials to seek disclosure in any other proceeding; and (c) agree that accidental disclosure of Confidential Information shall not be deemed a waiver of the privilege.

16. Additional Rights Preserved. The entry of this Protective Order is without prejudice to the rights of the Submitting Party to apply for additional or different protection where it is deemed necessary or to the rights of Reviewing Parties to request further or renewed disclosure of Confidential Information.

17. Effect of Protective Order. This Protective Order constitutes an Order of the Commission and an agreement between the Reviewing Party, executing the attached Declaration, and the Submitting Party.

18. Authority. This Protective Order is issued pursuant to Sections 4(i) and 4(j) of the Communications Act as amended, 47 U.S.C. §§ 154(i), (j) and 47 C.F.R. § 0.457(d).

Attachment A to Standard Protective Order

DECLARATION

In the Matter of )  
 )  
 [Name of Proceeding] )  
 )  
 )  
 )

I, \_\_\_\_\_, hereby declare under penalty of perjury that I have read the Protective Order that has been entered by the Commission in this proceeding, and that I agree to be bound by its terms pertaining to the treatment of Confidential Information submitted by parties to this proceeding. I understand that the Confidential Information shall not be disclosed to anyone except in accordance with the terms of the Protective Order and shall be used only for purposes of the proceedings in this matter. I acknowledge that a violation of the Protective Order is a violation of an order of the Federal Communications Commission. I acknowledge that this Protective Order is also a binding agreement with the Submitting Party.

(signed) \_\_\_\_\_

(printed name) \_\_\_\_\_

(representing) \_\_\_\_\_

(title) \_\_\_\_\_

(employer) \_\_\_\_\_

(address) \_\_\_\_\_

\_\_\_\_\_

(phone) \_\_\_\_\_

(date) \_\_\_\_\_

## Appendix C

## FINAL REGULATORY FLEXIBILITY ANALYSIS

**A. Background**

1. As required by the Regulatory Flexibility Act (RFA),<sup>1</sup> an Initial Regulatory Flexibility Analysis ("IRFA") was incorporated into the Notice of Proposed Rule Making ("NPRM") in this proceeding.<sup>2</sup> The Commission sought written public comment on the possible impact of the proposed policies and rules on small entities in the NPRM, including comments on the IRFA. This Final Regulatory Flexibility Analysis ("FRFA") in this *Report and Order* ("Order") conforms to the RFA.<sup>3</sup>

**B. Need for Action and Objectives of the Rules**

2. Section 628 of the Communications Act prohibits unfair or discriminatory practices in the sale of satellite cable and satellite broadcast programming and 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.<sup>4</sup> Pursuant to Congress's mandate in the 1992 Cable Act, the Commission promulgated regulations implementing the Communication Act's program access provisions.<sup>5</sup> In 1997, Ameritech New Media, Inc. filed a petition for rulemaking requesting that the Commission amend our program access rules. The Commission issued a NPRM seeking comment on amendments to our program access rules.<sup>6</sup> After reviewing the comments filed in this proceeding, we conclude that the public interest in increased competition and diversity in the multichannel video programming and the development of competition to traditional cable systems is further enhanced by amending our program access rules as described in the *Order*.

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<sup>1</sup>See 5 U.S.C. § 603. The RFA, see 5 U.S.C. § 601 *et seq.*, has been amended by the Contract With America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996) ("CWAAA"). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 ("SBREFA").

<sup>2</sup>*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, 22871 (1997) ("NPRM").

<sup>3</sup>See 5 U.S.C. § 604.

<sup>4</sup>Communications Act §628(a) 47 U.S.C. §548(a).

<sup>5</sup>*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"), 8 FCC Rcd 3359 (1993).

<sup>6</sup>See *supra* n.2.