

C. Summary of Significant Issues Raised by the Public Comments in Response to the IRFA

3. No comments were filed specifically in response to the IRFA. We have, however, considered the economic impact on small entities through consideration of comments that pertain to issues of concern to MVPDs and programming producers and distributors. In particular, the Small Cable Business Association ("SCBA") filed comments addressing a number of issues. One of the rule changes adopted in the *Order* is intended to assist program buying cooperatives, many members of which are small entities, in gaining access to vertically-integrated cable programming at competitive rates.⁷

D. Description and Estimate of the Number of Small Entities to Which the Rules Will Apply

4. The RFA directs the Commission to provide a description of and, where feasible, an estimate of the number of small entities that might be affected by the rules here adopted. The RFA defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."⁸ In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.⁹ Under the Small Business Act, a small business concern is one which: (a) is independently owned and operated; (b) is not dominant in its field of operation; and (c) satisfies any additional criteria established by the SBA.¹⁰ The rules we adopt in this Report and Order will affect cable systems, multipoint multichannel distribution systems, direct broadcast satellites, home satellite dish manufacturers, satellite master antenna television, open video systems, local multipoint distribution systems, and program producers and distributors. Below, we set forth the general SBA and FCC cable small size standards, and then address each service individually to provide a more precise estimate of small entities. We also describe program producers and distributors.

5. *SBA Definitions for Cable and Other Pay Television Services:* The SBA has developed a definition of small entities for cable and other pay television services, which includes all such companies generating \$11 million or less in annual receipts.¹¹ This definition includes cable system operators, closed circuit television services, direct broadcast satellite services, multipoint distribution systems, satellite master antenna systems and subscription television services. According to the Census Bureau data from 1992, there were approximately 1,758 total cable and other pay television services and 1,423 had less than

⁷See *Order* at ¶¶ 72-78.

⁸5 U.S.C. § 601(6).

⁹5 U.S.C. § 601(3) (1980) (incorporating by reference the definition of "small business concern" in 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of small business applies "unless an agency after consultation with the Office of Advocacy of the Small Business Administration and after an opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definitions in the Federal Register."

¹⁰*Small Business Act*, 15 U.S.C. § 632; see also Appendix C, n.6, *supra*.

¹¹13 C.F.R. § 121.201 (SIC 4841).

\$11 million in revenue.¹²

6. *Additional Cable System Definitions:* In addition, the Commission has developed, with SBA's approval, our own definition of a small cable system operator for the purposes of rate regulation. Under the Commission's rules, a "small cable company" is one serving no more than 400,000 subscribers nationwide.¹³ Based on recent information, we estimate that there were 1439 cable operators that qualified as small cable companies at the end of 1995.¹⁴ Since then, some of those companies may have grown to serve over 400,000 subscribers, and others may have been involved in transactions that caused them to be combined with other cable operators. Consequently, we estimate that there are fewer than 1439 small entity cable system operators that may be affected by the decisions and rules we are adopting. We conclude that only a small percentage of these entities currently provide qualifying "telecommunications services" as required by the Communications Act and, therefore, estimate that the number of such entities are significantly fewer than noted.

7. The Communications Act also contains a definition of a small cable system operator, which is "a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1% of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed \$250,000,000."¹⁵ The Commission has determined that there are 61,700,000 cable subscribers in the United States. Therefore, we found that an operator serving fewer than 617,000 subscribers shall be deemed a small operator, if its annual revenues, when combined with the total annual revenues of all of its affiliates, do not exceed \$250 million in the aggregate.¹⁶ Based on available data, we find that the number of cable operators serving 617,000 subscribers or less totals 1450.¹⁷ Although it seems certain that some of these cable system operators are affiliated with entities whose gross annual revenues exceed \$250,000,000, we are unable at this time to estimate with greater precision the number of cable system operators that would qualify as small cable operators under the definition in the Communications Act.

8. *Multipoint Multichannel Distribution Systems ("MMDS"):* The Commission refined its definition of "small entity" for the auction of MMDS as an entity that together with its affiliates has average gross annual revenues that are not more than \$40 million for the preceding three calendar years.¹⁸

¹²U.S. Department of Commerce, Bureau of the Census, Industry and Enterprise Receipts Size Report, Table 2D, SIC 4841 (Bureau of the Census data under contract to the Office of Advocacy of the SBA).

¹³47 C.F.R. § 76.901(e). The Commission developed this definition based on its determinations that a small cable system operator is one with annual revenues of \$100 million or less. *Implementation of Sections of the 1992 Cable Act: Rate Regulation, Sixth Report and Order and Eleventh Order on Reconsideration*, 10 FCC Rcd 7393 (1995).

¹⁴Paul Kagan Associates, Inc., *Cable TV Investor*, Feb. 29, 1996 (based on figures for Dec. 30, 1995).

¹⁵47 U.S.C. § 543(m)(2).

¹⁶47 C.F.R. § 76.1403(b) (SIC 4833).

¹⁷Paul Kagan Associates, Inc., *Cable TV Investor*, Feb. 29, 1996 (based on figures for Dec. 30, 1995).

¹⁸47 C.F.R. § 21.961(b)(1).

This definition of a small entity in the context of MMDS auctions has been approved by the SBA.¹⁹

9. The Commission completed its MMDS auction in March 1996 for authorizations in 493 basic trading areas ("BTAs"). Of 67 winning bidders, 61 qualified as small entities. Five bidders indicated that they were minority-owned and four winners indicated that they were women-owned businesses. MMDS is an especially competitive service, with approximately 1573 previously authorized and proposed MMDS facilities. Information available to us indicates that no MMDS facility generates revenue in excess of \$11 million annually. We conclude that, for purposes of this FRFA, there are approximately 1634 small MMDS providers as defined by the SBA and the Commission's auction rules.

10. *ITFS*: There are presently 2032 ITFS licensees. All but 100 of these licenses are held by educational institutions. Educational institutions are included in the definition of a small business.²⁰ However, we do not collect annual revenue data for ITFS licensees and are not able to ascertain how many of the 100 non-educational licensees would be categorized as small under the SBA definition. No commenters address these non-educational licensees. Accordingly, we conclude that there may be as many as 2032 licensees that are small businesses.

11. *Direct Broadcast Satellite ("DBS")*: Because DBS provides subscription services, DBS falls within the SBA definition of cable and other pay television services (SIC 4841). As of December 1996, there were eight DBS licensees. However, the Commission does not collect annual revenue data for DBS and, therefore, is unable to ascertain the number of small DBS licensees that could be affected by these proposed rules. Although DBS service requires a great investment of capital for operation, in the *NPRM*, we acknowledged that there are several new entrants in this field that may not yet have generated \$11 million in annual receipts, and therefore may be categorized as a small business, if independently owned and operated. Since the publication of the *NPRM*, however, more information has become available. In light of the 1997 gross revenue figures for the various DBS operators, we conclude that no DBS operator qualifies as a small entity.

12. *Home Satellite Dish ("HSD")*: The market for HSD service is difficult to quantify. Indeed, the service itself bears little resemblance to other MVPDs. HSD owners have access to more than 500 channels of programming placed on C-band satellites by programmers for receipt and distribution by MVPDs, of which 350 channels are scrambled and approximately 150 are unscrambled.²¹ HSD owners can watch unscrambled channels without paying a subscription fee. To receive scrambled channels,

¹⁹See *Amendment of Parts 21 and 74 of the Commission's Rules With Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service and Implementation of Section 309(j) of the Communications Act - Competitive Bidding*, MM Docket No. 94-31 and PP Docket No. 93-253, *Report and Order*, 10 FCC Rcd 9589 (1995).

²⁰SBREFA also applies to nonprofit organizations and governmental organizations such as cities, counties, towns, townships, villages, school districts, or special districts, with populations of less than 50,000. 5 U.S.C. § 601(5). See Appendix C (D) *supra*.

²¹*Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, CS Docket No. 97-141, *Fourth Annual Report ("1997 Report")*, 13 FCC Rcd 1034 at ¶ 68 (1997).

however, an HSD owner must purchase an integrated receiver-decoder from an equipment dealer and pay a subscription fee to an HSD programming packager. Thus, HSD users include: (1) viewers who subscribe to a packaged programming service, which affords them access to most of the same programming provided to subscribers of other MVPDs; (2) viewers who receive only non-subscription programming; and (3) viewers who receive satellite programming services illegally without subscribing.²²

13. According to the most recently available information, there are approximately 20 to 25 program packagers nationwide offering packages of scrambled programming to retail consumers.²³ These program packagers provide subscriptions to approximately 2,184,470 subscribers nationwide.²⁴ This is an average of about 77,163 subscribers per program packager. This is substantially smaller than the 400,000 subscribers used in the Commission's definition of a small multiple system operator ("MSO").

14. *Satellite Master Antenna Television ("SMATVs")*: Industry sources estimate that approximately 5200 SMATV operators were providing service as of December 1995.²⁵ Other estimates indicate that SMATV operators serve approximately 1.162 million residential subscribers as of June 30, 1997.²⁶ The ten largest SMATV operators together pass 848,450 units.²⁷ If we assume that these SMATV operators serve 50% of the units passed, the ten largest SMATV operators serve approximately 40% of the total number of SMATV subscribers. Because these operators are not rate regulated, they are not required to file financial data with the Commission. Furthermore, we are not aware of any privately published financial information regarding these operators. Based on the estimated number of operators and the estimated number of units served by the largest ten SMATVs, we conclude that a substantial number of SMATV operators qualify as small entities.

15. *Local Multipoint Distribution System ("LMDS")*: Unlike the above pay television services, LMDS technology and spectrum allocation will allow licensees to provide wireless telephony, data, and/or video services. A LMDS provider is not limited in the number of potential applications that will be available for this service. Therefore, the definition of a small LMDS entity may be applicable to both cable and other pay television (SIC 4841) and/or radiotelephone communications companies (SIC 4812). The SBA approved definition for cable and other pay services that qualify as a small business is defined in paragraphs 5-6, *supra*. A small radiotelephone entity is one with 1500 employees or fewer.²⁸ However, for the purposes of this *Report and Order* on navigation devices, we include only an estimate of LMDS

²²*Id.* at ¶ 69.

²³*Id.* at ¶ 68.

²⁴*Id.* at ¶ 69.

²⁵*Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, CS Docket No. 96-133, *Third Annual Report ("1996 Report")*, 12 FCC Rcd 4358 at ¶ 81 (1996).

²⁶*1997 Report*, 13 FCC Rcd at ¶ 84.

²⁷*Id.* at Appendix D, Table D-1.

²⁸13 C.F.R. § 121.201.

video service providers.

16. An auction for licenses to operate LMDS systems was recently completed by the Commission. The vast majority of the LMDS license auction winners were small businesses under the SBA's definition of cable and pay television (SIC 4841).²⁹ In the *Second R&O*,³⁰ we adopted a small business definition for entities bidding for LMDS licenses as an entity that, together with affiliates and controlling principles, has average gross revenues not exceeding \$40 million for each of the three preceding years. We have not yet received approval by the SBA for this definition.

17. There is only one company, CellularVision, that is currently providing LMDS video services. In the *IRFA*, we assumed that CellularVision was a small business under both the SBA definition and our auction rules. No commenters addressed the tentative conclusions we reached in the *NPRM*. Accordingly, we affirm our tentative conclusion that a majority of the potential LMDS licensees will be small entities, as that term is defined by the SBA.

18. *Open Video System ("OVS")*: The Commission has certified 15 OVS operators. Of these nine, only two are providing service. On October 17, 1996, Bell Atlantic received approval for its certification to convert its Dover, New Jersey Video Dialtone ("VDT") system to OVS.³¹ Bell Atlantic subsequently purchased the division of Futurevision which had been the only operating program package provider on the Dover system, and has begun offering programming on this system using these resources.³² Metropolitan Fiber Systems was granted certifications on December 9, 1996, for the operation of OVS systems in Boston and New York, both of which are being used to provide programming.³³ Bell Atlantic and Metropolitan Fiber Systems have sufficient revenues to assure us that they do not qualify as small business entities. Little financial information is available for the other entities authorized to provide OVS that are not yet operational. We believe that one OVS licensee may qualify as a small business concern. Given that other entities have been authorized to provide OVS service but have not yet begun to generate revenues, we conclude that at least some of the OVS operators qualify as small entities.

19. *Program Producers and Distributors*: The Commission has not developed a definition

²⁹See Appendix C (D), *supra*, for an estimate of the number of entities under SIC 4841.

³⁰In the *Matter of Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, to Reallocate the 29.5-30.0 GHz Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service*, CC Docket No. 92-297, *Second Report and Order, Order on Reconsideration, and Fifth Notice of Proposed Rule Making*, 62 FR 23148 (1997) ("*Second R&O*").

³¹*Bell Atlantic-New Jersey, Inc. (Certification to Operate an Open Video System)*, 11 FCC Rcd 13249 (CSB 1996) ("*Bell Atlantic OVS Certification*").

³²Bell Atlantic, *Bell Atlantic Now Offering Video Services in Dover Township New Jersey* (news release), Nov. 1, 1996.

³³See *Metropolitan Fiber Systems/New York, Inc. (Certification to Operate an Open Video System)*, Consolidated Order, 11 FCC Rcd 20896, DA 96-2075 (CSB Dec. 9, 1996).

of small entities applicable to producers or distributors of television programs.³⁴ Therefore, we will utilize the SBA classifications of Motion Picture and Video Tape Production (SIC 7812),³⁵ Motion Picture and Video Tape Distribution (SIC 7822),³⁶ and Theatrical Producers (Except Motion Pictures) and Miscellaneous Theatrical Services (SIC 7922).³⁷ These SBA definitions provide that a small entity in the television programming industry is an entity with \$21.5 million or less in annual receipts for SIC 7812 and 7822, and \$5 million or less in annual receipts for SIC 7922.³⁸ The 1992 Bureau of the Census data indicate the following: (1) there were 7265 U.S. firms classified as Motion Picture and Video Production (SIC 7812), and that 6987 of these firms had \$16,999 million or less in annual receipts and 7002 of these firms had \$24,999 million or less in annual receipts;³⁹ (2) there were 1139 U.S. firms classified as Motion Picture and Tape Distribution (SIC 7822), and that 1007 of these firms had \$16,999 million or less in annual receipts and 1013 of these firms had \$24,999 million or less in annual receipts;⁴⁰ and (3) there were 5671 U.S. firms classified as Theatrical Producers and Services (SIC 7922), and that 5627 of these firms had less than \$5 million in annual receipts.⁴¹

20. Each of these SIC categories is very broad and includes firms that may be engaged in various industries including television. Specific figures are not available as to how many of these firms

³⁴The term "television programs" is used in this context to include all video programming outlets, e.g., cable, DBS.

³⁵"Establishments primarily engaged in the production of theatrical and nontheatrical motion pictures and video tapes for exhibition or sale, including educational, industrial, and religious films. Included in the industry are establishments engaged in both production and distribution. Producers of live radio and television programs are classified in Industry 7922." Standard Industrial Classification Manual, SIC 7812, Executive Office of the President, Office of Management and Budget (1987) (OMB SIC Manual).

³⁶"Establishments primarily engaged in the distribution (rental or sale) of theatrical and nontheatrical motion picture films or in the distribution of video tapes and disks, except to the general public." OMB SIC Manual, SIC 7822.

³⁷"Establishments primarily engaged in providing live theatrical presentations, such as road companies and summer theaters. . . . Also included in this industry are producers of . . . live television programs." OMB SIC Manual, SIC 7922.

³⁸13 C.F.R. § 121.201.

³⁹U.S. Small Business Administration 1992 Economic Census Industry and Enterprise Report, Table 2D, SIC 7812, (Bureau of the Census data adapted by the Office of Advocacy of the U.S. Small Business Administration) (SBA 1992 Census Report). The Census data do not include a category for \$21.5 million. Therefore, we have reported the closest increment below and above the \$21.5 million threshold. There is a difference of 15 firms between the \$16,999 and \$24,999 million annual receipt categories. It is possible that these 15 firms could have annual receipts of \$21.5 million or less and, therefore, would be classified as small businesses.

⁴⁰SBA 1992 Census Report, SIC 7812. The Census data does not include a category for \$21.5 million; therefore, we have reported the closest increment below and above the \$21.5 million benchmark. There is a difference of 6 firms between the \$16,999 and \$24,999 million annual receipt categories. It is possible that these 6 firms could have annual receipts of \$21.5 million or less and, therefore, would be classified as small businesses.

⁴¹SBA 1992 Census Report, SIC 7922.

exclusively produce and/or distribute programming for television or how many are independently owned and operated. Consequently, we conclude that there are approximately 6987 small entities that produce and distribute taped television programs, 1013 small entities primarily engaged in the distribution of taped television programs, and 5627 small producers of live television programs that may be affected by the rules adopted in this *Report and Order*.

E. *Description of Reporting, Recordkeeping and Other Compliance Requirements*

21. This analysis examines the costs and administrative burdens associated with our rules and requirements. To the extent expressly relied upon in responding to a program access complaint, the rules we adopt require program access defendants to attach documents within their control to their answer or other responsive pleading permitted by the Commission.⁴² In addition, the rules we adopt, in certain situations, require program access complainants and defendants to negotiate in good faith regarding the amount of damages based upon a Commission-approved computation methodology.⁴³ The Commission believes, however, that this requirement would not necessitate significant additional costs or skills beyond those already utilized in the ordinary course of business by MVPDs and program producers and distributors.

F. *Steps Taken to Minimize Significant Economic Impact On Small Entities and Significant Alternatives Considered*

22. We believe that our amended rules relating to program access will have a positive impact on small entities. The purpose of the program access provisions is to prohibit unfair or discriminatory practices in the sale of satellite cable and satellite broadcast programming and increase competition and diversity in the multichannel video programming market. Small entities play an important role in effectuating this purpose. The rules we adopt will enable small entities to more fairly and expeditiously obtain programming and compensate such entities, in appropriate circumstances, when such programming is denied or obtained through unfair rates, terms or conditions.

G. *Report to Congress*

23. The Commission will send a copy of the *Report and Order*, including this FRFA, in a report to Congress pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. § 801(a)(1)(A). The *Report and Order* and this FRFA (or summaries thereof) will also be published in the Federal Register, see 5 U.S.C. § 604(b), and will be sent to the Chief Counsel for Advocacy of the Small Business Administration.

⁴²See Order at ¶ 56.

⁴³See Order at ¶ 30.

SEPARATE STATEMENT OF COMM. HAROLD W. FURCHTGOTT-ROTH
DISSENTING IN PART

In re: Petition for Rulemaking of Ameritech New Media, Inc., Regarding Development of Competition and Diversity in Video Programming Distribution and Carriage

Although I support the bulk of this Report & Order and commend the Cable Services Bureau for its fine work, I disagree with the Commission's decision in Part III.A to impose damages for violations of the program access rules. I also write to express my view that we possess no clear statutory authority to extend these rules to govern terrestrially-delivered programming.

I.

In my opinion, damages are neither necessary nor advisable. Moreover, they may undermine the Communication Act's statutory caps on forfeiture limits. For these reasons, I would not create such a remedy.

As an initial matter, I note that a simple finding of liability carries with it a great deal of costs for the program access violator. The "black mark" on the company's regulatory record affects its dealings here at the Commission and may also make it a riskier candidate, from the point of view of the capital markets, for investments and loans. Such a finding also encourages other would-be complainants to come forward and initiate program access proceedings against the company, in itself another substantial effect on the company.

There is no real evidence that the current penalty scheme for program access lacks a sufficient deterrent effect. Since the passage of the program access statute, the Commission has hardly been overrun with complaints pursuant to that provision. In fact, over the last 5 years, only 34 program access complaints have been filed at the Commission, and of that number, in only 3 cases has the Commission ruled in favor of the complainant. Accordingly, the Commission has on several occasions declined to expand the program access rules on the ground that they seemed to be achieving their intended purpose. *See Program Access First Reconsideration*, 10 FCC Rcd at 1911; 1996 Video Competition Report, *Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming, Third Annual Report*, 12 FCC Rcd. 4358 (1997) at paras. 149-64. Subsequent to those decisions, there has been no discernible upward trend in program access violations that would indicate inadequate deterrents, so today's movement towards strengthened regulations seems hard to explain on the basis of need. And from a general perspective, there is no shortage of "leverage," for better or worse, that this Commission can exercise over regulated entities for violation of our rules and regulations; in the end, we have power over their licenses and thus their livelihoods.

Why damages would as a general matter pose any greater deterrent effect than forfeitures, which we are clearly authorized by statute to impose, is also unanswered by the record before us. As a matter of fact, the Commission has never exercised its forfeiture power; it is thus hard to see how we could know such a penalty to be ineffective. I do not think it makes for good public policy for the Commission to go out of its way to create an entirely new set of regulations on industry without a showing that existing rules are not working. Taxpayers should not fund, and private companies should not expend resources

commenting on, rulemakings that produce regulations that are not clearly necessary. Unfortunately, this item increases the layers of regulation to which certain multichannel video programming providers are subject without the antecedent conclusion that the underlying rules are inadequate to the task at hand.

The creation of a damages remedy is also inadvisable as a practical matter. Much of the point of this item is to expedite the adjudication of program access complaints. But a bifurcated proceeding in which we must determine damages will only prolong and complicate these adjudications. I fear that the Cable Services Bureau will expend as much, if not more time, assessing damages in these cases as on the basic question of liability. How does one determine what position a programmer would have occupied if they had had access to certain programming? How many more subscribers would they have gained, how much more could they have earned in advertising revenue? The difficulty that we will have in defining these essentially speculative issues (not to mention the production and review of the mountain of documents theoretically relevant documents) is almost certain to bog down the process. In this regard, it is telling that even in this item the Commission is unable to define with any precision the outlines for calculating damages for program access violations. And to the extent the Commission sidesteps this problem by moving toward "standardized" damages, as some have suggested, then we would simply be replicating forfeitures under another name.

Finally, I find it relevant that the imposition of unlimited damages may be an end-run around the statutory caps on forfeitures contained in sections 503(b)(2)(A) and (C) of the Communications Act. Those sections provide that forfeitures against cable television operators "shall not exceed \$25,000 for each violation or each day of a continuing violation, except that the amount assessed for any continuing violation shall not exceed a total of \$250,000 for any single act" and that in any other case, such as one involving a vertically integrated programmer, "the amount of any forfeiture penalty . . . shall not exceed \$10,000 for each violation or each day of a continuing violation, except that the amount assessed for any continuing violation shall not exceed a total of \$75,000 for any single act." These sections thus express a clear Congressional intent to limit the monetary liability of regulated entities.

If the Commission is creating a damages remedy merely to avoid these limits on liability, I am unsure about the legal propriety of such an approach. The real problem here seems not that forfeitures *per se* are ineffective but that the limits on forfeiture amounts are, in the eyes of those who advocate damages, too low. See Reply Comments of Ameritech at 16 ("The incentive for violating the rules is even greater in light of the woefully inadequate statutory caps on forfeitures for cable operators and affiliated programmers. Ameritech . . . [believes] that the statutory maximum for violations of the Commission's rules by cable companies -- \$250,000 -- is far too low to deter anticompetitive behavior by incumbent cable operators. Moreover, the statutory cap on forfeitures for vertically integrated programmers is only \$75,000. These amounts are incredibly low when compared to the sizable economic benefits realized by incumbents when they violate the rules."). But if that is the case, the answer lies with Congress, which has the power to revise these limits. In fact, that is precisely what Congress has done in the common carrier context, raising the forfeiture limit for those entities to an aggregate of \$100,000,000. If Congress wanted to raise the limits for cable operators and vertically integrated programmers too, they surely could do so. They have not amended those limits, however, and we should not take backdoor measures to undermine them.

In closing, I would observe that the most important thing in program access proceedings -- as in all other Commission proceedings -- is a timely resolution of complaints. For that reason, I am pleased that we have established clear time limits for program access proceedings. If we do not make accurate

but prompt findings in these reviews, regulated industries will simply find private mechanisms for resolving compensation questions and bypass the administrative process altogether.

II.

As I noted in the Notice of Proposed Rulemaking in this proceeding, section 628 of the Communications Act, the statutory basis for our existing program-access scheme, by its terms governs the provision of "satellite cable programming" and "satellite broadcast programming." I have not been persuaded by those who urge us to extend our regulations to cover terrestrially-delivered programming that the import of this plain language can be overcome.

Accordingly, while I agree entirely with the rationale given in the item for declining to extend program access rules to terrestrially-delivered programming, *i.e.*, that the issue appears to be a nonproblem at this point in time, I also believe that we lack statutory authority to make such rules in any event. Congress, rather than this Commission, is the appropriate governmental entity to redress any competitive issues that may exist with respect to programming that is not transmitted (or retransmitted) by satellite. In fact, legislation was recently introduced by Congressmen Tauzin and Markey that would extend the program access rules to govern terrestrially-delivered programming. To my mind, the introduction of this legislation is a further indication that current statute does not cover such programming. We should, at the very least, stay our hand while Congress debates the matter.

SEPARATE STATEMENT OF
COMMISSIONER MICHAEL POWELL

Re: In re: Petition for Rulemaking of Ameritech New Media, Inc., Regarding Development of Competition and Diversity in Video Programming Distribution and Carriage, CS Docket No. 97-248, RM No. 9097

Among the many responsibilities Congress gave the FCC in the 1992 Cable Act, is a duty to implement the program access provisions of Section 628 of the Communications Act. After six years of experience with program access complaints we have decided that some changes are needed to our program. The changes we implement today are intended to speed our handling of these complaints and put some additional teeth into the program. I am pleased to support these changes because I believe they are necessary and appropriate to implement the will of the Congress.

I write separately to emphasize one point. We make clear in this item that we intend to make greater use of our forfeiture authority to address program access violations. I believe that this authority should be our first line of defense to curb program access abuses. Our authority to impose such forfeitures is clear and, unlike damages, the imposition of a forfeiture does not require a lengthy, resource intensive proceeding. Forfeitures are most likely to provide an efficient and effective deterrent. If the amounts permitted under the forfeiture provisions prove to be an inadequate deterrent to unlawful conduct, I would urge Congress to consider raising those caps to more serious levels as needed. It is my hope that we will use our forfeiture authority as our primary tool of enforcement and only resort to damages proceedings in the most extreme of cases.