



Federal Communications Commission  
Washington, D.C. 20554

November 30, 2007

## Small Entity Compliance Guide

*Implementation of the Cable Television Consumer Protection and Competition Act of 1992 -  
Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5)  
of the Communications Act: Sunset of Exclusive Contract Prohibition*

DA 07-4849

MB Docket No. 07-29; FCC 07-169

This Guide is prepared in accordance with the requirements of Section 212 of the Small Business Regulatory Enforcement Fairness Act of 1996. It is intended to help small entities—small businesses, small organizations (non-profits), and small governmental jurisdictions—to comply with the new rules adopted in the above-referenced docket. This Guide is not intended to replace the rules, and, therefore, final authority rests solely with the rules. Although we have attempted to cover all parts of the rules that might be especially important to small entities, the coverage may not be exhaustive. As a result, in any civil or administrative action against a small entity for a violation of a rule or rules, the content of the Small Entity Compliance Guide may be considered only as evidence of the reasonableness or appropriateness of proposed fines, penalties or damages. This Guide may not apply in a particular situation based upon the circumstances, and the FCC retains the discretion to adopt approaches on a case-by-case basis that may differ from this Guide, where appropriate. Any decisions regarding a particular small entity will be based on the statute and regulations. Interested parties are free to file comments regarding this Guide and the appropriateness of its application to a particular situation; the FCC will consider whether the recommendations or interpretations in the Guide are appropriate in that situation. The FCC may decide to revise this Guide without public notice to reflect changes in the FCC's approach to implementing a rule, or to clarify or update the text of the Guide. Direct your comments and recommendations, or calls for further assistance, to the FCC's Consumer Center:

**1-888-CALL-FCC (1-888-225-5322)**

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**Fax: 202-418-0232**

**[fccinfo@fcc.gov](mailto:fccinfo@fcc.gov)**

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## **OBJECTIVES OF THE PROCEEDING**

In the *Report and Order* in MB Docket No. 07-29, the Commission sought to:

- preserve and protect competition and diversity in the distribution of video programming by retaining until October 5, 2012 the rule prohibiting exclusive contracts for the distribution of certain video programming; and
- facilitate the fair and expeditious resolution of program access complaints by modifying its procedures for resolving these complaints.

## **COMPLIANCE REQUIREMENTS**

### **1. Prohibition of Exclusive Distribution Contracts for Affiliated Programming Networks**

- Basic Requirement
  - The Commission's rules prohibit:
    - a cable operator from entering into an exclusive distribution contract with a programming network that is owned in whole or in part by any cable operator (47 C.F.R. § 76.1002(c)(2)); and
    - a common carrier that provides video programming services directly to subscribers from entering into an exclusive distribution contract with a programming network that is owned in whole or in part by any common carrier (47 C.F.R. § 76.1004(b)).
  - The prohibition is referred to here as the "exclusive contract prohibition." The programming networks subject to the exclusive contract prohibition are referred to here as "affiliated programming networks." A programming network is an "affiliated programming network" if it is owned in whole or in part by a cable operator or by a common carrier.
  - Because of the exclusive contact prohibition, any affiliated programming network must be made available for purchase and carriage by all multichannel video programming distributors (MVPDs), which include cable operators, Direct Broadcast Satellite (DBS) operators, and other entities that offer multiple channels of video programming.
  - The exclusive contract prohibition was set to expire on October 5, 2007, but the Commission in the *Report and Order* in MB Docket No. 07-29 extended the exclusive contract prohibition until October 5, 2012.
  - Between October 2011 and October 2012, the Commission will conduct another review to determine whether to retain the exclusive contract prohibition. The Commission could also initiate its review earlier either on its own motion or in response to a petition.

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- What programming networks are covered?
    - The exclusive contract prohibition applies to programming networks that are owned in whole or in part by a cable operator or a common carrier.
      - The exclusive contract prohibition does not preclude an MVPD, including a cable operator or a common carrier, from entering into an exclusive distribution contract for a programming network that is owned in whole or in part by a DBS operator, unless the network is also owned in part by a cable operator or by a common carrier.
      - The exclusive contract prohibition does not preclude an MVPD, including a cable operator or a common carrier, from entering into an exclusive distribution contract for a programming network that is not owned by any MVPD.
    - The exclusive contract prohibition applies only to affiliated programming networks that are transmitted or retransmitted by satellite for direct reception by cable operators and other MVPDs.
      - The exclusive contract prohibition does not preclude an MVPD, including a cable operator or a common carrier, from entering into an exclusive distribution contract for an affiliated programming network that is transmitted or retransmitted by terrestrial means (such as by fiber) for direct reception by cable operators and other MVPDs (called “terrestrially delivered” networks). (Exclusive distribution contracts for certain terrestrially delivered networks are prohibited as a result of conditions imposed in other Commission decisions.)
  - Which MVPDs are covered by the prohibition?
    - The exclusive contract prohibition prevents:
      - a cable operator from entering into an exclusive distribution contract with a network owned in whole or in part by a cable operator; and
      - a common carrier that provides video programming services from entering into an exclusive distribution contract with a network owned in whole or in part by a common carrier.
    - The exclusive contract prohibition does not prevent an MVPD that is not a cable operator or a common carrier, such as a DBS operator, from entering into an exclusive distribution contract with an affiliated programming network.
- 2. Modification of the Commission’s Procedures For Resolving Program Access Complaints**
- Background
    - The Commission’s program access rules prohibit unfair methods of competition or unfair or deceptive practices that hinder or prevent any MVPD from providing programming to consumers. *See* 47 C.F.R. § 76.1002.

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- The Commission's rules provide that any MVPD harmed by conduct that it believes constitutes a violation of the Commission's program access rules may file a complaint at the Commission. *See* 47 C.F.R. § 76.1003.
- What has changed?
  - The Commission in the *Report and Order* in MB Docket No. 07-29 modified the rules pertaining to program access complaints in the following manner.
  - *Submission of Documents with Answer.* The *Report and Order* codifies the requirement that a respondent to a program access complaint that expressly relies upon a document within its control in asserting a defense to include the document as part of its answer. *See* 47 C.F.R. § 76.1003(e)(1).
  - *Production of Documents Upon Request.* The *Report and Order* finds that it would be unreasonable for a respondent not to produce all documents either requested by the complainant or whose production is ordered by the Commission, provided that such documents are in its control and relevant to the dispute. *See* 47 C.F.R. § 76.1003(j).
  - *Protection of Confidential Information.* In order to appropriately safeguard confidential information, the *Report and Order* revises the standard protective order for use in program access proceedings by clarifying that any personnel, including in-house counsel, (i) that are involved in competitive decision-making; (ii) that are in a position to use the confidential information for competitive commercial or business purposes, or (iii) whose activities, association, or relationship with the complainant, client, or any authorized representative involve advice and participation in any or all of said person's business decisions made in light of similar or corresponding information about a competitor, are prohibited from accessing the confidential information. *See* 47 C.F.R. § 76.1003(k).
  - *Default Orders.* The *Report and Order* emphasizes that the Commission will strictly enforce its default rules against respondents who do not answer complaints thoroughly and codifies its authority to issue default orders when parties do not respond in a timely manner to discovery requests with required documentation. *See* 47 C.F.R. § 76.1003(j).
  - *Voluntary Alternative Dispute Resolution.* The *Report and Order* allows parties to a program access complaint proceeding to voluntarily engage in alternative dispute resolution, including commercial arbitration, during which time Commission action on the complaint will be suspended. *See* 47 C.F.R. § 76.1003(i).
  - *Timeframe for Resolution.* The *Report and Order* retains the Commission's goals for resolving program access complaints: five months for denial of programming cases, and nine months for all other program access complaints, such as price discrimination cases. The Commission will expedite complaints filed by new entrants.

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### **RECORDKEEPING**

- The *Report and Order* does not mandate any recordkeeping requirements.
- Entities should note, however, that the *Report and Order* modifies the Commission's procedures for resolving program access complaints by:
  - requiring a respondent to a program access complaint that expressly relies upon a document within its control in asserting a defense to include the document as part of its answer; and
  - finding that it would be unreasonable for a respondent not to produce all documents either requested by the complainant or ordered by the Commission, provided that such documents are in its control and relevant to the dispute.

### **IMPACT ON SMALL BUSINESS**

- The modifications to the rules will not have a significant adverse economic impact on small entities. The rules will benefit small entities by:
  - facilitating competition in the video distribution market by ensuring that competitive MVPDs continue to have access to the programming they need to compete; and
  - facilitating the processing and resolution of program access complaints.

### **INTERNET LINKS**

- Report and Order and Notice of Proposed Rulemaking – FCC 07-169

[http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/FCC-07-169A1.doc](http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-07-169A1.doc)

[http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/FCC-07-169A2.doc](http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-07-169A2.doc)

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