



Federal Communications Commission  
Washington, D.C. 20554

May 19, 2010

DA 10-818

## Small Entity Compliance Guide

### Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements

MB Docket No. 07-198

FCC 10-17

Released: January 20, 2010

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—comply with the new rules adopted in the above-referenced FCC rulemaking docket(s). 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. This Guide may, perhaps, 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.

In any civil or administrative action against a small entity for a violation of rules, the content of the Small Entity Compliance Guide may be considered as evidence of the reasonableness or appropriateness of proposed fines, penalties or damages. 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:

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## **OBJECTIVES OF THE PROCEEDING**

In the *First Report and Order* in MB Docket No. 07-198, the Commission sought to:

- promote competition in the video distribution market by establishing rules to address unfair acts involving terrestrially delivered, cable-affiliated programming; and
- establish procedures for the Commission’s consideration of requests for a temporary standstill of the price, terms, and other conditions of an existing programming contract by a program access complainant seeking renewal of such a contract.

## **COMPLIANCE REQUIREMENTS**

### **1. Establishment of Rules to Address Unfair Acts Involving Terrestrially Delivered, Cable-Affiliated Programming**

- Background
  - Section 628(c)(2) of the Communications Act of 1934, as amended (the “Act”), required the Commission to adopt regulations prohibiting cable operators or their affiliates from engaging in unfair acts involving cable-affiliated programming that is delivered to cable operators via satellite (“satellite-delivered programming”). These rules are known as the program access rules.
    - The three unfair acts Congress required the Commission to address were: (i) exclusive contracts between a cable operator and a cable-affiliated programmer; (ii) discrimination by a cable-affiliated programmer in the prices, terms, and conditions for sale of programming among multichannel video programming distributors (“MVPDs”); and (iii) efforts by a cable operator to unduly influence the decision of its affiliated programmer to sell programming to competitors. *See* 47 C.F.R. § 76.1002.
    - MVPDs that compete with incumbent cable operators widely credit the program access rules for the increase in competition in the video distribution market that has occurred since these rules were adopted.
  - Congress did not require the Commission to adopt program access rules for cable-affiliated programming that is delivered to cable operators via terrestrial means (“terrestrially delivered programming”).
- Basic Rules
  - In the *First Report and Order*, pursuant to Sections 628(b) and 628(c) of the Act, the Commission established rules for the consideration of complaints alleging that a cable operator, a satellite cable programming vendor in which a cable operator has an attributable interest, or a satellite broadcast programming vendor, has engaged in unfair acts involving terrestrially delivered, cable-affiliated programming. *See* 47 C.F.R. § 76.1001(b).
    - Complainants may pursue claims involving terrestrially delivered, cable-affiliated programming similar to claims they may pursue with respect to satellite-delivered, cable-affiliated programming under the program access rules: exclusive contracts, discrimination, and undue or improper influence.

- Section 628(b) only addresses those unfair acts that have the purpose or effect of hindering significantly or preventing an MVPD from providing satellite cable programming or satellite broadcast programming to subscribers or consumers. The Commission found insufficient evidence to conclude that unfair acts involving terrestrially delivered, cable-affiliated programming always have such a purpose or effect.
- Accordingly, the Commission adopted a case-by-case approach, rather than a *per se* rule, for addressing unfair acts involving terrestrially delivered, cable-affiliated programming.
- How do the rules adopted to address unfair acts involving terrestrially delivered, cable-affiliated programming differ from the program access rules applied to satellite-delivered, cable-affiliated programming?
  - The Commission’s program access rules applicable to satellite-delivered, cable-affiliated programming generally prohibit exclusive contracts unless the cable operator or cable-affiliated programmer demonstrates that an exclusive contract serves the public interest based on the factors set forth in Section 76.1002(c)(4). *See* 47 C.F.R. § 76.1002(c)(4). In contrast, there is no *per se* prohibition on exclusive contracts between a cable operator and a cable-affiliated programmer that delivers programming to cable operators via terrestrial means; rather, the Commission will assess such contracts on a case-by-case basis in response to a program access complaint.
  - Unlike in cases involving satellite-delivered, cable-affiliated programming, a program access complainant alleging an unfair act involving terrestrially delivered, cable-affiliated programming will have the burden of proof that the defendant’s activities have the purpose or effect of hindering significantly or preventing the complainant from providing satellite cable programming or satellite broadcast programming to subscribers or consumers. *See* 47 C.F.R. § 76.1001(b)(2)(ii).
    - The Commission concluded that a complainant is unlikely to satisfy this burden when seeking access to readily replicable programming, such as local news and local community or educational programming.
    - In contrast, the Commission concluded that Regional Sports Network (“RSN”) programming is very likely to be both non-replicable and highly valued by consumers. Accordingly, in program access cases alleging an unfair act involving a terrestrially delivered, cable-affiliated RSN, the defendant must overcome a presumption that an unfair act involving such programming has the purpose or effect of hindering significantly or preventing the complainant from providing satellite cable programming or satellite broadcast programming to subscribers or consumers.
  - Unlike in cases involving satellite-delivered, cable-affiliated programming, a program access complainant alleging discrimination by a cable-affiliated programmer that provides terrestrially delivered programming will have the additional burden of proof that the programmer is wholly owned by, controlled by, or under common control with one of the three entities covered by Section 628(b): a cable operator or cable operators, a satellite cable programming vendor or vendors in which a cable operator has an attributable interest, or a satellite broadcast programming vendor or vendors. *See* 47 C.F.R. § 76.1001(b)(2)(iii).

- A defendant has 45 days – rather than the usual 20 days – from the date of service of the complaint to file an answer. *See* 47 C.F.R. § 76.1001(b)(2)(i).
- With the exceptions noted above, a program access complaint proceeding regarding an unfair act involving terrestrially delivered, cable-affiliated programming will be subject to the same procedures set forth in Sections 76.7 and 76.1003 of the Commission’s rules that apply to program access complaints involving satellite-delivered, cable-affiliated programming. *See* 47 C.F.R. §§ 76.7, 76.1003.
- Application of the Rules
  - The rules adopted in the *First Report and Order* apply to common carriers and open video system operators, and their affiliated programmers, to the extent that these entities provide video programming to subscribers or consumers, because the Act so requires.
  - The rules apply to existing contracts. Thus, although a cable operator may have entered into an exclusive contract prior to the effective date of the rules adopted in the *First Report and Order*, an MVPD may file a program access complaint after the effective date of the rules alleging that the cable operator’s continued reliance on or enforcement of this contract violates these rules.
  - The new rules do not apply, however, to the unfair acts of cable operators involving terrestrially-delivered, cable-affiliated programming that preceded the effective date of the rules. Rather, an MVPD filing a program access complaint pursuant to the rules adopted in the *First Report and Order* would need to demonstrate that the unfair act occurred after the effective date of the rules. Parties that had program access complaints involving terrestrially delivered programming pending at the Commission on the date the new rules were adopted may prosecute those complaints under the newly adopted rules only if they submit supplemental filings alleging that the defendant has engaged in an unfair act after the effective date of the rules.
  - Terrestrially delivered RSNs affiliated with a cable operator that are covered by prior merger conditions are not impacted by the rules adopted in the *First Report and Order* unless and until those merger conditions are modified or expire. Terrestrially delivered, cable-affiliated networks that were previously exempted from these merger conditions, however, may be the subject of a complaint pursuant to the rules adopted in the *First Report and Order*.
- 2. **Establishment of Procedures for the Commission’s Consideration of Requests for a Temporary Standstill of the Price, Terms, and Other Conditions of an Existing Programming Contract**
  - Basic Rule
    - A program access complainant seeking renewal of an existing contract may use the procedures adopted in the *First Report and Order* to seek a temporary standstill of the price, terms, and other conditions of the existing contract pending resolution of the program access complaint. This procedure applies in program access complaint proceedings involving terrestrially delivered, cable-affiliated programming or satellite-delivered, cable-affiliated programming. *See* 47 C.F.R. § 76.1003(l).
    - Along with its program access complaint, a complainant may submit a petition for a temporary standstill of its existing programming contract pending resolution of the complaint.

- In its petition, the complainant must demonstrate how grant of the standstill will meet the following four criteria:
  - the complainant is likely to prevail on the merits of its complaint;
  - the complainant will suffer irreparable harm absent a stay;
  - grant of a stay will not substantially harm other interested parties; and
  - the public interest favors grant of a stay.
- The defendant must answer the petition for a standstill order within ten days of service of the petition. *See* 47 C.F.R. § 76.1003(1)(2).
- Grant of a Standstill
  - If the Commission grants the temporary standstill, its decision acting on the complaint will make the terms of the new agreement between the parties, if any, retroactive to the expiration date of the previous agreement. *See* 47 C.F.R. § 76.1003(1)(3).

### **RECORDKEEPING**

- The *First Report and Order* does not mandate any specific recordkeeping requirements, but parties are required to file and produce documents when prosecuting or defending a program access complaint involving terrestrially delivered, cable-affiliated programming.
- Entities should note, however, that the *First Report and Order* modifies the Commission's procedures for resolving program access complaints by:
  - providing defendants to program access complaints involving terrestrially delivered, cable-affiliated programming with 45 days within which to file an answer; and
  - creating a process for requesting a temporary standstill of an existing programming contract pending resolution of a program access complaint.

### **IMPACT ON SMALL BUSINESS**

- The decision to establish rules to address unfair acts involving terrestrially delivered, cable-affiliated programming on a case-by-case basis, and to establish procedures for the Commission's consideration of requests for a temporary standstill, will benefit small entities by facilitating their access to certain cable-affiliated programming that they are unable to offer to their subscribers, thereby promoting competition in the video distribution market and broadband deployment.

### **INTERNET LINKS**

- First Report and Order – FCC 10-17

[http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/FCC-10-17A1.doc](http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-10-17A1.doc)  
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