



Federal Communications Commission
Washington, D.C. 20554

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DA 21-29

SMALL ENTITY COMPLIANCE GUIDE

**Revision of the Commission's Part 76 Review Procedures;
Modernization of Media Regulation Initiative;
Revision of the Commission's Program Carriage Rules
FCC 20-162; MB Docket Nos. 20-70, 17-105, 11-131
Released November 18, 2020**

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 revised rules adopted in the above-referenced Federal Communications Commission (FCC or Commission) rulemaking dockets. This Guide is not intended to replace or supersede these rules, but to facilitate compliance 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 cannot anticipate all situations in which the rules apply. Furthermore, the Commission retains the discretion to adopt case-by-case approaches, where appropriate, that may differ from this Guide. Any decision regarding a particular small entity will be based on the statute and any relevant rules.

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 then 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 it may 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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I. OBJECTIVES OF THE PROCEEDING

In the *Report and Order*¹ in MB Docket Nos. 20-70, 17-105, and 11-131, the Commission adopted changes to the rules governing the resolution of program carriage disputes between video programming vendors and multichannel video programming distributors (MVPDs) and also amended parallel procedural rules in Part 76 of the Rules, which govern program access, open video system (OVS), and good-faith retransmission consent complaints.

Specifically, the Commission amended the statute of limitations for program carriage complaints to make clear that the third triggering event applies only when a party seeks renewal of an existing contract or when there is not an existing program carriage contract or contract offer, and a defendant MVPD has denied or failed to acknowledge either a request for carriage or a request to negotiate for program carriage as explained in detail below in paragraphs 2 and 3 of Part II.² This third prong of the program carriage statute of limitations originally contained similar limiting language concerning an unreasonable refusal to deal that was deleted by the Commission in 1994 without setting forth an explicit rationale for doing so. The Commission has previously expressed concern that without that language this provision could be read to mean that a complaint would be timely within one year of the date on which a complainant notified the defendant MVPD of its intention to file a complaint, regardless of when the actual violation of the rules had occurred, undermining the fundamental purpose of a statute of limitations.

For consistency, the Commission similarly amended parallel provisions in the statutes of limitations for filing program access,³ OVS,⁴ and good-faith retransmission consent complaints⁵ so that they run from the date that a potential defendant denied an offer or a request to negotiate, rather than from the date a potential complainant provides notice of its intent to file on that basis. The Commission explained that these changes will help ensure an expeditious program access, program carriage, retransmission consent, and OVS complaint process and provide additional clarity to both potential complainants and defendants, as well as adjudicators.

The Commission also revised the effective date and review procedures for initial decisions issued by an administrative law judge (ALJ) in program carriage, program access, and OVS proceedings to make them consistent with the Commission's generally applicable procedures.⁶ In practice, this means that rather than taking immediate effect and remaining in effect pending review, ALJ initial decisions in these contexts will not take effect for at least 50 days following release and will be stayed automatically upon the filing of exceptions. As discussed fully in the FNPRM in this proceeding,⁷ the incongruous provisions concerning the effective date and review procedures for ALJ initial decisions in Part 76 and Part 1 of our rules have caused confusion for both parties and adjudicators and can create inconsistent outcomes

¹ *Revision of the Commission's Part 76 Review Procedures; Modernization of Media Regulation Initiative; Revision of the Commission's Program Carriage Rules*, MB Docket Nos. 20-70, 17-105, 11-131, Report and Order, FCC 20-162, 2020 WL 6822433 (Nov. 18, 2020).

² 47 CFR § 76.1302(h)(3).

³ 47 CFR § 76.1003(g)(3).

⁴ 47 CFR § 76.1513(g)(3).

⁵ 47 CFR § 76.65(e)(3).

⁶ 47 CFF § 76.10(c)(2).

⁷ *Revision of the Commission's Part 76 Review Procedures*, MB Docket Nos. 20-70, 17-105, and 11-131, Further Notice of Proposed Rulemaking in MB Docket No. 11-131 and Notice of Proposed Rulemaking in MB Docket No. 20-70, 35 FCC Rcd 3140 (2020) (FNPRM).

pending appeal.⁸ The Commission found that this action will simplify and streamline the Commission's procedures, which will reduce uncertainty and confusion for both parties and adjudicators. The Commission also established a 180-day aspirational shot-clock for circulating to the Commission a proposed ruling on review of an initial ALJ decision in program access, program carriage, and OVS proceedings that commences from the date that an aggrieved party appeals such initial decision. This shot-clock applies to the Commission itself and parties involved in appeals of such initial decisions do not need to take any action for the shot-clock to apply. The Commission explained that although it is under no statutory obligation to review ALJ initial decisions within a specified timeframe, it agreed that adopting such a timeframe would serve the public interest by limiting the harms to those programmers with finite litigation resources and expediting the resolution of complaints. The Commission elaborated that it intended to apply this aspirational shot-clock to these specific appeals in the ordinary course and only anticipated suspending it under special circumstances.

II. COMPLIANCE REQUIREMENTS

A. Program Carriage Statute of Limitations.

Section 76.1301 of the Commission's rules prohibits certain anti-competitive practices with regard to program carriage agreements. If a video programming vendor or MVPD is aggrieved by conduct that it believes constitutes a violation of these regulations, section 76.1302 permits them to file a complaint with the Commission.

Previously, for a program carriage complaint to be timely filed under the Commission's rules, it had to be brought within one year of the date on which any of the following events occurs: (1) the defendant MVPD enters into a contract with a video programming vendor that a party alleges to violate the program carriage rules, (2) the defendant MVPD makes a carriage offer that allegedly violates the program carriage rules, and such offer is unrelated to any existing contract between the complainant and the MVPD; or (3) "[a] party has notified [an MVPD] that it intends to file a complaint with the Commission" based on a violation of the program carriage rules.⁹ As explained above, this third prong could be read to mean that a complaint would be deemed timely filed if brought within one year of the date on which a complainant notified the defendant MVPD of its intention to file a complaint, regardless of when the actual violation of the rules had occurred.

Accordingly, the Commission amended the third prong to clarify that it applies only in circumstances where there is not an existing program carriage contract or carriage offer and the defendant MVPD has denied or failed to acknowledge either a request for program carriage or a request to negotiate for program carriage. As a result of this change, a complainant relying on the third prong will now need to file its complaint within one year of the date on which the defendant MVPD has denied or failed to acknowledge a request for carriage or to negotiate for carriage in order for such complaint to be timely.

The Commission explained that determining when an MVPD has denied or failed to acknowledge a request for carriage or a request to negotiate for carriage is an inherently fact-specific exercise and, therefore, such a determination will be made on a case-by-case basis. The Commission further elaborated that it would be appropriate for a programmer to request an answer by a reasonable date, after which it may consider an MVPD's failure to respond to constitute a denial of its request for purposes of triggering the third prong of the statute of limitations.

⁸ Compare 47 CFR §§ 76.1302(j)(1), 76.10(c)(2) with § 1.276(d).

⁹ 47 CFR § 76.1302(h)(1)-(3).

Finally, the Commission also amended the parallel prongs in the statutes of limitations for program access, OVS, and good-faith retransmission consent complaints so that they run from the date that a potential defendant has denied or failed to acknowledge an offer or a request to negotiate, rather than from the date a potential complainant provides notice of its intent to file on that basis. For such complaints to be deemed timely filed, therefore, complainants in such contexts will need to file their complaints within one year of the date that a defendant has denied or failed to acknowledge a request if relying on the third prong of the respective statutes of limitations.

B. Part 76 ALJ Initial Decision Effective Date and Review Procedures.

The Commission rules also permit the Chief of the Media Bureau to refer a program carriage dispute to an ALJ for a hearing on the merits if a complainant establishes that a *prima facie* violation of section 76.1301 has occurred.¹⁰ After an ALJ conducts such hearing, section 76.10 of the Commission's rules governs the effective date of an initial ALJ decision in this context and whether that decision will remain in effect pending review.¹¹ This same rule also governs the effective date and whether a decision remains in effect pending appeal for program access and OVS disputes.

Previously, this rule has provided that decisions issued by an ALJ in these three contexts will become effective upon release and remain in effect pending Commission review. This differs from the generally applicable procedures in Part 1 of the Commission's rules, which dictate that ALJ initial decisions do not become effective before 50 days after the public release of the decision, unless otherwise ordered by the Commission, and that ALJ initial decisions are automatically stayed upon the timely filing of exceptions. As noted above, these incongruous procedural provisions in the rules have caused confusion for both parties and adjudicators in the past and can create inconsistent outcomes pending appeal.

To address these problems, the Commission revised its rules to harmonize the procedures governing the effective date and review of initial ALJ decisions in program carriage, program access, and OVS proceedings with the generally applicable procedures in Part 1 of the Commission's rules. In practice, this means that rather than taking immediate effect and remaining in effect pending Commission review, ALJ initial decisions in these contexts will not take effect for at least 50 days following release and will be stayed automatically upon the filing of exceptions.

Some commenters expressed concern about the effect of prolonged program carriage disputes on unaffiliated programmers that could result from staying the effectiveness of ALJ initial decisions during review. To alleviate this concern, the Commission also established a 180-day aspirational shot-clock for circulating to the Commission a proposed ruling on review of an initial ALJ decision in program access, program carriage, and OVS proceedings that commences from the date that an aggrieved party appeals such initial decision. The Commission explained that creating this aspirational shot-clock would establish clearer expectations for all parties involved and facilitate prompt review of ALJ initial decisions by the Commission.

¹⁰ The elements that a complainant must show to establish a *prima facie* case can be found in section 76.1302(d) of the Commission's rules. 47 CFR § 76.1302(d).

¹¹ The relevant language in the rule previously provided, "Any party to a part 76 proceeding aggrieved by any decision on the merits by an administrative law judge may file an appeal of the decision directly with the Commission, in accordance with §§1.276(a) and 1.277(a) through (c) of this chapter, except that in proceedings brought pursuant to §§76.1003, 76.1302, and 76.1513 of this part, unless a stay is granted by the Commission, the decision by the administrative law judge will become effective upon release and will remain in effect pending appeal." See 47 CFR 76.10(c)(2).

III. RECORDKEEPING AND REPORTING REQUIREMENTS

The Commission's actions in the *Report and Order* did not create any new recordkeeping or reporting requirements.

IV. IMPLEMENTATION DATE

The rules as amended in the *Report and Order* are effective 30 days after the date of publication of a summary in the Federal Register. The summary was published in the Federal Register on December 17, 2020 and the rules will take effect on January 19, 2021.

V. INTERNET LINKS

A copy of the *Report and Order*, FCC 20-162, MB Docket Nos. 20-70, 17-105, and 11-131, is available at:

<https://docs.fcc.gov/public/attachments/FCC-20-162A1.pdf>

A copy of the Federal Register Summary of the *Report and Order* is available at:

<https://www.federalregister.gov/documents/2020/12/17/2020-26259/review-procedures-modernization-of-media-regulation-initiative-program-carriage-rules>