

Enhancements to the Carriage Access Rules, 76.1300.

The ten summary enhancements below, are designed to provide meaningful discouragement of carriage access discrimination and effective enforcement of such behavior.

1. Complaint Resolution “No Later Than” Timeframe

- a. Establish a specific “no later than” time frame for when the Media Bureau on delegated authority from the Commission will determine whether the complainant has made out a *prima facie* case, and an additional deadline for the Commission to issue a final order resolving the complaint. Multi-billion dollar mergers are placed on a 180 day shot clock. The Media Bureau should under a similar timeframe.
- b. The ALJ need not be involved as an adjudicator and such involvement undermines the goal of expedited review.
- c. The Media Bureau should expedite discovery through a standing order, reasonable limits, and oversight.

2. The Commission can and should Adopt a Standstill Requirement

- a. Any programmer that files a pre-filing notice or complaint may request and receive a temporary standstill from the Media Bureau until the complaint is resolved. An MVPD that refuses to deal in good faith during a renewal of an affiliation agreement or threatening a black-out shall be subject to a standstill. A standstill removes MVPDs incentives to delay the process. A programmer should not be further harmed due to filing a pre-filing notice. A stand-still may be requested up to 30 days after a network goes dark on an MVPD.

3. Defining the Criteria for Establishing a Prima Facie Case

- a. Specifically defining the criteria for establishing a “*prima facie* case”, namely adopting a standard akin to the standard applied in federal courts to assess whether a complaint can survive a motion to dismiss.

4. Explicitly adopting “burden-shifting after a Prima Facie Case is Made

- a. Explicitly adopting findings by the Media Bureau^[1] that complaints brought under Section 616 and the Commission’s program carriage regulations are governed by a “burden-shifting” framework. Pursuant to this framework, plaintiff bears the burden of making out a prima facie case of discrimination, at which point the burden shifts to the defendant to prove that the disparate treatment was based solely on other, non-discriminatory considerations. Note that under the program access discrimination framework, the burdens of production and persuasion shift to the defendant to establish a non-discriminatory reason for its carriage decision.

^[1] Order on Review, *TCR Sports Broadcasting Holding, L.L.P. d/b/a Mid-Atlantic Sports Network v. Time Warner Cable Inc.*, DA 08-2441 (MB rel. Oc. 30, 2008).

5. No Retaliation by an MVPD or OVD for a Programmer filing a Carriage Access Complaint

- a. Clarifying the existing regulations to prohibit retaliation by a MVPD or OVD against a programmer for filing a pre-filing complaint notice or a complaint.

6. Define what standards shall be applied and what constitutes “discrimination in video programming distribution”

- a. In connection with recent adjudications, the cable MSOs have asserted the applicability of unreasonably high standards for finding discrimination that do not comport with the statute or Congressional intent.

7. Define the term “unreasonably restrain” as used in 47 C.F.R. § 76.1301(c)

- a. The Enforcement Bureau has commented in administrative litigations that discrimination that “reasonably” restrains the ability of a programmer to compete fairly may not be unlawful. Ironically, the Media Bureau in its Hearing Designation Order for the same proceeding rejected such a “claim because it would effectively exempt all MVPDs from program carriage obligations based on the possibility of carriage on other MVPDs.”^[2] The Media Bureau went on to state that “...the program carriage provision of the Act prohibits an MVPD from discriminating against an unaffiliated programmer regardless of the competition the MVPD faces,”^[3] thus rejecting the contention that discrimination that “reasonably” restrains the ability of a programmer to compete is lawful.

8. Define “similarly situated”

- a. The term “similarly situated” has been exploited by defendants as its easy to prove differences in two programming services even when the networks are operating in the same genre such as national cable news or soccer centric sports programming, and thus, should be recognized as similarly situated. Sub-genre analyses should not be the criteria of similarly situated.

9. Explicitly Prohibit Discrimination Against Unaffiliated Programmers in Favor of Programmers Affiliated with Competing MVPDs

- a. Section 616(a)(3) of the Communications Act is best interpreted to prohibit vertically integrated MVPDs from discriminating on the basis of a programming vendor’s lack of affiliation, either with that MVPD or with another MVPD. 34 Such an interpretation comports both with the text of Section 616 and with Congress’s intent in enacting the Cable Television Consumer Protection and Competition Act of 1992. The plain text of Section 616(a)(3) prevents “discriminating in video programming distribution on the basis of affiliation or nonaffiliation of vendors . . .” and neither requires nor implies that the favored vendor must be affiliated with the discriminating MVPD, as opposed to

^[2] Memorandum Opinion and Hearing Designation Order, By the Chief, Media Bureau, dated October 10, 2008, MB Docket No. 08-214, File No. CSR-7709-P, CSR-7822-P, CSR-7829-P, CSR-7907-P, CSR-7876-P, CSR-8001-P, page 12.

^[3] Memorandum Opinion and Hearing Designation Order, By the Chief, Media Bureau, dated October 10, 2008, MB Docket No. 08-214, File No. CSR-7709-P, CSR-7822-P, CSR-7829-P, CSR-7907-P, CSR-7876-P, CSR-8001-P, page 12.

another MVPD. Rather, the critical question in a discrimination claim is whether an MVPD made a carriage decision based on the programming vendor's affiliation, or lack thereof, with any MVPD, instead of the video programming's value to the MVPD's customers.

10. The Parties Should be Subject to Baseball-Style Arbitration

- a. Baseball-Style Arbitration provides an expedited process by eliminating the adjudicator's need to fashion a detailed remedy while giving the adjudicator the benefit of the parties' expertise. Baseball style arbitration encourages the parties to submit realistic offering facilitating dispute resolution. Baseball-Style Arbitration is specified in the program access process.

(NOTE: The above suggested enhancements to the carriage access regulations have been taken without citation, at times word for word, from prior filings by Herring Networks, Inc., along with Media Access Project and Public Knowledge. Full credit is given to these prior filings.)