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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FCC 93-457

In the Matter of)
)
Implementation of Sections 12 and 19) MM Docket No. 92-265
of the Cable Television Consumer)
Protection and Competition Act of 1992)
)
Development of Competition and)
Diversity in Video Programming)
Distribution and Carriage)

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SECOND REPORT AND ORDER

Adopted: September 23, 1993; Released: October 22, 1993

By the Commission:

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I. INTRODUCTION

1. This Second Report and Order adopts rules to implement Section 12 of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act"), which adds a new Section 616 to the Communications Act of 1934 governing agreements between cable operators -- or other multichannel video programming distributors -- and the programming services they distribute.¹ Section 616 is intended to prevent cable systems and

¹ Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. (1992).

other multichannel video programming distributors ("multichannel distributors") from taking undue advantage of programming vendors through various practices, including coercing vendors to grant ownership interests or exclusive distribution rights to multichannel distributors in exchange for carriage on their systems. As we have developed regulations pertaining to program access and carriage agreements in this proceeding, we have endeavored to serve the congressional intent to prohibit unfair or anticompetitive actions without restraining the amount of multichannel programming available by precluding legitimate business practices common to a competitive marketplace. Therefore, the implementing rules for program carriage agreements that we adopt are intended to prohibit those activities specified by Congress in the statute without unduly interfering with legitimate negotiating practices between multichannel video programming distributors and programming vendors. As a result, in this Second Report and Order, we adopt general rules that are consistent with the statute's specific prohibitions regarding actions between distributors and program vendors in forming program carriage agreements, and we will enforce these regulations through a process that will focus on the specific facts pertaining to each negotiation.

II. BACKGROUND

2. When drafting the 1992 Cable Act, Congress was concerned that increased horizontal concentration and vertical integration in the cable industry have created an imbalance of power between cable operators and program vendors. Specifically, Congress concluded that vertically integrated cable operators have the incentive and ability to favor affiliated programmers over unaffiliated programmers with respect to granting carriage on their systems. Cable operators or programmers that compete with the vertically integrated entities may suffer harm to the extent that they do not receive such favorable terms.² Congress also found that some cable operators have required certain non-affiliated program vendors to grant exclusive rights to programming, a financial interest in the programming, or some other additional consideration as a condition of carriage on the cable system.³

3. The program access provisions of the 1992 Cable Act discussed in the First Report and Order⁴ primarily restrict the activities of vertically integrated programming vendors with respect to cable operators and other multichannel programming distributors. Section 616 restricts the activities of cable operators and other multichannel programming distributors when dealing with programming vendors.

4. Specifically, Section 616 requires the Commission to adopt regulations that prevent a multichannel distributor from: (1) requiring a programming vendor to provide it with a financial interest in the programming service as a condition of carrying the program service on its system; (2) coercing a programming vendor to provide it with exclusive rights as a condition of carriage, from retaliating against such a vendor for failing to provide exclusive rights; or (3) engaging in conduct that discriminates on the basis of affiliation of vendors in the selection, terms or conditions for carriage of video programming. In addition, the statute specifies procedures the Commission must adopt for implementation of the above

² 1992 Cable Act, Section 2(a)(5).

³ See Senate Report at 24; House Report at 42.

⁴ See First Report and Order ("First Report and Order"), MM Docket No. 92-265, 8 FCC Rcd 3359 (1993).

provisions, including expedited review of complaints made by a programming vendor and assessment of appropriate penalties for violation of the carriage agreement rules as well as for the filing of frivolous claims. In our Notice of Proposed Rulemaking,⁵ the Commission sought comment on specific practices that it should prohibit, as well as on appropriate complaint procedures for addressing allegations of conduct that violates our implementing regulations.

III. IMPLEMENTATION OF CARRIAGE AGREEMENT PROVISIONS

5. Section 616(a)(1) of the 1992 Cable Act provides that the Commission must adopt rules to prevent a cable operator or other multichannel distributor from requiring a financial interest in a program service as a condition for carriage on the operator's systems. Given that the statute does not prohibit multichannel distributors from holding a financial interest in a programming service, the Notice stated that it may not always be clear whether a cable operator has "required" the programming vendor to provide a financial interest as a condition of carrying a particular programming service. Therefore, we sought comment on the factors we should use to determine whether such a requirement for carriage has occurred.

6. Second, Section 616(a)(2) directs the Commission to adopt rules that prohibit a cable operator or other multichannel distributor from coercing a video programming vendor to provide, and from retaliating against such a vendor for failing to provide, exclusive rights against other multichannel video programming distributors as a condition of carriage. In this regard, we sought comment on (1) the types of activities that should constitute indicia of coercion; (2) how we might distinguish between "coercion" and "negotiation"; and (3) whether our implementing rules for Section 616 might preclude as "coercion" certain mutually acceptable arrangements that would otherwise comply with Section 628. Further, the statute clearly states that exclusive arrangements may exist other than as a condition of carriage. Therefore, we also sought comment on our interpretation that Section 616 does not prohibit exclusive arrangements, but that Section 616 must be read together with Section 628(c), which precludes certain exclusive arrangements and establishes standards for determining whether other exclusive contracts are in the public interest.

7. Third, Section 616(a)(3) provides that the new rules must prevent a multichannel distributor from engaging in conduct that unreasonably restrains the ability of an unaffiliated video programming vendor to compete fairly, by discriminating in video programming distribution on the basis of affiliation or nonaffiliation of vendors in the selection, terms or conditions for carriage of video programming. In the Notice, we sought comment on the specific conduct that we should consider a violation of this section. We also proposed that an "unaffiliated video programming vendor" would be a video programming vendor or service in which the multichannel distributor does not have an attributable interest, which could be defined by the broadcast attribution criteria of Section 73.3555 of the Commission's Rules. In addition, we observed that Section 616(a)(3) prohibits multichannel distributors from "discriminating in video programming distribution on the basis of affiliation or nonaffiliation of vendors." We stated our belief that a practice of discriminating in the context of carriage agreements involves different activities than those discussed with respect to Section 628 regarding programming access, and we sought

⁵ See Notice of Proposed Rulemaking ("Notice"), MM Docket No. 92-265, 8 FCC Red 194 (1992).

comment on how we should define "discrimination" in the context of Section 616.⁴

Comments

8. General Issues. Several commenters raise general issues regarding the carriage agreement provisions of Section 616. MPAA states that the intent of Section 616 is to ensure that no cable operator or multichannel distributor can demand ownership interests or exclusive rights in programming services in exchange for carriage. Furthermore, MPAA argues that Congress sought to prevent distributors from discriminating in terms of carriage against programming services in which the operator has no ownership interest.⁷ Therefore, MPAA claims that the statute clearly proscribes coercive and discriminatory conduct, and that the Commission's rules must discourage such practices and provide effective remedies. To the extent that it is neither possible nor necessary for the rules to define every type of conduct that could evidence coerced or required concessions, MPAA and Time Warner suggest rules using generic language, perhaps amplified by illustrative examples in notes appended to the rules, that may be invoked by individual complaints on a case-by-case basis.⁸ MPAA also contends that the Commission should interpret the congressional intent regarding the carriage agreement provisions of Section 616 independently of the intent of the program access provisions of Section 628, especially concerning the respective standards concerning exclusivity.⁹ Similarly, Viacom believes that the competitive problems targeted by Section 616 are more pervasive than the program access issues addressed in Section 628, and thus warrant different and more stringent standards.¹⁰

9. Alternatively, several parties observe that Section 616 does not prohibit distributors from obtaining financial interests or exclusivity rights, but instead addresses "coercive" conduct and "unreasonable restraints" by distributors, for which direct evidence is available.¹¹ These parties thus assert that the Commission's implementing rules should only reach conduct that is beyond the normal course of negotiations. Furthermore, Continental believes that imposition of remedies under Section 616, if not subject to sufficient limits, may force distributors to make carriage decisions based on an expectation

⁴ We note that with respect to these carriage agreement rules, the House Report indicates that "the term 'discrimination' is to be distinguished from how that term is used in connection with actions by common carriers subject to title II of the Communications Act." The House Report further provides that the Commission is to define discrimination with respect to the extensive body of law addressing discrimination in normal business practices. House Report at 110. We sought comment on the appropriate interpretation of this language, particularly with respect to developing standards for identifying "discrimination" governed by Sections 616 and 628.

⁷ See MPAA at 4-5.

⁸ See MPAA at 4-5, Time Warner Reply at 22. To the extent that the Commission seeks to define such coercive and discriminatory practices, CSS also recommends that the Commission review sample agreements between program vendors and cable operators that impose restrictive conditions on the vendor's ability to license independent or competitive multichannel distributors in the cable operators' service areas. See CSS at 17. Similarly, Caribbean Satellite Network (CSN) proposes that the Commission examine the totality of circumstances under which a cable operator requires a vendor to provide a financial interest as a condition of carriage, including a cable operator's stalling of negotiations associated with demands for financial interests. See CSN at 5.

⁹ See MPAA Reply at 7.

¹⁰ See Viacom Reply at 21.

¹¹ See, e.g., Cablevision at 23, Liberty Media at 67.

of whether a programmer is likely to seek mandatory carriage if rejected, rather than selecting the programming that best serves the needs of its subscribers. Continental argues that in the absence of wrongful or anticompetitive conduct, the Commission's rules should allow distributors to exercise the freedom to determine whether a particular programming service has the experience and resources to succeed.¹² Moreover, Discovery observes that most program carriage decisions are made at the local level by managers of individual systems, rather than at a national or regional level by owners of MSOs. As a result, Discovery contends that carriage decisions are generally uninfluenced by the affiliation of a program service's owners. Discovery further contends that the existence of a financial investment or an exclusive contract is not evidence of "coercion" or "required" conduct.¹³

10. Specific Prohibitions of Section 616. With respect to implementing the statute's specific prohibitions, commenters appear to focus on Section 616(a)(2)'s provision against attempts by a distributor to coerce exclusive rights as a condition of carriage. MPAA, for example, argues that, in contrast to Section 628, Section 616 does not require the Commission to "specify particular conduct that is prohibited," so that adopting generic rules would be sufficient to comply with the statute, rather than attempting to delineate specific behavior that would constitute "coercion".¹⁴ Similarly, Viacom states that although "coercion" may include more than explicit threats or overt intimidation, the Commission should recognize that many negotiating impasses are not actionable under Section 616.¹⁵ MPAA states that examples of activity that may involve coercion are useful as guided by industry experience, and suggests several indicators for evaluating complaints, including: (1) refusals to carry a service on terms and conditions that are reasonable or standard in the industry for comparable programming; (2) patterns of conduct during the course of dealing between the parties; (3) market dominance by a distributor obtaining exclusivity or ownership, or the absence of a comparable alternative distributor; and (4) the timing of agreement on financial interests or exclusivity relative to the agreement on carriage.¹⁶

11. Alternatively, several parties suggest defining "coercion" as narrowly as possible in order to avoid foreclosing the discussion of exclusivity or ownership in aggressive, good-faith negotiations, subject to the constraints of Section 628.¹⁷ Accordingly, these parties recommend viewing "coercion" as conduct that is not reasonably considered good-faith negotiation, or that amounts to the exertion of pressure beyond mere negotiation. In order to allow for aggressive negotiations on carriage and other terms, TCI suggests that the implementing rules require that complaints alleging "coercion" demonstrate explicit threats by a distributor, stating that such practices are arguably analogous to antitrust standards regarding tying and exclusive dealing.¹⁸ In addition, Cablevision et al. recommend a three-

¹² See Continental at 26-27.

¹³ See Discovery at 32.

¹⁴ See MPAA at 7-9.

¹⁵ See Viacom Reply at 22.

¹⁶ See MPAA at 7-9.

¹⁷ See, e.g., Discovery at 32, Liberty Media at 68, and TCI at 33-36.

¹⁸ Using these lines of precedent, TCI cites several cases to highlight actions or conditions that would or would not evidence "coercion". See TCI at 34.

part test for identifying "coercion" or retaliatory conduct, involving: (1) the plausibility of coercion, especially with respect to established or powerful program vendors; (2) specific facts of coercion; and (3) alleged facts that the conduct has unreasonably restrained the vendor's ability to compete fairly.¹⁹ Cablevision justifies such a standard by observing that cable operators rarely consider dropping established services in negotiations, and cable operators often provide non-monetary "value" in exchange for exclusivity -- such as placement, carriage, or other commitments -- that could rebut the claim of coercion.

12. In response, MPAA claims that TCI provides no valid support for its proposal that a finding of "coercion" must require evidence of explicit threats, stating that the provisions established by Congress in Section 616 differ from the antitrust standards referenced by TCI due to the absence of an alternative multichannel video programming distributor.²⁰ Furthermore, MPAA argues that coerced exclusivity is prohibited by Section 616, even if the Commission would find non-coerced exclusivity to be in the public interest under the standards set forth in Section 628. TCI states that it agrees with a case-by-case application of the implementing regulations for Section 616 in order to allow for aggressive market negotiations, but observes that MPAA's indicia are often unrelated to coercion.²¹

13. Another specific statutory provision is set forth in Section 616(a)(3), which prohibits a distributor from "engaging in conduct the effect of which is to unreasonably restrain the ability of an unaffiliated video programming vendor to compete fairly by discriminating in video programming distribution on the basis of affiliation or nonaffiliation in the selection, terms, or conditions of carriage." MPAA recommends that the Commission consider several criteria for a *prima facie* showing of such discrimination, such as: (a) a refusal to carry an unaffiliated service without reasonable business justification; (b) assignment of significantly inferior channel positioning, or other type of inaccessibility to subscribers, as compared to competing affiliated services added to the system during the same time period; (c) unwillingness to engage in promotional support, cooperative advertising, or other similar activity performed for comparable affiliated services, without a reasonable business justification; (d) willingness to sell subscriber lists and addresses and other data useful in promotional activity only to affiliated programmers; (e) excluding unaffiliated programming services from mention in standard presentations to potential subscribers, when affiliated services are named; (f) requiring that unaffiliated services waive rights not waived by any comparable affiliated or unaffiliated service; (g) higher monthly payments to affiliated services than to comparable unaffiliated services without reasonable business justification; (h) imposing more onerous technical quality standards or requirements on an unaffiliated service; and (i) refusing to include a nonaffiliated service in comparable discount packages to those in which comparable affiliated services are offered to subscribers, without a reasonable business justification.²² Viacom also agrees that discrimination in the context of carriage agreements involves different activities from those discussed under

¹⁹ See Cablevision et al. at 23-26.

²⁰ MPAA claims that TCI's discussion of the antitrust cases is incomplete in that the court decisions did not hinge on the presence of a threat. MPAA, therefore, cites the "essential facilities" doctrine as a more appropriate standard for comparison. See MPAA Reply at 4-5.

²¹ See TCI Reply at 18-20.

²² See MPAA at 10.

Section 628 regarding program access.²³ Other parties recommend that the Commission narrowly construe the prohibition against discrimination by favoring an "affiliated" vendor, so as to avoid discouraging MSO's from making favorable deals with program services in which they have invested.²⁴ Finally, Continental recommends using the same factors listed in Section 628(c)(2)(B) to justify a distributor's different treatment of various program vendors, including an allowance for considering creditworthiness, offering of service, financial stability, character, and technical quality.²⁵

Discussion

14. In implementing the provisions of Section 616, we believe that our regulations must strike a balance that not only prescribes behavior prohibited by the specific language of the statute, but also preserves the ability of affected parties to engage in legitimate, aggressive negotiations. Because the statute does not prohibit distributors from acquiring exclusivity rights or financial interests from programming vendors, we believe that resolution of Section 616 complaints will necessarily focus on the specific facts pertaining to each negotiation, and the manner in which certain rights were obtained, in order to determine whether a violation has, in fact, occurred. Accordingly, we adopt general rules that are consistent with the statute's specific prohibitions regarding actions between distributors and program vendors in forming program carriage agreements. With respect to the prohibitions set forth in Section 616(a)(1)-(3), we will identify specific behavior that constitutes "coercion" and "discrimination" as we resolve particular Section 616 complaints, because the practices at issue will necessarily involve behavior that must be evaluated within the context of specific facts pertaining to each negotiation. In addition, we observe that Section 616(a)(3) prohibits only that conduct "the effect of which is to unreasonably restrain the ability of an unaffiliated video programming vendor to compete fairly."²⁶ Thus, the implementing regulations for Section 616 will require that any complainant alleging a violation of Section 616(a)(3) must demonstrate that the effect of the conduct that prompts the complaint is to unreasonably restrain the ability of the complainant to compete fairly.

15. We believe that this approach complies with the expressed congressional intent of the program access and carriage agreement provisions of the 1992 Cable Act, by preserving the legitimate aspects of negotiations for multichannel video programming that result in greater availability of programming to the multichannel video marketplace.²⁷ Indeed, we believe that these regulations will follow the statute's directive to "rely on the marketplace, to the maximum extent feasible, to achieve greater availability" of the relevant programming.²⁸ We emphasize that this approach remains consistent with our objective of serving "the congressional intent to prohibit unfair and anticompetitive actions without restraining the amount of multichannel programming available by precluding legitimate business practices

²³ See Viacom at 21.

²⁴ See, e.g., Discovery at 32, Cablevision at 26.

²⁵ See Continental at 25.

²⁶ See 47 U.S.C. § 616(a)(3).

²⁷ See 1992 Cable Act, Section 2(b). See also First Report and Order, MM Docket No. 92-265, 8 FCC Rod 3403 (1993).

²⁸ See 1992 Cable Act, Section 2(b)(2).

common to a competitive marketplace."²⁹ Furthermore, as suggested in the Notice, the flexibility that is inherent in this approach will be important in our overall effort to resolve both carriage agreement and program access complaints, so that our implementing rules for Section 616 do not preclude as "coercion" any mutually acceptable arrangements that would otherwise comply with the program access provisions of Section 628.³⁰ We remind vendors and distributors, however, that our program access regulations prohibit exclusivity in areas unserved by a cable operator, and require prior Commission approval of any exclusivity rights provided in areas served by a cable operator before such rights may be enforced.³¹

16. At the same time, we believe that this method will preclude opportunities for distributors to restrain the ability of certain program vendors to sell programming and compete fairly through attempts to (1) require financial interests in program services as conditions for carriage, (2) coerce exclusive rights or retaliate against vendors that fail to provide such rights, or (3) discriminate among affiliated or nonaffiliated vendors in the selection, terms or conditions of carriage of multichannel video programming.³² Thus, after reviewing the facts of individual negotiations involved in carriage agreement disputes, the Commission will be able to identify behavior that, in context, is prohibited under Section 616.

17. We also observe that the record on this aspect of the 1992 Cable Act has been extremely limited. In the absence of more explicit input from the commenters, we believe that it is neither helpful nor necessary to develop specific indicia of "coercion" at this time, contrary to the suggestions of two commenters.³³ Also, while we believe that it is unnecessary provide further illustrative guidelines, we believe that behavior such as that suggested by commenters, as described above, can provide useful guidelines for case-by-case inquiry. Such examples may be used by complainants to develop facts to support their complaints, thus serving as models for specific allegations pertaining to unfair program carriage agreements. We also reject the suggestions from commenters that supported alternative tests for identifying "coercion" or "discrimination", because we believe that the unique aspects of individual negotiations will require a more direct examination and evaluation of the facts pertaining to each complaint situation. We emphasize that the statute does not explicitly prohibit multichannel distributors from acquiring a financial interest or exclusive rights that are otherwise permissible. Thus, in the context of good faith, arms-length discussions, multichannel distributors may negotiate for, but may not insist upon, such benefits in exchange for carriage on their systems. We believe that ultimatums, intimidation, conduct that amounts to the exertion of pressure beyond good faith negotiations, or behavior that is tantamount to an unreasonable refusal to deal with a vendor who refuses to grant financial interests or exclusivity rights in exchange for carriage, should be considered examples of behavior that violates the prohibitions set forth in Section 616.

²⁹ See First Report and Order at 3402; see also Notice at 194.

³⁰ Cite to Notice at 205.

³¹ See 47 C.F.R. § 76.1002(c). Such approval requires a finding that the proposed exclusivity serves the public interest under the factors articulated in the 1992 Cable Act and set forth in § 76.1002(c) of our Rules.

³² See 1992 Cable Act, Section 12(a)(1)-(3).

³³ We note that we believe that the case-by-case approach adopted for carriage agreements will make it unnecessary for us to thoroughly evaluate the line of antitrust precedents related to "coercion" cited by TCI, MPAA. See TCI at 33-36, MPAA at 7-9.

18. Finally, we reject TCI's suggestion that we should require evidence of explicit threats, because we believe that actual threats may not always comprise a necessary condition for a finding of coercion. Requiring such evidence would establish an unreasonably high burden of proof that could undermine the intent of Section 616 by allowing multichannel distributors to engage in bad faith negotiations that apparently would not violate the statute and our regulations simply because explicit threats were not made during such negotiations. In contrast, we believe that Section 616(a)(2) was intended to prohibit implicit as well as explicit behavior that amounts to "coercion."³⁴

19. With respect to the prohibitions set forth in Section 616(a)(3), in order to distinguish between programming vendors that are "affiliated" or "nonaffiliated" with particular distributors, we adopt the attribution standard as applied in the program access rules.³⁵ Specifically, we will consider a vendor to be "affiliated" with respect to a multichannel distributor if the distributor holds five percent or more of the stock of the programmer, whether voting or non-voting. As in the First Report and Order on program access, we will not adopt the single majority shareholder aspect of the broadcast attribution rule. In addition, all officer and director positions and general partnership interests will be attributable, as will limited partnership interests of five percent or greater, regardless of insulation. While certain aspects of this attribution standard may be subject to reconsideration in the program access context, we will adopt a parallel standard in the absence of a detailed rationale that would distinguish the relationships in Section 616 from the vertical integration issues in the program access provisions of Section 628.³⁶

IV. COMPLAINT AND ENFORCEMENT PROCEDURES

20. The Notice also sought comment on the procedures to be established for review of complaints, and on the appropriate penalties and remedies to be ordered. Section 616(a)(4) provides for expedited review of any complaints made by a video programming vendor pursuant to this section. We sought comment on: (1) whether we should follow the same review process as was discussed with respect to Section 628(d), or rather, adopt different complaint procedures; and (2) whether we should afford carriage agreements confidential treatment in full, or rather, only permit confidential or proprietary information to be redacted. Section 616(a)(5) provides that the Commission must adopt appropriate penalties and remedies for violations of this subsection, including requiring the multichannel video

³⁴ We also note that on May 20, 1993, CSN filed a motion to amend the First Report and Order in MM Docket No. 92-265 and to revise procedural dates. CSN contended that various issues raised in their comments were not considered in the First Report and Order. We find that a number of the issues pertained to program carriage agreements, and are addressed in this item. To the extent that issues raised in CSN's comments were relevant to the program access provisions, we find no oversight on our part concerning their issues as they are cited in the comment summary. See, e.g., First Report and Order, Appendix C, n. 91. Accordingly, the motion filed by CSN is hereby denied.

³⁵ See First Report and Order at 3370; 47 C.F.R. § 76.1000(b). We note that the same attribution standard was adopted in proceeding adopting the cable rate regulation provisions of the 1992 Cable Act. See Report and Order, MM Docket No. 92-266, FCC 93-177, 58 FR 29736 (May 21, 1993).

³⁶ See, e.g., Petitions for Reconsideration in MM Docket No. 92-265, filed June 10, 1993 by Black Entertainment Television at 1, Discovery at 2, Liberty Media at 8, Time Warner at 7, Viacom at 2.

programming distributor to carry the unaffiliated program vendor.³⁷ Accordingly, we sought comment on: (1) procedures that we should establish for mandatory carriage; (2) the appropriate duration for mandatory carriage, given that we do not intend to require the multichannel distributor to carry the aggrieved programming service indefinitely; (3) guidelines that we should use to determine forfeiture amounts assessed against violators; (4) whether we should also consider ordering remedies other than forfeiture or mandatory carriage, such as establishment of prices, terms and conditions of sale, similar to the remedies specified in Section 628(e)(1).³⁸ In addition, Section 616(a)(6) provides that the Commission must delineate penalties to be assessed against any person filing a frivolous complaint pursuant to this section. We proposed to assess monetary forfeitures for frivolous complaints and we asked for comment on (1) the factors that should determine whether a complaint is frivolous; (2) guidelines to determine forfeiture amounts; and (3) whether we should base the forfeiture amount on the resources expended by the Commission in considering the claim and by the party defending against the claim.

Comments

21. Regarding Section 616(a)(4)'s requirement for an expedited review process for complaints by programming vendors, MPAA contends that the same standards of evidentiary support for allegations should apply to both complaints and answers. MPAA also claims that the availability of disputed carriage agreements with redacted proprietary terms would contribute to the body of precedent concerning prohibited conduct, thus deterring violations and minimizing the incidence of unsuccessful complaints. According to MPAA, these considerations appear to outweigh the need to maintain the confidentiality of the entire contract, which a distributor could still request in appropriate cases pursuant to existing Commission procedures for requesting confidential treatment.³⁹

22. Regarding remedies for violations, MPAA claims that mandatory carriage should be imposed as a remedy for most violations, and that the rules should enable the Commission to set terms and conditions of carriage in appropriate cases. When carriage is ordered as a remedy, MPAA argues that it should continue for a reasonable period on non-discriminatory terms until the parties notify the Commission that they have reached a voluntary and non-abusive agreement. MPAA also believes that the rules should require consideration of a complaint within 90 days to afford meaningful relief to programming vendors.⁴⁰ Alternatively, Continental asserts that the Commission should use a remedy of mandatory carriage only rarely, and should not require it in response to a distributor's mere denial of carriage.⁴¹ In addition, Continental believes that the Commission should not always rely on mandatory carriage, even when wrongful conduct has occurred.⁴² Finally, Cablevision states

³⁷ We note that the House Report states that "[t]his legislation provides new FCC remedies and does not amend, and is not intended to amend, existing antitrust laws. All antitrust and other remedies that can be pursued under current law by video programming vendors are unaffected by this section." House Report at 111.

³⁸ See 47 U.S.C. § 628(e)(1).

³⁹ See MPAA at 11-12.

⁴⁰ See MPAA at 12-14.

⁴¹ See Continental at 25.

⁴² *Id.* at 27.

that remedies imposed should reflect the harm to the aggrieved vendor. Cablevision recommends limiting the time period for filing a Section 616 complaint to 90 days after the aggrieved violation. If mandatory carriage is warranted, Cablevision contends that the Commission should limit such carriage to one year plus the time period between the Commission's order and the distributor's compliance, with terms of carriage that are reasonable and customary in the industry. Cablevision also recommends that any forfeitures imposed by the Commission on a cable operator should be related to the alleged harm to the programming vendor, and should not exceed the vendor's lost profits.⁴³

Discussion

23. General Procedures. We believe that a complaint process derived from the process we established for adjudicating undue influence complaints filed pursuant to Section 628(c)(2)(A) of the program access provisions of the 1992 Cable Act will provide the most flexible and expeditious means of enforcing the carriage agreement provisions of Section 616. Thus, we hereby adopt a system that promotes resolution of as many cases as possible on the basis of a complaint, answer and reply. Given the statute's explicit direction to the Commission to handle program carriage complaints expeditiously, additional pleadings will not be accepted or entertained unless specifically requested by the reviewing staff. Discovery will not necessarily be permitted as a matter of right in all cases, but only as needed on a case-by-case basis, as determined by the staff. Cases that require a relatively contained amount of discovery (limited to written interrogatories and document production) will be resolved at the staff level and shall be subject to review directly by the Commission. Interlocutory review shall be permitted only after the staff has ruled on the merits. The ex parte rules governing restricted proceedings will be applied.

24. As a practical matter, however, given that alleged violations of Section 616, especially those involving potentially "coercive" practices, will require an evaluation of contested facts and behavior related to program carriage negotiations, we believe that the staff will be unable to resolve most program carriage complaints on the sole basis of a written record as described above. Rather, we anticipate that resolution of most program carriage complaints will require an administrative hearing to evaluate contested facts related to the parties' specific negotiations. In such cases, after reviewing the complaint, answer and reply, the staff will inform the parties of its determination that resolution of the complaint will require a hearing before an administrative law judge (ALJ). The parties will be given the opportunity to resolve the dispute through the Commission's alternative dispute resolution process (ADR). If ADR is not selected or is unsuccessful, the case will be designated for hearing before an ALJ. Interlocutory applications for review in such cases will be similarly limited, and any decision rendered by an ALJ shall be directly appealable to the Commission. The ex parte rules governing restricted proceedings will be applied.

25. As we have required in the context of program access complaints,⁴⁴ to minimize the number of complaints brought before the Commission we will require that prior to filing a program carriage complaint, an aggrieved programming vendor must first inform the multichannel distributor of its belief that a violation of Section 616 of the 1992 Cable Act has occurred. Such notice must be sufficiently detailed so that the multichannel distributor can determine the specific nature of the potential complaint. This will give the multichannel

⁴³ See Cablevision et al at 27.

⁴⁴ See 47 C.F.R. §76.1003(a).

distributor a final opportunity to resolve the dispute without involving the Commission. If the parties still cannot reach resolution, the aggrieved program vendor should file its complaint along with evidence (an affidavit or copy of a certified letter) that the required notice to the multichannel distributor has been given.⁴⁶ Complaints failing to include such evidence will be dismissed. Finally, a one year statute of limitations will apply to carriage agreement complaints. Thus, a complaint filed pursuant to Section 616 must be filed within one year of the date on which one of the following occurs: (a) the complainant enters into a carriage agreement with a multichannel distributor, which the complainant alleges involves a violation of Section 616; (b) the multichannel distributor offers to carry a vendor's programming pursuant to terms that the complainant alleges to violate Section 616; or (c) the complainant notifies a multichannel distributor that it intends to file a complaint based on a request to carry programming that has been denied for reasons that allegedly involve a violation of Section 616.⁴⁷

26. Remedies. We note that the record offers very little guidance on the subject of remedies, and in particular, provides little insight on the appropriate scope and duration of relief in the form of mandatory carriage of the complainant's programming. Thus, we do not believe that it is possible to prescribe specific requirements for such relief at this time. Instead, we will determine the appropriate relief for program carriage violations on a case-by-case basis. Complainants will be expected to include a request for relief in their complaint, along with any relevant evidence and arguments in support of the relief requested. Available remedies and sanctions include forfeitures, mandatory carriage, or carriage on terms revised or specified by the Commission.⁴⁸

27. If a complainant seeks mandatory carriage, it should propose specific terms for such carriage, as well as an explanation of its rationale for proposing those terms, such as the existence of comparable terms in other program carriage agreements to which either the complainant or the defendant is a party, or comparable terms that have been approved by the Commission in other program carriage complaint cases. The defendant may oppose the proposed relief in its answer, and may offer alternative remedies without prejudice to any defenses it may raise or responses to the complainant's allegations. Given the wide range of behavior that may potentially give rise to a violation of the rules adopted herein to implement Section 616, we believe that a case-by-case determination of the appropriate remedies based on the specific behavior involved in a particular violation provides the only

⁴⁶ At this time, rather than establish a specific time period for the parties to attempt to resolve the dispute before an aggrieved party may file a complaint at the Commission, we will allow the aggrieved programming vendor to determine the appropriate duration of negotiations. At a minimum, however, the programming vendor must provide the potential defendant ten (10) days to respond to the notice, and allow a reasonable time thereafter - which will vary given the particular circumstances of each case -- for negotiations.

⁴⁷ We do not believe that 90 days, as suggested by Cablevision, provides a sufficient statute of limitations for program carriage complaints. We have adopted a one year statute of limitations for filing complaints alleging violations of our program access regulations, which may involve similar types of behavior and allegations. See 47 C.F.R. §76.1003(r). The commenters, including Cablevision, have not provided sufficient information that demonstrates the need for a more abbreviated statute of limitations for alleged violations of the program carriage requirements set forth in Section 616.

⁴⁸ For example, if the Commission finds that a carriage agreement includes a coerced financial interest or exclusivity requirement in violation of Section 616, the appropriate remedy may simply be to determine that such terms are unenforceable by the multichannel distributor, and to revise the existing agreement, ordering carriage on the same terms negotiated in that agreement without the coerced financial interest provisions or coerced promise of exclusivity.

reasonable and meaningful method of enforcing Section 616.

28. With respect to forfeitures, we disagree with the suggestion by Cablevision that the forfeiture amount must be related to the alleged harm to the programming vendor, or that it should be limited to the vendor's "lost profits." Such a standard has not provided the basis for FCC forfeitures in other contexts, nor is it set forth in the statute. Rather, the Commission will rely upon its forfeiture guidelines to determine the appropriate penalty.⁴⁸

Complaint Process

29. Complaint. When filing a complaint, the burden of proof will be on the programming vendor to establish a *prima facie* showing that the defendant multichannel distributor has engaged in behavior that is prohibited by Section 616. The complaint must identify the relevant Commission regulation allegedly violated, and must describe with specificity the behavior constituting the alleged violation. The complainant must establish that it is a video programming vendor, as defined in Section 76.1300(d) of the Commission's rules, and that the defendant is an multichannel distributor as defined in Section 76.1300(c).⁴⁹ For complaints alleging discriminatory treatment that favors "affiliated" programming vendors,⁵⁰ the complainant must provide evidence that the defendant has an attributable interest in the allegedly favored programming vendor, as set forth in Section 76.1300(a). The complaint must be supported by documentary evidence of the alleged violation, or by an affidavit (signed by an authorized representative or agent of the complaining programming vendor) setting forth the basis for the complainant's allegations. If the complaint involves a specific written program carriage agreement, that agreement should be included with the complaint with proprietary information redacted. We agree with MPAA that the availability of disputed carriage agreements with redacted proprietary terms will contribute to the body of precedent concerning prohibited conduct, and will assist parties in future negotiations by deterring violations and minimizing the instance of unsuccessful or frivolous complaints. As stated above, a one-year statute of limitations will be applied to program carriage complaints. Finally, the complaint should specify the relief requested. If the complainant seeks mandatory carriage, the complaint should specify the desired duration and terms of such carriage, and should include the rationale and any documentary evidence supporting such request. If the complainant seeks modification of an existing carriage agreement, it should specify the terms it seeks to change and should propose specific substitute provisions.

30. Answer and Reply. The defendant will be given thirty (30) days to file its answer responding to the complainant's allegations. The answer should be supported by documentary evidence, or an affidavit (signed by an officer of the defendant) that refutes each allegation made by the complainant or supports any affirmative defenses the defendant may raise. The answer should also include the defendant's response to the relief requested by complainant, as well as any documentary evidence that supports defendant's position.

⁴⁸ See Standards for Assessing Forfeitures, 8 FCC Rcd 6215 (1993).

⁴⁹ See Appendix D.

⁵⁰ See Appendix D.

The complainant will be given twenty (20) days to respond to the defendant's answer.⁵¹

31. **Staff Determination.** After reviewing the complaint, answer and reply, the staff will make what, for the purposes of these proceedings, we will deem a prima facie determination. If the complainant has not made a prima facie case of a violation of our carriage agreement regulations the complaint will be dismissed. If the staff determines that the complainant has made a prima facie showing, the staff will so rule, and will determine whether it can grant relief on the basis of the existing record. If the record is not sufficient to resolve the complaint and grant relief, the staff will determine and outline the appropriate procedures for discovery, or will refer the case to an ALJ for an administrative hearing.

32. **Discovery.** The staff will determine what additional information is necessary to resolve the complaint, and will develop a discovery process and timetable to resolve the dispute expeditiously.⁵² Wherever possible, to avoid discovery disputes and arguments pertaining to relevance, the staff will itself conduct discovery by issuing appropriate letters of inquiry or requiring that specific documents be produced. The staff will determine whether the materials ordered to be produced to the opposing party should also be filed with the Commission. The staff may order that any documents or answers to such inquiries will be submitted to the Commission and to the opposing party within a specified time period. Any information exchanged through discovery may be subjected to a protective order upon an appropriate showing by the relevant party that the information is proprietary.⁵³ If the staff cannot readily determine what additional information is needed to resolve the dispute, it

⁵¹ As stated above, unless specifically requested by the Commission or its staff, additional pleadings such as motions to dismiss or motions for summary judgment will not be considered. We intend to keep pleadings to a minimum to comply with the statutory directive for an expedited adjudicatory process.

⁵² The staff, including ALJs, is directed herein to resolve all program carriage disputes as expeditiously as possible. Given the complexity of the issues that may be raised in such cases, as well as the likely need to resolve factual disputes, we do not believe that it is practicable or advisable to add to the administrative burdens already placed on the FCC staff by the 1992 Cable Act by imposing, at the outset, a uniform requirement on the staff to dispose of these cases within 90 days, as was suggested by MPAA in its comments.

⁵³ See 47 C.F.R. § 0.459. The parties will be required to take reasonable steps to prevent unauthorized access to protected documents and information. Access to protected materials will be limited to the individual complainant or defendant, the attorneys listed with the Commission as representatives of the parties, their staffs and any expert advisors or analysts. Each party is responsible for informing anyone with access to protected information that the documents or information contained therein may not be disclosed to anyone or any entity other than the Commission. Each party may require the other to disclose in writing the names of all persons who have access to documents and information subject to the protective order. The information contained in any proprietary materials may not be disclosed to any person not authorized to receive such information, and may not be used in any activity or function other than the prosecution or defense of the case before the Commission. Each individual who is provided access to the information by the opposing party shall sign a notarized statement, or shall certify under penalty of perjury, that the individual has personally reviewed the Commission's regulations and understands the limitations they impose upon the signing party. No copies of proprietary materials may be made except copies to be used by authorized persons. Each party will be required to maintain a log recording the number of copies made of all proprietary information and the persons to whom the copies were provided. Upon termination of the proceeding, all originals and reproductions of any proprietary materials, along with the log recording persons who received copies of such materials, will be provided to the producing party. Upon final termination of the proceeding, any notes or other work product derived in whole or in part from the proprietary materials of an opposing or third party shall be destroyed. The parties may agree to additional reasonable measures to protect the confidentiality of information as the circumstances may require. Such agreement should be confirmed in writing and filed with the Commission. Any failure to abide by the terms of the protective order may result in the imposition of sanctions, including dismissal of the complaint, or censure, suspension or disbarment of the attorneys involved. See 47 C.F.R. § 1.24. See also Appendix D.

should refer the complaint to an ALJ. The staff may also hold a status conference to conduct discovery, and is authorized to issue oral rulings at the status conference which will be confirmed to the parties in writing.

33. Upon the conclusion of any discovery, the staff may direct the parties to submit briefs, together with proposed findings of fact, conclusions of law and proposed remedies on a specified date. Reply briefs should be filed within the following fifteen (15) days. The parties will be given an additional five (5) days in which to file redacted copies of briefs and reply briefs for the public record when they contain confidential or proprietary information that is subject to a protective order. After a ruling on the merits, either party may file an application for review of the staff's determinations directly to the Commission. This ruling will include a timetable for compliance, and will become effective upon release.³⁴ In the absence of a stay, any relief or remedies imposed therein, with the exception of an order requiring mandatory carriage that would require the defendant to delete other programming carried on its distribution system in order to carry complainant's programming, will remain in effect pending appeal. Stays will not be routinely granted. If the staff orders mandatory carriage of the complainant's programming, and such carriage would necessitate deletion of other programming from the defendant's distribution system, the defendant need not carry the programming until the Commission has issued a final ruling on the application for review. In such cases, however, if the Commission upholds in its entirety the relief granted by the staff ruling, the defendant will be required to carry the complainant's programming for an additional time period, beyond that originally ordered by the staff, equal to the amount of time that elapsed between the staff order and the Commission's final decision, on the terms ordered by the staff and upheld by the Commission.

34. Referral to ALJ. If the staff determines that the complainant has established a prima facie case, and that disposition of the complaint will require the resolution of factual disputes or other extensive discovery, it will so advise the parties in writing. If both parties agree, they may elect to resolve the dispute through ADR. If the parties do not agree to ADR, or if ADR is unsuccessful, the staff will refer the complaint to an ALJ for an administrative hearing. As stated above, we anticipate that the majority of the program carriage complaints filed will require an administrative hearing to resolve factual disputes related to the negotiations between the parties. ALJs are expected to resolve program carriage complaints expeditiously, and should hold an immediate status conference to establish timetables for discovery, hearing and submission of briefs and proposed findings of fact and conclusions of law. Interlocutory appeals shall be permitted only after a ruling on the merits. A ruling on the merits by the ALJ must be appealed directly to the Commission. Such a ruling will include the relief granted, a timetable for compliance, and will become effective upon release. In the absence of a stay, any relief or remedies imposed therein, with the exception of an order for mandatory carriage that would require deletion of other programming, will remain in effect pending appeal. Stays will not be routinely granted. If the ALJ orders mandatory carriage of the complainant's programming, and such carriage would necessitate deletion of other programming from the defendant's distribution system, the defendant need not carry the programming until the Commission has issued a final ruling on the appeal. As in the case of a staff order, if the Commission upholds the relief granted by the ALJ in its entirety, the defendant will be required to carry the complainant's programming for an additional time period, beyond that originally ordered by the ALJ, equal to the amount of time that elapsed between the ALJ's decision and the Commission's ruling on the appeal, pursuant to the terms ordered by the ALJ and upheld by the Commission.

³⁴ See 47 C.F.R. §1.102(b).

Frivolous Complaints

35. The regulations we have adopted to implement the proscriptions contained in Section 616 of the 1992 Cable Act are intended to avoid constraining aggrieved programming vendors from filing legitimate complaints, but at the same time must afford the statutory protection to multichannel distributors from frivolous complaints. We note that the commenters have offered no suggestions as to what should be deemed a "frivolous" program carriage complaint. Accordingly, as in the case of program access complaints filed under Section 628 of the 1992 Cable Act,⁵⁶ we adopt herein a regulation prohibiting the filing of frivolous complaints alleging a violation of Section 616.⁵⁷ Our regulations will also require that all complaints alleging violations of Section 616 must be accompanied by an affidavit signed by an authorized officer or agent of the complainant. To enforce the prohibition against filing frivolous complaints, we will assess monetary forfeitures in accordance with Section 503 of the Communications Act and our forfeiture regulations and policies. For purposes of Section 503(b)(5), one finding that a non-licensee complainant has filed a frivolous complaint under any provision of Section 616 will be sufficient to fulfill the citation requirements of the forfeiture provisions.⁵⁷

36. With respect to the type of complaints that the Commission will deem frivolous, we believe that complaints filed without any effort to ascertain or review the underlying facts should be considered frivolous. We expect that the requirement adopted herein that complaints be accompanied by affidavit should assure that such complaints are based on specific and substantiated facts. When this is not the case, the complainant will be liable for sanctions for violating our rule against frivolous complaints. Similarly, complainants will be liable for sanctions for filing a frivolous complaint when that complaint is based on arguments that have been specifically rejected by the Commission in other proceedings, or for filing a complaint that has no plausible basis for relief. We expect that further standards with respect to frivolous complaints will develop as specific cases are adjudicated.

V. CONCLUSION

37. In this Second Report and Order, we adopt rules to implement the new Section 616 of the Communications Act regarding program carriage agreements. Given the program access regulations previously adopted, we recognize that enhanced availability of multichannel programming to the public will also depend upon the ability of program vendors to sell their services without becoming subject to coercive or discriminatory practices. Therefore, we seek to establish regulations that prevent multichannel programming distributors from entering into carriage agreements that are conditioned on concessions of various rights, including financial interests or exclusivity. By adopting this process to identify prohibited conduct in negotiating program carriage agreements, we believe that the implementing regulations remain consistent with the general approach in this proceeding to serve the congressional intent to prohibit unfair and anticompetitive actions without restraining the amount of multichannel programming available by precluding legitimate business practices

⁵⁶ See 47 C.F.R. §76.1003(q).

⁵⁸ See Appendix D.

⁵⁷ See 47 U.S.C. § 503(b)(5).

common to a competitive marketplace.

VI. ADMINISTRATIVE MATTERS

A. Final Regulatory Flexibility Analysis

38. The Final Regulatory Flexibility Analysis is attached as Appendix C.

B. Paperwork Reduction Act Statement

39. The decision in this proceeding has been analyzed with respect to the Paperwork Reduction Act of 1980, and has been found to impose new or modified requirements or burdens upon the public. Implementation of any new or modified requirements will be subject to approval by the Office of Management and Budget as prescribed by the Act.

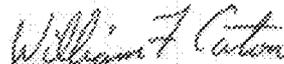
C. Ordering Clauses

40. Accordingly, IT IS ORDERED that, pursuant to Sections 2(a), 4(i), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 152(a), 154(i), and 303(r), Part 76 of the Commission's Rules, 47 C.F.R. Part 76, IS AMENDED as set forth in Appendix C, below, effective January 10, 1994.

41. IT IS FURTHER ORDERED that MM Docket No. 92-265 IS TERMINATED.

42. For further information in this proceeding, contact James Coltharp, Mass Media Bureau, (202) 632-6302; Diane Hofbauer, Office of the General Counsel, (202) 632-6990.

FEDERAL COMMUNICATIONS COMMISSION


William F. Caton
Acting Secretary

Appendix A: Section 12 of the
Cable Television Consumer Protection and Competition Act of 1992

SEC. 12. REGULATION OF CARRIAGE AGREEMENTS.

Part II of title VI of the Communications Act of 1934 is amended by inserting after section 615 (as added by section 5 of this Act) the following new section:

"SEC. 616. REGULATION OF CARRIAGE AGREEMENTS.

"(a) Regulations.--Within one year after the date of enactment of this section, the Commission shall establish regulations governing program carriage agreements and related practices between cable operators or other multichannel video programming distributors and video programming vendors.

Such regulations shall--

"(1) include provisions designed to prevent a cable operator or other multichannel video programming distributor from requiring a financial interest in a program service as a condition for carriage on one or more of such operator's systems;

"(2) include provisions designed to prohibit a cable operator or other multichannel video programming distributor from coercing a video programming vendor to provide, and from retaliating against such a vendor for failing to provide, exclusive rights against other multichannel video programming distributors as a condition of carriage on a system;

"(3) contain provisions designed to prevent a multichannel video programming distributor from engaging in conduct the effect of which is to unreasonably restrain the ability of an unaffiliated video programming vendor to compete fairly by discriminating in video programming distribution on the basis of affiliation or nonaffiliation of vendors in the selection, terms, or conditions for carriage of video programming provided by such vendors;

"(4) provide for expedited review of any complaints made by a video programming vendor pursuant to this section;

"(5) provide for appropriate penalties and remedies for violations of this subsection, including carriage; and

"(6) provide penalties to be assessed against any person filing a frivolous complaint pursuant to this section.

"(b) Definition.--As used in this section, the term 'video programming vendor' means a person engaged in the production, creation, or wholesale distribution of video programming for sale."

Appendix B: List of Commenters

Initial Comments

1. Cablevision Industries Corporation, Comcast Cable Communications, Inc., and Cox Cable Communications
2. Caribbean Satellite Network, Inc.
3. Consumer Satellite Systems, Inc.
4. Continental Cablevision, Inc.
5. Discovery Communications, Inc.
6. Liberty Media Corporation
7. Motion Picture Association of America, Inc.
8. Tele-Communications, Inc.
9. Time Warner Entertainment Company, L.P.
10. WJB-TV Fort Pierce, L.P.

Reply Comments

1. Motion Picture Association of America
2. Sammons Communications, Inc.
3. Tele-communications, Inc.
4. Time Warner Entertainment Company, L.P.
5. Viacom International Inc.

Appendix C: Final Regulatory Flexibility Analysis

Pursuant to the Regulatory Flexibility Act of 1980, the Commission's final analysis is as follows:

I. Need and purpose of this action:

This action is taken to implement Section 12 of the Cable Television Consumer Protection and Competition Act of 1992.

II. Summary of the issues raised by the public comments in response to the Initial Regulatory Flexibility Analysis:

There were no comments submitted in response to the Initial Regulatory Flexibility Analysis.

III. Significant alternatives considered:

We have analyzed the comments submitted in light of our statutory directives and have formulated regulations which, to the extent possible, minimize the regulatory burden placed on entities covered by the program carriage agreement provisions of the Cable Act. Different entities will be affected in different ways. Some programming distributors may be forced to alter their policies for negotiating for program carriage, while other vendors may receive benefits in increased flexibility in selling their program services.

IV. Federal Rules which overlap, duplicate or conflict with these rules.

None

V. Paperwork Reduction Act Statement

The proposal contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980 and found to impose new and modified information collection requirements on the public. Implementation of any new or modified requirements will be subject to approval by the Office of Management and Budget as prescribed by the Act.

Appendix D: Rules

Part 76 of Title 47 of the Code of Federal Regulations is amended as follows.

PART 76 -- CABLE TELEVISION SERVICE

1. The authority citation for part 76 is revised to read as follows:

Authority: 47 U.S.C. 152, 153, 154, 301, 303, 307, 308, 309, 532, 533, 535, 536, 542, 543, 552.

2. The heading in Subpart Q is added to read as follows:

Subpart Q -- Regulation of Carriage Agreements

3. Subpart Q is added to read as follows:

§76.1300 Definitions

As used in this subpart:

(a) **Affiliated.** For purposes of determining whether a video programming vendor is "affiliated" with a multichannel video programming distributor, as used in this subpart, the definitions for "attributable interest" contained in the notes to §76.501 of this chapter shall be used, provided, however that:

(1) the single majority shareholder provisions of Note 2(b) and the limited partner insulation provisions of Note 2(g) shall not apply; and

(2) the provisions of Note 2(a) regarding five (5) percent interests shall include all voting or nonvoting stock or limited partnership equity interests of five (5) percent or more.

(b) **Buying groups.** The term "buying group" or "agent," for purposes of the definition of a multichannel video programming distributor set forth in paragraph (e) of this section, means an entity representing the interests of more than one entity distributing multichannel video programming that:

(1) Agrees to be financially liable for any fees due pursuant to a satellite cable programming, or satellite broadcast programming, contract which it signs as a contracting party as a representative of its members or whose members, as contracting parties, agree to joint and several liability; and

(2) Agrees to uniform billing and standardized contract provisions for individual members; and

(3) Agrees either collectively or individually on reasonable technical quality standards for the individual members of the group.

(c) **Multichannel video programming distributor.** The term "multichannel video programming distributor" means an entity engaged in the business of making available for purchase, by subscribers or customers, multiple channels of video programming. Such entities include, but are not limited to, a cable operator, a multichannel multipoint distribution service, a direct broadcast satellite service, a television receive-only satellite program distributor, and a satellite master antenna television system operator, as well as buying groups or agents of all such entities.

(d) **Video programming vendor.** The term "video programming vendor" means a person engaged in the production, creation, or wholesale distribution of video programming for sale.

4. Section 76.1301 is added to Subpart Q to read as follows:

§76.1301 Prohibited Practices

(a) **Financial Interest.** No cable operator or other multichannel video programming distributor shall require a financial interest in any program service as a condition for carriage on one or more of such operator's/provider's systems.

(b) **Exclusive rights.** No cable operator or other multichannel video programming distributor shall coerce any video programming vendor to provide, or retaliate against such a vendor for failing to provide, exclusive rights against any other multichannel video programming distributor as a condition for carriage on a system.

(c) **Discrimination.** No multichannel video programming distributor shall engage in conduct the effect of which is to unreasonably restrain the ability of an unaffiliated video programming vendor to compete fairly by discriminating in video programming distribution on the basis of affiliation or non-affiliation of vendors in the selection, terms, or conditions for carriage of

video programming provided by such vendors.

5. Section 76.1302 is added to Subpart Q to read as follows:

§76.1302 Adjudicatory Proceedings

Any video programming vendor aggrieved by conduct that it alleges to constitute a violation of the regulations set forth in this subpart may commence an adjudicatory proceeding at the Commission.

(a) **Notice required.** Any aggrieved video programming vendor intending to file a complaint under this section must first notify the defendant multichannel video programming distributor that it intends to file a complaint with the Commission based on actions alleged to violate one or more of the provisions contained in §76.1301 of this subpart. The notice must be sufficiently detailed so that its recipient(s) can determine the specific nature of the potential complaint. The potential complainant must allow a minimum of ten (10) days for the potential defendant(s) to respond before filing a complaint with the Commission.

(b) **General pleading requirements.** Carriage agreement complaint proceedings are generally resolved on a written record consisting of a complaint, answer and reply, but may also include other written submissions such as briefs and written interrogatories. All written submissions, both substantive and procedural, must conform to the following standards:

(1) Pleadings must be clear, concise, and explicit. All matters concerning a claim, defense or requested remedy should be pleaded fully and with specificity.

(2) Pleadings must contain facts which, if true, are sufficient to constitute a violation of the Act or Commission order or regulation, or a defense to such alleged violation.

(3) Facts must be supported by relevant documentation or affidavit.

(4) Legal arguments must be supported by appropriate judicial, Commission, or statutory authority.

(5) Opposing authorities must be distinguished.

(6) Copies must be provided of all non-Commission authorities relied upon which are not routinely

available in national reporting systems, such as unpublished decisions or slip opinions of courts or administrative agencies.

(7) Parties are responsible for the continuing accuracy and completeness of all information and supporting authority furnished in a pending complaint proceeding. Information submitted, as well as relevant legal authorities, must be current and updated as necessary and in a timely manner at any time before a decision is rendered on the merits of the complaint.

(c) **Complaint.**

(1) A carriage agreement complaint shall contain:

(i) The name of the complainant and defendant;

(ii) The address and telephone number of the complainant, the type of multichannel video programming distributor that describes the defendant, and the address and telephone number of the defendant;

(iii) The name, address and telephone number of complainant's attorney, if represented by counsel;

(iv) Citation to the section of the Communications Act and/or Commission regulation or order alleged to have been violated;

(v) A complete statement of facts, which, if proven true, would constitute such a violation;

(vi) Any evidence that supports the truth or accuracy of the alleged facts, including, when relevant, any written carriage agreement between the complainant and the defendant, with proprietary information redacted;

(vii) Evidence that supports complainant's belief that the defendant, where necessary, meets the attribution standards for application of the carriage agreement regulations;

(viii) For complaints alleging a violation of Section 76.1301(c) of this subpart, evidence that supports complainant's claim that the effect of the conduct complained of is to unreasonably restrain the ability of the complainant to compete fairly;

(ix) The specific relief sought, and the rationale and any evidence in support of the relief sought.

(2) Every complaint alleging a violation of the carriage agreement requirements shall be accompanied by a sworn affidavit signed by an authorized officer or agent of the complainant. This affidavit shall contain a statement that the affiant has read the complaint and that to the best of the affiant's knowledge, information and belief formed after reasonable inquiry it is well grounded in fact and is warranted under Commission regulations and policies or is a good faith argument for the extension, modification or reversal of such regulations or policies, and it is not interposed for any improper purpose. If the complaint is signed in violation of this rule, the Commission upon motion or its own initiative shall impose upon the complainant an appropriate sanction.

(3) The following format may be used in cases to which it is applicable, with such modifications as the circumstances may render necessary: