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Federal Communications Commission

FCC 99-258

DISPATCHED BY

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of:)	
)	
1998 Biennial Regulatory Review--)	CS Docket No. 98-54
)	
Part 76 - Cable Television Service)	
Pleading and Complaint Rules)	

ORDER ON RECONSIDERATION

Adopted: September 23, 1999

Released: September 29, 1999

By the Commission:

I. INTRODUCTION

1. In *1998 Biennial Regulatory Review -- Part 76 - Cable Television Service Pleading and Complaint Rules*, Report and Order ("*Part 76 Order*"), the Commission adopted rules to reorganize and simplify the Part 76 Cable Television Service pleading and complaint rules.¹ A petition for reconsideration of the *Part 76 Order* was filed by EchoStar Communications Corporation ("EchoStar").² For the reasons discussed below, EchoStar's petition is denied.

II. BACKGROUND

2. The *Part 76 Order* was adopted as an adjunct to the Commission's 1998 biennial regulatory review pursuant to Section 11 of the Telecommunications Act of 1996 ("*1996 Act*").³ Section 11 of the 1996 Act instructs the Commission "to conduct a biennial review of regulations that apply to operations and activities of any provider of telecommunications service and to repeal or modify any regulation it determines to be no longer in the public interest."⁴ Although Section 11 does not specifically refer to cable operators, the Commission determined that the first biennial review presented an opportunity for a thorough examination of all of the Commission's regulations.

¹ *1998 Biennial Regulatory Review -- Part 76 - Cable Television Service Pleading and Complaint Rules*, Report and Order, 14 FCC Rcd 418 (1999).

² Comments to the petition were filed by Ameritech New Media, Inc. ("Ameritech") and Fox Sports Net LLC ("Fox"). EchoStar filed a reply to the comments.

³ 47 U.S.C. § 161; see FCC News Release, *1998 Biennial Review of FCC Regulations Begun Early* (Nov. 18, 1997).

⁴ 47 U.S.C. § 161.

3. The *Part 76 Order* implemented several rule changes designed to consolidate the procedural requirements for most Part 76 filings.⁵ Provisions rendered redundant by the amendments adopted in the *Part 76 Order* were eliminated. Additionally, the *Part 76 Order* adopted a procedural amendment clarifying essentially similar provisions related to the limitations period for filing program access, program carriage and open video system complaints.⁶ These changes made the Part 76 rules more concise and easier to use and serve the public interest by lessening confusion and reducing the regulatory burden on franchising authorities, cable operators, and other interested persons making filings under Part 76.⁷

III. DISCUSSION

4. Congress enacted the *Cable Television Consumer Protection and Competition Act of 1992* ("1992 Cable Act"), which instructed the Commission, *inter alia*, to promulgate regulations that prohibit discrimination by a satellite cable programming vendor in which a cable operator has an attributable interest.⁸ In enacting the program access provisions, which are codified in Section 628 of the Communications Act,⁹ Congress was concerned about the market power of wired cable companies and cable programmers in which cable operators have an attributable interest.¹⁰ The program access provisions were designed to ensure that competition to incumbent cable operators develops and to encourage competition from emerging competitors.¹¹ Similarly, the 1992 Cable Act added Section 616 to the Communications Act, which governs the agreements between cable operators, or other multichannel video programming distributors ("MVPDs"), and the programming services they distribute.¹² Section 616 was intended to prevent a MVPD from requiring a financial interest in a program service or exclusive rights as a

⁵Part 76 contains the Commission's regulations for cable television service. See 47 C.F.R. §§ 76.1 - 76.1514.

⁶See 47 C.F.R. §§ 76.1003(f), 76.1302(e), 76.1513(g) (renumbered by the *Part 76 Order* from §§ 76.1003(r), 76.1302(r) and 76.1513(t) respectively).

⁷*Part 76 Order*, 14 FCC Rcd at 418.

⁸47 U.S.C. § 548.

⁹47 U.S.C. § 548.

¹⁰1992 Cable Act §§ 2(a)(2), 2(b)(5), 106 Stat. 1460, 1463.

¹¹47 C.F.R. § 548(a). In *Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992*, First Report and Order, 8 FCC Rcd 3359 (1993), the Commission adopted the program access rules and set forth procedures for adjudicating complaints.

¹²47 U.S.C. § 536.

condition for carriage on the MVPD's system.¹³ The Telecommunications Act of 1996 added Section 653 to the Communications Act, which establishes the open video system framework, an option for the distribution of video programming other than as a cable operator.¹⁴

5. The dispute resolution processes in Part 76 for program access, program carriage and open video system complaints follow similar procedural rules that were designed to achieve an expedient resolution of complaints. The rules contain three like provisions which set forth a one year limitations period for bringing complaints.¹⁵ The rules list three events that trigger the running of the limitations period: (1) complainant and defendant enter into a contract alleged to violate the rules; (2) unrelated to an existing contract, defendant makes an offer to complainant that allegedly violates the rules; or (3) defendant unreasonably refuses to negotiate with complainant.¹⁶ In the *Part 76 Order*, the Commission clarified the appropriate interaction between the limitations period for alleging an existing contract violates the rules and the limitations period for alleging that an offer to the complainant violates the rules. For example, Section 76.1003(f), the program access limitations period, was amended to include the highlighted language:

(f) Time limit on filing of complaints. Any complaint filed pursuant to this subsection must be filed within one year of the date on which one of the following events occurs:

- (1) The satellite cable programming or satellite broadcast programming vendor enters into a contract with the complainant that the complainant alleges to violate one or more of the rules contained in this subpart; or
- (2) The satellite cable programming or satellite broadcast programming vendor offers to sell programming to the complainant pursuant to terms that the complainant alleges to violate one or more of the rules contained in this subpart, **and such offer to sell programming is unrelated to any existing contract between the**

¹³See *Implementation of Sections 12 and 19 of the Cable Television Consumer and Protection Act of 1992; Development of Competition and Diversity in Video Programming Distribution and Carriage*, Second Report and Order, 9 FCC Rcd 2642 (1993).

¹⁴See *Implementation of Section 302 of the Telecommunications Act of 1996; Open Video Systems*, Second Report and Order, 11 FCC Rcd 18223, 18226 (1996).

¹⁵47 C.F.R. §§ 76.1003(f), 76.1302(e), 76.1513(g).

¹⁶*Id.*

**complainant and the satellite cable programming or satellite
broadcast programming vendor.¹⁷**

The rules adopted in the *Part 76 Order* explain that complaints based on allegedly discriminatory contracts must be brought within one year of entering into the contract and that an allegedly discriminatory offer to amend such contract made more than one year after the execution thereof does not reopen such contract to program access liability. For example, in the program access context, this amendment explains that an offer to amend an existing contract that has been in effect for more than one year does not reopen the existing contract to complaints that the provisions thereof are discriminatory.¹⁸

6. Petitioner EchoStar seeks reconsideration of the adoption of this language. EchoStar argues that these amendments effect a significant rule change that was not addressed in the *Notice of Proposed Rule Making* ("*NPRM*") that led to the *Part 76 Order*.¹⁹ EchoStar maintains that the adoption of the rules is inconsistent with the Administrative Procedure Act ("*APA*") because substantive changes were made to the Commission's rules without providing notice and opportunity for comment.²⁰ Ameritech New Media, Inc., ("*Ameritech*") supports EchoStar, maintaining that the amendment establishes a significant new restriction on allowable program access complaints by limiting the events that can trigger program access review.²¹ Ameritech believes that the amendments do not satisfy the *APA* as a logical outgrowth of the proposals in the *NPRM*. Ameritech contends that the public could not have contemplated these amendments because the *NPRM* stated that the Commission was proposing to standardize the *Part 76* complaint procedures and the three rules were already procedurally the same prior to the amendment.²²

7. In opposition, Fox Sports Net LLC ("*Fox*") maintains that the amendments are consistent with the stated purpose of the *Part 76 Order* to reorganize and simplify the *Part 76* pleading and complaint process rules.²³ Fox argues that the amendments clarify when the limitations period commences for complaints against existing contracts and complaints not based on existing contracts. Fox believes that since the rules adopted are interpretive rules which

¹⁷See 47 C.F.R. § 76.1003(f). Similar language was added to 47 C.F.R. §§ 76.1302(e)(2) and 76.1513(g)(2).

¹⁸*Part 76 Order*, 14 *FCC Rcd* at 424.

¹⁹EchoStar Petition at 2, citing 1998 *Biennial Regulatory Review -- Part 76 - Cable Television Service Pleading and Complaint Rules*, Notice of Proposed Rule Making, 13 *FCC Rcd* 10644 (1998).

²⁰EchoStar Petition at 1, citing 5 U.S.C. § 553(b).

²¹Ameritech Comments at 4.

²²*Id.* at 4.

²³Fox Comments at 4.

merely explain how the existing rules would be enforced, the Commission was not required to publish its intentions in advance.²⁴ In reply, EchoStar maintains that the amendments do not constitute interpretive rules because the change is binding on potential Part 76 complainants, and accordingly, covered by the notice and comment requirement of the APA.²⁵

8. We believe that the amendments conform with APA requirements. The APA requires publication of proposed agency rules that are substantive followed by a period of public consideration and comment.²⁶ Section 553 of the APA excepts from the notice and comment requirements interpretative and procedural rules.²⁷ Interpretative rules are agency statements of general effect in which the agency announces an interpretation of a statute or of another rule.²⁸ Interpretative rules thus serve an advisory function by explaining the meaning given to a particular word or phrase in a statute or rule that an agency administers.²⁹ Procedural rules do not alter the substantive rights or interests of a party, but rather govern the manner in which substantive positions are presented to the agency.³⁰

9. The amendments at issue clarified the time period for filing complaints pursuant to the existing rules. The amendments are not substantive rule changes that impose new obligations, but at most clarify how to file complaints under the existing rules, and thus, are interpretive and/or procedural rules that are excepted from the notice and comment requirements.³¹ The amendments did not create any new rights or obligations. The basic tenet that entering into a contract precludes an unlimited time frame for bringing certain complaints was explicitly set forth in the rules prior to their amendment.³² The policy for the establishment

²⁴*Id.*

²⁵EchoStar Reply at 4.

²⁶See 5 U.S.C. § 553(b), (c).

²⁷See 5 U.S.C. § 553(b)(3)(A).

²⁸*Id.*

²⁹See *US West Communications, Inc. and Eagle Telecommunications, Inc. Joint Petition for Waiver of the Definition of "Study Area" Contained in Part 36*, 12 FCC Rcd 4644, 4651 (1997).

³⁰See *JEM Broadcasting Co., Inc. v. FCC*, 22 F.3d 320, 326 (D.C. Cir. 1994).

³¹See *White v. Shalala*, 7 F.3d 296, 303 (2d Cir. 1993) (central question in determining whether rule is subject to notice and comment requirements of the APA is whether agency is exercising its rule making power to clarify an existing statute or regulation, or to create new law, rights or duties).

³²See e.g., 47 C.F.R. 76.1003(r)(1) ("Any complaint filed pursuant to this subsection must be filed within one year of the date on which . . . satellite cable programming or satellite broadcast programming vendor enters into a contract with the complainant that the complainant alleges to violate one or more of the rules contained in this subpart.")

of a limitations period was delineated in the proceedings adopting the original rules.³³ The fact that EchoStar and commenter, Ameritech, misunderstood or disagree with the Commission's reading of the limitations period provisions at issue in this proceeding does not transform the amendments adopted in the *Part 76 Order* from interpretive and/or procedural rules to substantive amendments.

10. In the *Part 76 Order*, we spell out more clearly the previously articulated criteria for bringing specific types of complaints. We intended that the amendments would apprise the public that subsequent negotiations do not reopen an existing contract to program access, program carriage, or open video system complaints after one year has elapsed from the execution of the contract. Advising the public regarding its construction and application of the rules which it administers is within the Commission's rights, and consistent with the APA.³⁴

11. As discussed above, we believe that the notice and comment provisions of the APA do not apply to the amendments to the program access, program carriage and open video system rules. In addition, we disagree with petitioner's contention that the amendments are unrelated to the objectives of the biennial review. To the contrary, we believe that the amendments were undertaken in a manner consistent with the purposes of the *Part 76 Order*. The purpose of the review of the Part 76 rules was to make amendments to simplify and clarify the procedural rules so that the public would find them less confusing and easier to use. The *Part 76 Order* noted that confusion regarding the limitation period for program access complaints led to the filing of untimely complaints.³⁵ The amendments comport with the goals of the streamlining proceeding by providing greater detail regarding the procedures encompassed in the original regulations. The amendments give complainants a clearer explanation of the existing limitations period for filing certain complaints. Contrary to petitioner's assertion, the amendments do not create any new duties. Under Section 76.1003(f), parties were required to bring program access complaints within a specified time frame. The start of the limitations period depended on whether the parties in dispute had entered into a contract. If a contract had been executed, the rules required complaints to be filed within one year of the date of the contract. This obligation remains the same under the amended rule, although the obligation is now better explained. This conclusion is supported by a Cable Services Bureau decision issued prior to the *Part 76 Order*.³⁶ In

³³"Our regulations regarding program access are designed . . . in a manner that is faithful to the policy of Congress to . . . rely on the marketplace, to the maximum extent feasible . . ." *Implementation of Sections 12 and 19 of the Cable Television Consumer and Protection Act of 1992*, First Report and Order, 8 FCC Rcd 3359, 3369 (1993); Second Report and Order, 9 FCC Rcd 2642, 2653 n.46 (adopting program carriage limitations period similar to program access because allegations may involve similar types of behavior). See also *Implementation of Section 302 of the Telecommunications Act of 1996*, Second Report and Order, 11 FCC Rcd 18223, 18343 (1996) (adoption of rules to model open video system dispute resolution process after the rules governing program access disputes).

³⁴See *Paralyzed Veterans v. of America v. D.C. Arena, L.P.*, 117 F.3d 579, 588 (D. C. Cir. 1997).

³⁵*Part 76 Order*, 14 FCC Rcd at 424.

³⁶*EchoStar Communications Corp. v. Fox Liberty Networks, et al.*, 13 FCC Rcd 21841 (1998).

EchoStar v. Fox, the Bureau dismissed as untimely a program access complaint because the complaint was not brought within one year of contract execution. The Bureau considered the triggering event of the limitations period the execution of the contract. The Bureau found that the fact that defendant subsequently offered to amend the contract after it had been in effect for more than one year did not reopen the contract to program access liability. The Bureau recently reaffirmed this conclusion on reconsideration.³⁷

IV. ORDERING CLAUSES

12. IT IS ORDERED that the Petition for Reconsideration filed by EchoStar Communications Corporation IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION



Magalie Roman Salas
Secretary

³⁷See *EchoStar Communications Corp. v. Fox Liberty Networks, et al.*, DA 99-1271 (rel. June 30, 1999) (petition for reconsideration denied).