



Program Access

Facilitating Video Competition

1992 CABLE ACT

 Congress found that vertically integrated program suppliers “have the incentive and ability to favor their affiliated cable operators...” 47 U.S.C. §521 nt (a)(5).

 Directed the FCC to establish rules that “prohibit discrimination ... in the sale or delivery of satellite cable programming.” 47 U.S.C. § 548(c)(2)(B).

Cable Programming Remains a Prerequisite to a Viable Video Offering



Video Competition

-  Access to unaffiliated content has been central to DISH Network's growth (over 13 million subscribers today).
-  EchoStar has relied on the program access process to ensure non-discriminatory terms and conditions.
-  We have filed more program access complaints than any other entity (8 in total).
-  Telcos are entering video business and, like EchoStar, need access to content.
-  Congress could have required cable conglomerates to divest programming assets, but instead chose non-discrimination coupled with strong enforcement.

Procedures

Congress required the FCC to prescribe regulations that:

-  Provide for expedited review;
-  Establish procedures for the Commission to collect data, including all contracts and documents.

Complaint-Based Mechanism is Broken

 Broad spectrum of commenters agree that current mechanism is ineffective and does not reflect market realities

- ☞ Complaints are not timely resolved (8+ months for EchoStar filed complaints)
- ☞ Current process does not ensure that necessary documentation is produced
- ☞ MVPD customers are not protected while complaints are pending

 Tellingly, only cable companies support the current broken regime

- ☞ Delay and uncertainty only benefits cable providers: no programming = no competitive offering = no subscriber losses for dominant cable.

Arbitration Remedy Works

-  “Baseball” style arbitration was adopted in the *News/Hughes* and expanded in the *Adelphia/Comcast/Time Warner* merger proceeding

-  Real world experience has demonstrated this mechanism works:
 -  Mirrors commercial negotiations
 -  Requires production of all relevant materials and agreements
 -  Includes standstill provision to protect customers
 -  Induces parties to reach private accord
 -  Conserves finite Commission resources

-  Urge adoption of same arbitration rules as alternative relief mechanism under program access regime

Arbitration is Legally Permissible

-  Communications Act provides FCC with authority to adopt the program access enforcement mechanisms it deems necessary
-  ADR Act is inapplicable: Under *News/Hughes*, Commission retains final authority over resolution of program access disputes
-  Subdelegation principles satisfied because *News/Hughes* arbitration preserves agency's final decision-making authority