

that the complainant has not carried this burden.

(iii) A complainant alleging that a terrestrial cable programming vendor has engaged in conduct described in paragraph (b)(1)(ii) of this section shall have the burden of proof that the terrestrial cable programming vendor is wholly owned by, controlled by, or under common control with a cable operator or cable operators, satellite cable programming vendor or vendors in which a cable operator has an attributable interest, or satellite broadcast programming vendor or vendors. An answer to such a complaint shall set forth the defendant's reasons to support a finding that the complainant has not carried this burden.

[75 FR 9723, Mar. 3, 2010]

**§ 76.1002 Specific unfair practices prohibited.**

(a) *Undue or improper influence.* No cable operator that has an attributable interest in a satellite cable programming vendor or in a satellite broadcast programming vendor shall unduly or improperly influence the decision of such vendor to sell, or unduly or improperly influence such vendor's prices, terms and conditions for the sale of, satellite cable programming or satellite broadcast programming to any unaffiliated multichannel video programming distributor.

(b) *Discrimination in prices, terms or conditions.* No satellite cable programming vendor in which a cable operator has an attributable interest, or satellite broadcast programming vendor, shall discriminate in the prices, terms, and conditions of sale or delivery of satellite cable programming or satellite broadcast programming among or between competing cable systems, competing cable operators, or any competing multichannel video programming distributors. Nothing in this subsection, however, shall preclude:

(1) The imposition of reasonable requirements for creditworthiness, offering of service, and financial stability and standards regarding character and technical quality;

NOTE 1: Vendors are permitted to create a distinct class or classes of service in pricing based on credit considerations or financial stability, although any such distinctions

must be applied for reasons for other than a multichannel video programming distributor's technology. Vendors are not permitted to manifest factors such as creditworthiness or financial stability in price differentials if such factors are already taken into account through different terms or conditions such as special credit requirements or payment guarantees.

NOTE 2: Vendors may establish price differentials based on factors related to offering of service, or difference related to the actual service exchanged between the vendor and the distributor, as manifested in standardly applied contract terms based on a distributor's particular characteristics or willingness to provide secondary services that are reflected as a discount or surcharge in the programming service's price. Such factors include, but are not limited to, penetration of programming to subscribers or to particular systems; retail price of programming to the consumer for pay services; amount and type of promotional or advertising services by a distributor; a distributor's purchase of programming in a package or a la carte; channel position; importance of location for non-volume reasons; prepayment discounts; contract duration; date of purchase, especially purchase of service at launch; meeting competition at the distributor level; and other legitimate factors as standardly applied in a technology neutral fashion.

(2) The establishment of different prices, terms, and conditions to take into account actual and reasonable differences in the cost of creation, sale, delivery, or transmission of satellite cable programming, satellite broadcast programming, or terrestrial cable programming;

NOTE: Vendors may base price differentials, in whole or in part, on differences in the cost of delivering a programming service to particular distributors, such as differences in costs, or additional costs, incurred for advertising expenses, copyright fees, customer service, and signal security. Vendors may base price differentials on cost differences that occur within a given technology as well as between technologies. A price differential for a program service may not be based on a distributor's retail costs in delivering service to subscribers unless the program vendor can demonstrate that subscribers do not or will not benefit from the distributor's cost savings that result from a lower programming price.

(3) The establishment of different prices, terms, and conditions which take into account economies of scale,

cost savings, or other direct and legitimate economic benefits reasonably attributable to the number of subscribers served by the distributor; or

NOTE: Vendors may use volume-related justifications to establish price differentials to the extent that such justifications are made available to similarly situated distributors on a technology-neutral basis. When relying upon standardized volume-related factors that are made available to all multichannel video programming distributors using all technologies, the vendor may be required to demonstrate that such volume discounts are reasonably related to direct and legitimate economic benefits reasonably attributable to the number of subscribers served by the distributor if questions arise about the application of that discount. In such demonstrations, vendors will not be required to provide a strict cost justification for the structure of such standard volume-related factors, but may also identify non-cost economic benefits related to increased viewership.

(4) Entering into exclusive contracts in areas that are permitted under paragraphs (c)(2) and (c)(4) of this section.

(c) *Exclusive contracts and practices—*

(1) *Unserved areas.* No cable operator shall engage in any practice or activity or enter into any understanding or arrangement, including exclusive contracts, with a satellite cable programming vendor or satellite broadcast programming vendor for satellite cable programming or satellite broadcast programming that prevents a multichannel video programming distributor from obtaining such programming from any satellite cable programming vendor in which a cable operator has an attributable interest, or any satellite broadcast programming vendor in which a cable operator has an attributable interest for distribution to persons in areas not served by a cable operator as of October 5, 1992.

(2) *Served areas.* No cable operator shall enter into any exclusive contracts, or engage in any practice, activity or arrangement tantamount to an exclusive contract, for satellite cable programming or satellite broadcast programming with a satellite cable programming vendor in which a cable operator has an attributable interest or a satellite broadcast programming vendor in which a cable operator has an attributable interest, with respect to areas served by a cable operator, un-

less the Commission determines in accordance with paragraph (c)(4) of this section that such contract, practice, activity or arrangement is in the public interest.

(3) *Specific arrangements: Subdistribution agreements—*(i) *Served areas.* No cable operator shall enter into any subdistribution agreement or arrangement for satellite cable programming or satellite broadcast programming with a satellite cable programming vendor in which a cable operator has an attributable interest or a satellite broadcast programming vendor in which a cable operator has an attributable interest, with respect to areas served by a cable operator, unless such agreement or arrangement complies with the limitations set forth in paragraph (c)(3)(iii) of this section.

(ii) *Limitations on subdistribution agreements in served areas.* No cable operator engaged in subdistribution of satellite cable programming or satellite broadcast programming may require a competing multichannel video programming distributor to

(A) Purchase additional or unrelated programming as a condition of such subdistribution; or

(B) Provide access to private property in exchange for access to programming. In addition, a subdistributor may not charge a competing multichannel video programming distributor more for said programming than the satellite cable programming vendor or satellite broadcast programming vendor itself would be permitted to charge. Any cable operator acting as a subdistributor of satellite cable programming or satellite broadcast programming must respond to a request for access to such programming by a competing multichannel video programming distributor within fifteen (15) days of the request. If the request is denied, the competing multichannel video programming distributor must be permitted to negotiate directly with the satellite cable programming vendor or satellite broadcast programming vendor.

(4) *Public interest determination.* In determining whether an exclusive contract is in the public interest for purposes of paragraph (c)(2) of this section, the Commission will consider each of

the following factors with respect to the effect of such contract on the distribution of video programming in areas that are served by a cable operator:

(i) The effect of such exclusive contract on the development of competition in local and national multichannel video programming distribution markets;

(ii) The effect of such exclusive contract on competition from multichannel video programming distribution technologies other than cable;

(iii) The effect of such exclusive contract on the attraction of capital investment in the production and distribution of new satellite cable programming;

(iv) The effect of such exclusive contract on diversity of programming in the multichannel video programming distribution market; and

(v) The duration of the exclusive contract.

(5) *Prior Commission approval required.* Any cable operator, satellite cable programming vendor in which a cable operator has an attributable interest, or satellite broadcast programming vendor in which a cable operator has an attributable interest seeking to enforce or enter into an exclusive contract in an area served by a cable operator must submit a "Petition for Exclusivity" to the Commission for approval.

(i) The petition for exclusivity shall contain those portions of the contract relevant to exclusivity, including:

(A) A description of the programming service;

(B) The extent and duration of exclusivity proposed; and

(C) Any other terms or provisions directly related to exclusivity or to any of the criteria set forth in paragraph (c)(4) of this section. The petition for exclusivity shall also include a statement setting forth the petitioner's reasons to support a finding that the contract is in the public interest, addressing each of the five factors set forth in paragraph (c)(4) of this section.

(ii) Any competing multichannel video programming distributor affected by the proposed exclusivity may file an opposition to the petition for exclusivity within thirty (30) days of the

date on which the petition is placed on public notice, setting forth its reasons to support a finding that the contract is not in the public interest under the criteria set forth in paragraph (c)(4) of this section. Any such formal opposition must be served on petitioner on the same day on which it is filed with the Commission.

(iii) The petitioner may file a response within ten (10) days of receipt of any formal opposition. The Commission will then approve or deny the petition for exclusivity.

(6) *Sunset provision.* The prohibition of exclusive contracts set forth in paragraph (c)(2) of this section shall cease to be effective on October 5, 2012, unless the Commission finds, during a proceeding to be conducted during the year preceding such date, that said prohibition continues to be necessary to preserve and protect competition and diversity in the distribution of video programming.

(d) *Limitations—(1) Geographic limitations.* Nothing in this section shall require any person who is engaged in the national or regional distribution of video programming to make such programming available in any geographic area beyond which such programming has been authorized or licensed for distribution.

(2) *Applicability to satellite retransmissions.* Nothing in this section shall apply:

(i) To the signal of any broadcast affiliate of a national television network or other television signal that is retransmitted by satellite but that is not satellite broadcast programming; or

(ii) To any internal satellite communication of any broadcast network or cable network that is not satellite broadcast programming.

(e) *Exemptions for prior contracts—(1) In general.* Nothing in this section shall affect any contract that grants exclusive distribution rights to any person with respect to satellite cable programming and that was entered into or before June 1, 1990, except that the provisions of paragraph (c)(1) of this section shall apply for distribution to persons in areas not served by a cable operator.

(2) *Limitation on renewals.* A contract that was entered into on or before June

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1, 1990, but that was renewed or extended after October 5, 1992, shall not be exempt under paragraph (e)(1) of this section.

(f) *Application to existing contracts.* All contracts, except those specified in paragraph (e) of this section, related to the provision of satellite cable programming or satellite broadcast programming to any multichannel video programming distributor must be brought into compliance with the requirements specified in this subpart no later than November 15, 1993.

[58 FR 27671, May 11, 1993, as amended at 59 FR 66259, Dec. 23, 1994; 67 FR 42951, July 30, 2002; 72 FR 56661, Oct. 4, 2007; 75 FR 9724, Mar. 3, 2010]

### § 76.1003 Program access proceedings.

(a) *Complaints.* Any multichannel video programming distributor aggrieved by conduct that it believes constitute a violation of the regulations set forth in this subpart may commence an adjudicatory proceeding at the Commission to obtain enforcement of the rules through the filing of a complaint. The complaint shall be filed and responded to in accordance with the procedures specified in § 76.7 of this part with the following additions or changes:

(b) *Prefiling notice required.* Any aggrieved multichannel video programming distributor intending to file a complaint under this section must first notify the potential defendant cable operator, and/or the potential defendant satellite cable programming vendor or satellite broadcast programming vendor, that it intends to file a complaint with the Commission based on actions alleged to violate one or more of the provisions contained in § 76.1001 or § 76.1002 of this part. 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.

(c) *Contents of complaint.* In addition to the requirements of § 76.7 of this part, a program access complaint shall contain:

(1) The type of multichannel video programming distributor that de-

scribes complainant, the address and telephone number of the complainant, whether the defendant is a cable operator, satellite broadcast programming vendor or satellite cable programming vendor (describing each defendant), and the address and telephone number of each defendant;

(2) Evidence that supports complainant's belief that the defendant, where necessary, meets the attribution standards for application of the program access requirements;

(3) Evidence that the complainant competes with the defendant cable operator, or with a multichannel video programming distributor that is a customer of the defendant satellite cable programming or satellite broadcast programming vendor or a terrestrial cable programming vendor alleged to have engaged in conduct described in § 76.1001(b)(1);

(4) In complaints alleging discrimination, documentary evidence such as a rate card or a programming contract that demonstrates a differential in price, terms or conditions between complainant and a competing multichannel video programming distributor or, if no programming contract or rate card is submitted with the complaint, an affidavit signed by an officer of complainant alleging that a differential in price, terms or conditions exists, a description of the nature and extent (if known or reasonably estimated by the complainant) of the differential, together with a statement that defendant refused to provide any further specific comparative information;

(5) If a programming contract or a rate card is submitted with the complaint in support of the alleged violation, specific references to the relevant provisions therein;

(6) In complaints alleging exclusivity violations:

(i) The identity of both the programmer and cable operator who are parties to the alleged prohibited agreement,

(ii) Evidence that complainant can or does serve the area specified in the complaint, and

(iii) Evidence that the complainant has requested to purchase the relevant programming and has been refused or unanswered;