



January 22, 2010

MEMORANDUM TO CLIENTS

Re: FCC Adopts Procedures for Program Access Complaints Regarding Terrestrially Delivered Programming

This week, the Federal Communications Commission (“FCC”) adopted a Report and Order (“*Order*”) expanding its program access rules to apply to “cable-affiliated programming” that is distributed by terrestrial means. Previously, the FCC had consistently held that, under Section 628 of the Communications Act, the program access rules applied only to satellite-delivered cable-affiliated programming. The principal beneficiaries of the FCC’s action in limiting the so-called “terrestrial loophole” likely will be DBS operators and telco-video providers who claim that vertically-integrated cable programmers are denying them access to “must have” regional sports and other programming.

Background. The so-called terrestrial loophole has been a source of controversy for more than a decade. Over the years, DirecTV and other competing MVPDs have repeatedly brought complaints arising out their inability to obtain access to certain terrestrially-distributed services. A number of these cases arose out of Comcast’s refusal to give DBS providers access to its Philadelphia-area regional sports network (“RSN”). More recently, Verizon and AT&T have brought complaints with respect to other RSNs that are distributed terrestrially rather than via satellite. Citing Section 628 of the Communications Act, which refers expressly to “satellite cable programming,” the FCC uniformly has rejected these complaints on the grounds that it was up to Congress to expand the program access rules to cover program services that were delivered by terrestrial means.

However, in September 2007, the FCC issued a rulemaking notice seeking comment on whether the agency can and should close the terrestrial loophole by extending the program access rules to terrestrially delivered, cable-affiliated programming. The *Order* first concludes that Section 628 does not preclude the FCC from applying program access rules to terrestrial programming services. It then goes on to find that, subject to certain limitations described below, the application of the rules to terrestrial networks was necessary because: (1) cable operators have the incentive and ability to withhold affiliated programming to hinder competition regardless of the method of programming delivery; (2) the record indicated that cable operators withheld affiliated programming from competitors when not explicitly barred from doing so; and (3) there was evidence that, in some cases, withholding of terrestrially delivered programming would “significantly hinder” competitive MVPDs. (The *Order* specifically mentions a 2006 regression analysis performed in connection with the review of the Adelphia/Comcast/Time Warner Cable transactions that purported to show that the percentage of households subscribing to DBS was lower than it otherwise would have been because of its lack of access to Comcast’s Philadelphia-area RSN and Cox’s San Diego-area RSN.) The *Order* also expresses concern that

the withholding of terrestrially-delivered programming could impede the ability of MVPDs to provide broadband in rural areas.

According to the FCC, the rules adopted in the *Order* attempt to “chart a middle course” between vertically integrated cable operators who argued that there was no need or statutory authority for rules relating to terrestrially delivered programming and competing MVPDs that argued for a rule that would have made it a *per se* violation to withhold terrestrially delivered programming. Specifically, the *Order* adopts a case-by-case approach to dealing with program access complaints relating to terrestrially delivered programming that distinguishes between sports programming and other types of programming.

Complaint Procedures and Burden of Proof. Going forward, MVPDs may bring a complaint against a cable-affiliate programmer on the grounds that the programmer has engaged in one of the following three activities:

- (i) an exclusive contract between a cable operator and a cable-affiliated programmer for terrestrially delivered programming;
- (ii) discrimination by a cable-affiliated programmer has occurred relating to the prices, terms and conditions for sale of terrestrially delivered programming among MVPDs; or
- (iii) efforts have been made by a cable operator to unduly influence the decision of its affiliated programmer to sell terrestrially delivered programming to a competitor.

The burden of proof is on the complainant to not only prove the existence of one of these three activities, but to also prove that the activity’s purpose or effect is to prevent or significantly hinder an MVPD from competing in the marketplace for video delivery. The complainant must also prove that the programmer in question is wholly owned by, controlled by, or under common control of a cable operator or cable operators.¹ This “control” test is in contrast to the program access rules for satellite delivered programming, which merely require an “attributable” ownership affiliation with a cable operator.

While the *Order* does not specify any precise evidentiary requirement, it suggests that acceptable means for meeting the burden of proof might include: (1) an “appropriately crafted regression analysis” relating to MVPD market share due to the carriage of a terrestrially delivered programming service; or (2) a “statistically reliable survey” regarding the likelihood that customers would choose not to subscribe or switch to an MVPD due to a particular terrestrially delivered programming service. The proceedings will generally be subject to procedures set forth in Sections 76.7 and 76.1003 of the FCC’s rules that apply to program access complaints involving satellite delivered, cable-affiliated programming. However,

¹ If two or more cable operators have a minority interest in a terrestrial programming service that exceeds 50 percent, the burden is met. The *Order* also indicates that the Commission may look beyond the corporate structural formalities in cases where a regulated entity has organized itself in an effort to shield against program access complaints.

defendants will have 45 days, instead of the usual 20 days, to respond to a program access complaint regarding terrestrially delivered programming. Also, unlike the satellite delivered programming program access rules, the FCC indicated that the terrestrially delivered programming rules relating to exclusive contracts would not sunset.

Regional Sports Networks. Significantly, in cases involving RSNs,² there will be a rebuttable presumption that the party controlling the RSN is acting in a manner with the purpose or effect of significantly hindering a competitor. The defendant can overcome the presumption by establishing that an unfair act does not have such an effect.

Local News Programming. The new rules also allow program access complaints to be brought with respect to terrestrially delivered programming services that feature local news and local community or educational programming. However, the FCC stated that it was “highly unlikely” that withholding of such programming would be considered impermissible under the new rules. Thus, in cases involving such “replicable” programming, the complainant retains the burden of proving that the purpose or effect of the activities was to significantly hinder the competitor.

High Definition Programming. In cases where a terrestrially delivered programming service is available in both Standard Definition (SD) and High Definition (HD), each feed will be treated as a separate service. Therefore, even if a cable-affiliated programmer makes an SD feed available to a competitor, the competitor could still bring a program access complaint regarding the HD feed. The *Order* makes clear that making the SD feed available will not be a defense to a program access complaint relating to the HD feed. Similarly, if a VOD, 3D, or other new format becomes available, separate program access complaints can be made with respect to any distinct format.

Existing Contracts and Impact on the Adelfphia Order. The *Order* allows competing MVPDs to bring complaints against cable operators who entered into exclusive contracts that are currently in effect for terrestrially delivered programming, but that were entered into before the rules go into effect. However, conduct that is not currently ongoing and that occurred prior to the effective date of the rules will not be subject to complaints under the new rules. Additionally, the conditions relating to terrestrially delivered programming that were imposed on Time Warner Cable and Comcast as a part of the *Adelfphia Order* remain in effect and unchanged after the effective date of the new rules. After the effective date of the rules, complaints may be brought against Time Warner Cable and Comcast regarding terrestrially delivered programming that is not subject to conditions in the *Adelfphia Order*.

² An RSN is defined as “any non-broadcast video programming service that (1) provides live or same-day distribution within a limited geographic region of sporting events of a sports team that is a member of certain identified professional or college sports leagues and (2) in any year, carries a specified minimum amount of sporting event coverage.

Complaints Regarding the Renewal of Existing Contracts. Finally, the FCC adopted specific procedures for cases where an existing contract for terrestrially delivered programming is in place, but an MVPD brings a complaint regarding the renewal of the contract. In such cases, the complainant may submit, along with the program access complaint, a petition for a “temporary standstill” (*i.e.* stay) of the existing contract during the complaint resolution process. The petitioning party will have to meet the standard criteria for grant of a FCC stay.³ If a stay is granted, the FCC’s decision regarding the new contract’s terms will be retroactive to the date that the previous contract expires.⁴ The FCC may lift the stay in the event that it finds the stay is having a negative impact on settlement negotiations or is otherwise no longer in the public interest.

Effective Date of the Rules and Possible Court Challenge. The *Order* specifies that the rules will go into effect 30 days after publication of the *Order* in the *Federal Register*. However, the *Order*’s most significant provisions, including the new complaint process and stay procedures, will not go into effect until the Office of Management and Budget approves the new rules pursuant to the Paperwork Reduction Act.

We anticipate that the *Order* will be subject to a court challenge. Commissioner Robert McDowell, the only dissenter to the *Order*, wrote a lengthy analysis challenging the FCC’s actions on the grounds that the FCC lacked statutory authority under Section 628 to close the terrestrial loophole, a ground that will likely serve as the basis for a court challenge. It also is likely that the rules will be challenged on constitutional grounds and on the grounds that, in light of the development of substantial competition in the video marketplace since 1992, the expansion of the program access rules was arbitrary and capricious.

We would be pleased to respond to any questions regarding these matters.

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³ Those criteria are as follows: (i) a demonstration that the complainant is likely to prevail on the merits of the complaint; (ii) the complainant will suffer irreparable harm absent a stay; (iii) grant of a stay will not substantially harm other interested parties; and (iv) the public interest favors the grant of the stay.

⁴ For instance, if the Commission decides the rate for the new contract should be lower than that of the old contract, the MVPD will be entitled to a credit for the overpayment that occurred during the complaint process.