§ 76.1003 Program access proceedings.

(a) Complaints. Any multichannel video programming distributor aggrieved by conduct that it believes constitutes 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 based on actions alleged to violate one or more of the provisions contained in § 76.1001 or § 76.1002 of this part.

(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 describes 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 exits (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;

(7) In complaints alleging a violation of § 76.1001 of this part, evidence demonstrating that the behavior complained of has harmed complainant.

(8) The complaint must be accompanied by appropriate evidence demonstrating that the required notification pursuant to paragraph (a) of this section has been made.

(d) Damages requests. (1) In a case where recovery of damages is sought, the complaint shall contain a clear and unequivocal request for damages and appropriate allegations in support of such claim in accordance with the requirements of paragraph (d)(3) of this section.

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(2) Damages will not be awarded upon a complaint unless specifically requested. Damages may be awarded if the complaint complies fully with the requirement of paragraph (d)(3) of this section where the defendant knew, or should have known that it was engaging in conduct violative of section 628.

(3) In all cases in which recovery of damages is sought, the complainant shall include within, or as an attachment to, the complaint, either:

(i) A computation of each and every category of damages for which recovery is sought, along with an identification of all relevant documents and materials or such other evidence to be used by the complainant to determine the amount of such damages; or

(ii) An explanation of:

(A) The information not in the possession of the complaining party that is necessary to develop a detailed computation of damages;

(B) The reason such information is unavailable to the complaining party;

(C) The factual basis the complainant has for believing that such evidence of damages exists; and

(D) A detailed outline of the methodology that would be used to create a computation of damages when such evidence is available.

(e) Answer. (1) Except as otherwise provided or directed by the Commission, any cable operator, satellite cable programming vendor or satellite broadcast programming vendor upon which a program access complaint is served under this section shall answer within twenty (20) days of service of the complaint, provided that the answer shall be filed within forty-five (45) days of service of the complaint if the complaint alleges a violation of section 628(b) of the Communications Act of 1934, as amended, or § 76.1001(a). To the extent that a cable operator, satellite cable programming vendor or satellite broadcast programming vendor expressly references and relies upon a document or documents in asserting a defense or responding to a material allegation, such document or documents shall be included as part of the answer.

(2) An answer to an exclusivity complaint shall provide the defendant’s reasons for refusing to sell the subject programming to the complainant. In addition, the defendant may submit its programming contracts covering the area specified in the complaint with its answer to refute allegations concerning the existence of an impermissible exclusive contract. If there are no contracts governing the specified area, the defendant shall so certify in its answer. Any contracts submitted pursuant to this provision may be protected as proprietary pursuant to §76.9 of this part.

(3) An answer to a discrimination complaint shall state the reasons for any differential in prices, terms or conditions between the complainant and its competitor, and shall specify the particular justification set forth in §76.1002(b) of this part relied upon in support of the differential.

(i) When responding to allegations concerning price discrimination, except in cases in which the alleged price differential is de minimis (less than or equal to five cents per subscriber or five percent, whichever is greater), the defendant shall provide documentary evidence to support any argument that the magnitude of the differential is not discriminatory.

(ii) In cases involving a price differential of less than or equal to five cents per subscriber or five percent, whichever is greater, the answer shall identify the differential as de minimis and state that the defendant is therefore not required to justify the magnitude of the differential.

(iii) If the defendant believes that the complainant and its competitor are not sufficiently similar, the answer shall set forth the reasons supporting this conclusion, and the defendant may submit an alternative contract for comparison with a similarly situated multichannel video programming distributor that uses the same distribution technology as the competitor selected for comparison by the complainant. The answer shall state the defendant’s reasons for any differential between the prices, terms and conditions between the complainant and such similarly situated distributor, and shall specify the particular justifications in §76.1002(b) of this part relied upon in support of the differential. The defendant shall also provide with its answer written documentary evidence
to support its justification of the magnitude of any price differential between the complainant and such similarly situated distributor that is not *de minimis*.

(4) An answer to a complaint alleging an unreasonable refusal to sell programming shall state the defendant’s reasons for refusing to sell to the complainant, or for refusing to sell to the complainant on the same terms and conditions as complainant’s competitor, and shall specify why the defendant’s actions are not discriminatory.

(f) *Reply.* Within fifteen (15) days after service of an answer, unless otherwise directed by the Commission, the complainant may file and serve a reply which shall be responsive to matters contained in the answer and shall not contain new matters.

(g) *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 vendor, satellite broadcast programming vendor, or terrestrial cable 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 vendor, satellite broadcast programming vendor, or terrestrial cable 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 complainant and the satellite cable programming vendor, satellite broadcast programming vendor, or terrestrial cable programming vendor; or

(3) The complainant has notified a cable operator, or a satellite cable programming vendor or a satellite broadcast programming vendor that it intends to file a complaint with the Commission based on a request to purchase or negotiate to purchase satellite cable programming, satellite broadcast programming, or terrestrial cable programming, or has made a request to amend an existing contract pertaining to such programming pursuant to §76.1002(f) of this part that has been denied or unacknowledged, allegedly in violation of one or more of the rules contained in this subpart.

(h) *Remedies for violations.*—(1) *Remedies authorized.* Upon completion of such adjudicatory proceeding, the Commission shall order appropriate remedies, including, if necessary, the imposition of damages, and/or the establishment of prices, terms, and conditions for the sale of programming to the aggrieved multichannel video programming distributor. Such order shall set forth a timetable for compliance, and shall become effective upon release.

(2) *Additional sanctions.* The remedies provided in paragraph (h)(1) of this section are in addition to and not in lieu of the sanctions available under title V or any other provision of the Communications Act.

(3) *Imposition of damages.* (i) *Bifurcation.* In all cases in which damages are requested, the Commission may bifurcate the program access violation determination from any damage adjudication.

(i) *Burden of proof.* The burden of proof regarding damages rests with the complainant, who must demonstrate with specificity the damages arising from the program access violation. Requests for damages that grossly overstate the amount of damages may result in a Commission determination that the complainant failed to satisfy its burden of proof to demonstrate with specificity the damages arising from the program access violation.

(iii) *Damages adjudication.* (A) The Commission may, in its discretion, end adjudication of damages with a written order determining the sufficiency of the damages computation submitted in accordance with paragraph (d)(3)(i) of this section or the damages computation methodology submitted in accordance with paragraph (d)(3)(ii)(D) of this section, modifying such computation or methodology, or requiring the complainant to resubmit such computation or methodology.

(I) Where the Commission issues a written order approving or modifying a damages computation submitted in accordance with paragraph (d)(3)(i) of
this section, the defendant shall re-
compense the complainant as directed
therein.
(2) Where the Commission issues a
written order approving or modifying a
damages computation methodology
submitted in accordance with para-
graph (d)(3)(ii)(D) of this section, the
parties shall negotiate in good faith to
reach an agreement on the exact
amount of damages pursuant to the
Commission-mandated methodology.
(B) Within thirty days of the
issuance of a paragraph (d)(3)(ii)(D) of
this section damages methodology
order, the parties shall submit jointly
to the Commission either:
(1) A statement detailing the parties’
agreement as to the amount of dam-
ages;
(2) A statement that the parties are
continuing to negotiate in good faith
and a request that the parties be given
an extension of time to continue nego-
tiations; or
(3) A statement detailing the bases
for the continuing dispute and the rea-
sons why no agreement can be reached.
(C)(1) In cases in which the parties
cannot resolve the amount of damages
within a reasonable time period, the
Commission retains the right to deter-
mine the actual amount of damages on
its own, or through the procedures de-
scribed in paragraph (h)(3)(iii)(C)(2) of
this section.
(2) Issues concerning the amount of
damages may be designated by the
Chief, Media Bureau for hearing before,
or, if the parties agree, submitted for
mediation to, a Commission Adminis-
trative Law Judge.
(D) Interest on the amount of dam-
ages awarded will accrue from either
the date indicated in the Commission’s
written order issued pursuant to para-
graph (h)(3)(iii)(A)(1) of this section or
the date agreed upon by the parties as
a result of their negotiations pursuant
to paragraph (h)(3)(iii)(A)(2) of this
section. Interest shall be computed at
applicable rates published by the Internal
Revenue Service for tax refunds.
(1) Alternative dispute resolution. Within
20 days of the close of the pleading
cycle, the parties to the program ac-
cess dispute may voluntarily engage in
alternative dispute resolution, includ-
ing commercial arbitration. The Com-
mision will suspend action on the
complaint if both parties agree to use
alternative dispute resolution.
(j) Discovery. In addition to the gen-
eral pleading and discovery rules con-
tained in §76.7, parties to a program ac-
cess complaint may serve requests for
discovery directly on opposing parties,
and file a copy of the request with the
Commission. The respondent shall have
the opportunity to object to any re-
quest for documents that are not in its
control or relevant to the dispute or
protected from disclosure by the attor-
ney-client privilege, the work-product
document, or other recognized protec-
tions from disclosure. Such request
shall be heard, and determination
made, by the Commission. Until the
objection is ruled upon, the obligation
to produce the disputed material is sus-
pended. Any party who fails to timely
provide discovery requested by the op-
posing party to which it has not raised
an objection as described above, or who
fails to respond to a Commission order
for discovery material, may be deemed
in default and an order may be entered
in accordance with the allegations con-
tained in the complaint, or the com-
plaint may be dismissed with preju-
dice.
(k) Protective orders. In addition to
the procedures contained in §76.9 of
this part related to the protection of
confidential material, the Commission
may issue orders to protect the con-
fidentiality of proprietary information
required to be produced for resolution
of program access complaints. A pro-
tective order constitutes both an order
of the Commission and an agreement
between the party executing the pro-
tective order declaration and the party
submitting the protected material. The
Commission has full authority to fash-
ion appropriate sanctions for violations
of its protective orders, including but
not limited to suspension or disbar-
ment of attorneys from practice before
the Commission, forfeitures, cease and
desist orders, and denial of further ac-
cess to confidential information in
Commission proceedings.
(1) Petitions for temporary standstill. (1)
A program access complainant seeking
renewal of an existing programming
contract may file a petition along with
its complaint requesting a temporary
standstill of the price, terms, and other conditions of the existing programming contract pending resolution of the complaint. In addition to the requirements of §76.7, the complainant shall have the burden of proof to demonstrate the following in its petition:

(i) The complainant is likely to prevail on the merits of its complaint;

(ii) The complainant will suffer irremediable harm absent a stay;

(iii) Grant of a stay will not substantially harm other interested parties; and

(iv) The public interest favors grant of a stay.

(2) The defendant cable operator, satellite cable programming vendor or satellite broadcast programming vendor upon which a petition for temporary standstill is served shall answer within ten (10) days of service of the petition, unless otherwise directed by the Commission.

(3) If the Commission grants the temporary standstill, the Commission’s decision acting on the complaint will provide for remedies that make the terms of the new agreement between the parties retroactive to the expiration date of the previous programming contract.

(m) Deadline for Media Bureau action on complaints alleging a denial of programming. For complaints alleging a denial of programming, the Chief, Media Bureau shall release a decision resolving the complaint within six (6) months from the date the complaint is filed.


§ 76.1004 Applicability of program access rules to common carriers and affiliates.

(a) Any provision that applies to a cable operator under §§76.1000 through 76.1003 shall also apply to a common carrier or its affiliate that provides video programming by any means directly to subscribers. Any such provision that applies to a satellite cable programming vendor in which a cable operator has an attributable interest shall apply to any satellite cable programming vendor in which such common carrier has an attributable interest. For the purposes of this section, two or fewer common carriers or directors shall not by itself establish an attributable interest by a common carrier in a satellite cable programming vendor (or its parent company) or a terrestrial cable programming vendor (or its parent company). (b) Sections 76.1002(c)(1) through (3) shall be applied to a common carrier or its affiliate that provides video programming by any means directly to subscribers as follows: No common carrier or its affiliate that provides video programming directly to subscribers 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 common carrier or its affiliate has an attributable interest, or any satellite broadcasting vendor in which a common carrier or its affiliate has an attributable interest for distribution to persons in areas not served by a cable operator as of October 5, 1992.


§§ 76.1005–76.1010 [Reserved]

Subpart P—Competitive Availability of Navigation Devices

SOURCE: 63 FR 38094, July 15, 1998, unless otherwise noted.

§ 76.1200 Definitions.

As used in this subpart:

(a) Multichannel video programming system. A distribution system that makes available for purchase, by customers or subscribers, multiple channels of video programming other than an open video system as defined by §76.1500(a). Such systems include, but are not limited to, cable television systems, BRS/EBS systems, direct broadcast satellite systems, other systems