

# Program Access Rules Expire

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November 2012

On October 5, 2012, the Federal Communications Commission (FCC or Commission) released a Report and Order (Order), Further Notice of Proposed Rulemaking (FNPRM) and Order on Reconsideration that let expire the exclusive contract prohibition of its program access rules. The rules banned exclusive contracts for satellite-delivered programming between any cable operator and any cable-affiliated programmer in areas served by the cable operator. The Commission determined that those rules swept too broadly in light of marketplace developments that have occurred since 2007, the last time the FCC extended the rules.

A case-by-case process remains in place that will assess the competitive impact of individual exclusive contracts. Potentially aggrieved parties can file complaints alleging violation of either Section 628(b), alleging competitive harm, or Section 628(c), alleging claims of undue influence or discrimination. Under 628(b), the Complainant must prove two elements: (1) the exclusive contract is “unfair”; and (2) the exclusive contract has the “purpose or effect” of “significantly hindering or preventing” it from providing competitive satellite cable programming or satellite broadcast programming. The case-by-case process will mirror that already in place for complaints involving exclusive contracts for terrestrially-delivered, cable-affiliated programming.

As part of the case-by-case determination, the FCC established a rebuttable presumption that exclusive contracts for a cable-affiliated, satellite-delivered regional sports network (RSN) had the “purpose or effect” of “significantly hindering or preventing” other MVPDs in the market from providing a competitive service.

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**Four developments affected the FCC's determination that the broad, preemptive ban is no longer necessary:**

- Comcast/NBCU merger condition requires Comcast/NBCU to make the estimated 30 satellite-delivered national networks and 14 satellite-delivered RSNs it controls available to competitors until January 2018.
- Comcast sold its interest in A&E to Disney and Hearst, reducing since 2007 the number of satellite-delivered, cable-affiliated networks among the Top 20 national cable networks.
- Because Time Warner Cable separated from Time Warner Inc. in 2009, pay networks HBO and Cinemax and cable networks such as CNN, TBS, and TNT are no longer cable-affiliated.
- Prior Commission analysis did not distinguish between satellite- and terrestrially-delivered RSNs, of which only the former was subject to the exclusive contract prohibition. Out of 108 RSNs, only 18 (17 percent) are cable-affiliated, satellite-delivered, and not Comcast-controlled, and therefore potentially impacted by the sunset.

**The FNPRM sought comment on the following:**

- In regard to cable-affiliated RSNs, whether the Commission should establish a rebuttable presumption that exclusive contracts for all cable-affiliated RSNs, no matter how they are delivered, are "unfair acts" under 628(b).
- Whether a complainant challenging an exclusive, cable-affiliated RSN contract should be entitled to a rebuttable presumption for a standstill of existing programming contracts for that RSN.
- Whether there should be rebuttable presumptions of both the "unfair act" and "significant hindrance" elements of a Section 628(b) claim involving national sports networks (both terrestrial- and satellite-delivered).
- Whether once one complainant proves that an exclusive contract involving a cable-affiliated network (both terrestrial- and satellite-delivered) violates 628(b) or potentially 628(c)(2)(B), any other exclusive contract involving the same network also violates those same provisions.
- Buying Groups. The ACA seeks three modifications to the program access rules: (1) revising the definition of "buying group" to reflect industry practice for liability assumed by buying groups; (2) standards for the right of participation of buying group members in their group's master licensing agreements; and (3) establishing a comparability standard for a buying group regarding volume discounts. The FCC seeks comment on revising the "buying group" definition to provide that a buying group may not unreasonably deny membership to any MVPD requesting membership.

Comments are due by December 14, 2012, and Reply Comments must be submitted by January 14, 2013.