

Important Recent FCC Activity, And A Small Concession From Disney/ABC

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Retransmission consent is on all independent cable operators' minds today, and for good reason. As broadcasters' cash demands escalate and the DTV transition looms only six months away, independent cable operators should expect increasingly complex and contentious negotiations with broadcasters this fall. Now is the time to begin focusing on retransmission consent negotiations.

To help you prepare, we cover in this article important FCC activity and a recent announcement from Disney. Later articles will cover additional broadcast signal carriage topics.

FCC Tying and Bundling Proceeding. Last fall, the Commission initiated a proceeding on wholesale programming practices and asked how tying of undesired channels to desired channels hurts competition and choice.

We saw a clear division in the comments between broadcasters and programmers on one hand and small cable operators on the other. ACA and others filed comments discussing how current programming and retransmission consent practices cause significant harm to the public interest. ACA emphasized one of these significant harms – retransmission consent price discrimination – in its reply comments. ACA's reply noted that broadcasters commonly charge small cable operators per subscriber fees many times higher than larger operators. As a result, customers of small cable companies must pay more for the same signals solely because of broadcasters' exercise of market power. That's wrong, says ACA. And we agree.

In stark contrast to the harms described by ACA and others, programmers and broadcasters defended current wholesale programming and retransmission consent practices. Surprisingly, their arguments defended current wholesale practices as being in the best interests of consumers.

This rulemaking represents the first time that the FCC has directly addressed tying and bundling arrangements and the harms they create. The proposal remains pending.

Retransmission Consent Quiet Period. In April, Mediacom, GCI, and other operators asked the FCC to order a quiet period for retransmission consent negotiations during the DTV transition. Under the proposal, the quiet period would extend until May 31, 2009, and would prohibit broadcasters from pulling their signals if a retransmission consent agreement could not be reached by the December 31, 2008 deadline.

The operators argued that a quiet period would minimize the disruption and confusion that would result if broadcasters withdrew signals during the DTV transition. ACA filed a letter in support of this proposal.

This proposal remains pending. If approved, it would give small operators a measure of stability during the crucial months surrounding the DTV transition.

Fox/DirecTV Conditions. Recall that the FCC imposed conditions on retransmission consent negotiations with Fox owned and operated stations when News Corp. took control of DirecTV back in 2004. In response to concerns raised by small and medium-sized cable operators, the FCC imposed the following conditions on Fox transactions:

- For cable companies serving less than 5,000 subscribers, News Corp. must elect "must-carry" or grant retransmission consent without any requirements for cash compensation or carriage of additional programming.
- Cable companies serving between 5,000 and 400,000 subscribers can appoint a bargaining agent, like NCTC, for retransmission consent. Fox cannot refuse to deal with the bargaining agent.
- Retransmission consent disputes can go to expedited commercial arbitration. A bargaining agent, like NCTC, has the right to arbitration.
- While an arbitration is pending, Fox cannot withhold the broadcast signal.

As soon as News Corp. sold its holdings in DirecTV to Liberty Media this spring, it filed a petition for modification with the FCC. The petition claimed that these retransmission consent conditions should

no longer apply because it would place News Corp. at a "competitive disadvantage" in competing with other programming networks.

ACA and others strongly oppose any changes to the conditions, and have asked the Commission to maintain the conditions for their full term through 2010.

The petition remains pending. The timing of any action could certainly affect any negotiations with Fox owned and operated stations.

Recent Disney Announcement. At least one media conglomerate has responded to the pressure brought by ACA in the tying and bundling proceeding. In early July, Disney announced that it would offer retransmission consent deals to small operators in the markets of its ten ABC-owned broadcast stations "at no charge." This offer would cover about ninety small cable operators for the 2009-2011 retransmission consent period.

While Disney's move seems positive, it is limited in scope, affecting only about 1% of cable subscribers. We question whether this announcement from Disney was just a public relations ploy.

The current retransmission consent marketplace poses significant challenges for small and medium-sized cable operators. At the same time, familiarity with recent FCC activity can help your company approach your upcoming retransmission consent negotiations with greater knowledge and understanding of the current issues. Stay tuned for additional broadcast carriage information! □

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