

Retransmission Consent Part 2: Key Regulations and a Recent FCC Case **Chris Cinnamon and Emily A. Denney**

As the next round of retransmission consent approaches, there are FCC rules you should be familiar with. One of the most powerful rules for cable operators is the requirement that a broadcaster negotiate retransmission consent in good faith. Read below for key information.

FCC Regulations You Should Know – Good Faith is Key

You are not alone if you are asking yourself... “What are broadcasters allowed to do under the rules?” This section should help answer your question.

The rules allow broadcasters to do the following:

- Ask for compensation above that agreed to with other MVPDs in the same market.
- Ask for compensation that is different from the compensation offered by other broadcasters in the same market.
- Propose that carriage be conditioned on carriage of other programming.
- Propose that carriage be conditioned on a broadcaster obtaining channel positioning or tier placement rights.
- Ask for compensation in the form of commitments to purchase advertising on the broadcast station or broadcast-affiliated media.

On the other hand, there are several examples of broadcaster bargaining positions that presumptively conflict with the good faith negotiation requirement. These include:

- Proposals that specifically foreclose carriage of other non-duplicative programming services.
- Proposals involving compensation or carriage terms that result from an exercise of market power by a broadcast station the effect of which is to hinder significantly or foreclose MVPD competition.
- Proposals that result from agreements not to compete or to fix prices.
- Proposals for contract terms that would foreclose the filing of complaints with the Commission.

The Commission has also concluded that the following broadcaster conduct violates the obligation to negotiate in good faith:

- Refusal to negotiate retransmission consent.
- Refusal to designate a representative with authority to make binding representations.
- Refusal to meet and negotiate at reasonable times and locations.
- Unreasonably delaying negotiations.
- Refusal to put forth more than a single, unilateral proposal.
- Failure to respond to a proposal from an MVPD, including the reasons for rejecting a proposal.
- Executing an agreement that prevents the broadcaster from entering into a retransmission consent agreement with any other MVPD.

- Refusal to execute an agreement that sets forth the full understanding of the parties.

Retransmission Consent at the FCC – Horry Telephone Cooperative

As we recently reported in our Client Update, at the end of January an independent cable operator filed an Emergency Retransmission Consent Complaint with the FCC. The operator, Horry Telephone Cooperative, Inc. (“HTC”), alleged that the local Fox affiliate, WFXB, refused to grant HTC retransmission consent for WFXB’s DTV signal because it had entered into an “exclusive agreement” with Time Warner, which competes with HTC in certain franchise areas. As a result, Time Warner would be able to offer the Super Bowl and the Daytona 500 in HD, but Horry would not. HTC filed its Emergency Complaint on Tuesday, January 18, and asked for expedited action. In a strong message to broadcasters, the FCC responded the next day.

In a January 19 Public Notice, the FCC ordered WFXB to respond to HTC’s Emergency Complaint in five days. The Public Notice stated, “Because of the significance and time sensitive nature of HTC’s allegations, we see good cause to establish an accelerated pleading cycle in this matter so that it can be resolved in an expedited manner.”

WFXB quickly reversed its position and granted HTC retransmission consent. The case settled, and HTC withdrew its Complaint. Cinnamon Mueller represented HTC in this case.

In our final installment about Retransmission Consent we will discuss other important questions, including, for example, determining when a broadcaster is entitled to carriage on a cable system.

Cinnamon Mueller serves as general counsel to the American Cable Association and concentrates on the representation of independent cable companies throughout the U.S. in transactions and regulatory matters. You can reach Chris or Emily at 312-372-3930.