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## **CLIENT UPDATE**

**February 19, 2004**

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We summarize below key developments of interest to our clients in the cable television industry.

### **DTV MUST CARRY DEMAND DEFEATED WITH MARKET MODIFICATION PETITION**

**Must carry complaint defeated with market modification.** We recently represented a small, independent cable operator in a must carry dispute involving a DTV station that transmits its signal via satellite from 200 miles away from the system. The operator could not concede carriage to a station located so far away, especially since there was no customer demand for the station. Because must carry is premised on the preservation of local broadcast television stations and local programming, to fight the demand we needed to establish that the station was not "local." To prove that a station is not local, an operator must file a market modification petition at the FCC.

In our market modification petition, we focused on the station's lack of programming targeted at the operator's communities, the distance between the station and the systems, and the station's lack of viewership. The FCC granted our petition and rejected the broadcaster's must carry complaint. Even though the station is capable of delivering a good quality signal, the market modification extinguished the station's must carry rights on the systems.

**What this means for you.** As stations transition to DTV and technology continues to develop, we anticipate that more DTV stations will make their signals available on satellite. Independent and small cable operators may soon find themselves facing new must carry demands from satellite-delivered DTV stations. This could in turn strain channel capacity. If you receive a must carry demand similar to the one described and would like our help, please free to call our office.

### **EFFECTIVE COMPETITION**

**Effective competition.** Under FCC regulations, a cable operator is subject to effective competition if there are two or more video providers in a franchise area, each are available to 50% of the houses in the area, and at least 15% of houses subscribe to the second largest video provider in the area. Typically, DBS is the primary competitor to franchised cable operators. To establish that a cable operator is subject to effective competition, the cable operator must file a petition at the FCC, including DBS subscriber data. In the past, SkyTrends provided subscriber data for the DBS industry on a zip code basis.

**Satellite Broadcasting and Cable Association (SBCA) takes over for SkyTrends as provider of satellite viewer data for effective competition filings.** SkyTrends no longer provides data for effective competition petitions. Cable operators may now obtain data from the SBCA, subject to a standard agreement regarding data confidentiality and payment of a fee. Fees start at \$15 per zip code for a one-time request. If you are considering filing an effective competition petition at the FCC, please contact us.

### **CABLE OPERATORS AND THE DMCA**

**The law.** The Digital Millennium Copyright Act (DMCA) offers Internet Service Providers (ISPs) significant protection from copyright infringement claims. If you are an ISP, your company is exposed to infringement claims that may arise from copyrighted material illegally placed on your network by a user.

The DMCA established procedures through which your company can obtain immunity from infringement claims. Compliance with the statute involves understanding and completing all the steps, consistent monitoring of complaints, and adherence to the various procedures required under the DMCA. Our firm has helped a number of ISPs efficiently obtain the benefits provided under the DMCA. Please call us for more information.

**Recent activity.** Federal Courts across the country are addressing several DMCA issues. Can a copyright holder serve a subpoena and obtain subscriber information without judicial oversight? Do portions of the DMCA violate a subscriber's first amendment right to anonymous speech? In *RIAA v. Verizon*, the US Court of Appeals for the DC Circuit ruled in favor of Verizon in December 2003. Putting the constitutional issue aside, the court held that "a subpoena may be issued only to an ISP engaged in storing on its servers material that is infringing or the subject of infringing activity."

### **FCC REMINDERS AND UPCOMING DEADLINES**

**Basic signal leakage performance reports deadline extended to February 29, 2004 – if filed electronically.** The deadline for 2003 signal leakage reports is extended to February 29, 2004 – but only for cable operators filing the report electronically. It is important that all operators file the Signal Leakage Report for several reasons. First, the rules are in place for safety purposes. Second, the FCC could charge your company fees for noncompliance. Recently, the FCC fined a small cable operator \$8,000 for violating the signal rules. The signal leakage actually stemmed from theft of service. Even so, the FCC slammed them. The upshot? Even when a third party is the cause of the signal leakage, the FCC can find a cable operator in violation.

**Form 477 is released for the March 1, 2004 filing.** The FCC recently released its Local Competition and Broadband Reporting Form 477. The form collects information on the deployment of broadband, local telephone and mobile telephony services. Data from the form will be used to describe the current state of competition. Facilities-based providers that provide at least 250 one-way or two-way broadband connections to end users in a given state (or have at least 250 subscribers to broadband service in a given state) must file a Form 477 for that state. Access the form and instructions at [www.fcc.gov/formpage.html](http://www.fcc.gov/formpage.html).

**FCC rules require cable operators maintain a public file.** As you are well aware, under FCC rules and regulations, cable operators must comply with public inspection and recordkeeping requirements. These requirements include but are not limited to keeping proof-of-performance test data and signal leakage logs and repair records. Several exceptions exist depending on the number of subscribers your system serves. Recently, the FCC issued 28 Notices of Apparent Liability to radio stations that did not adequately comply with the FCC's public file requirements. The stations were ordered to pay fines of \$3,000 each. Small cable operators are not immune from monetary forfeitures. The benefits of knowing and following the FCC's public file rules far outweigh the risks of being fined thousands of dollars.

**Cable Copyright filings are due March 1, 2004.**

**Applications for loan guarantees under the LOCAL program are due April 21, 2004.**

### **FCC FORMS**

**Several forms at the FCC can now be filed online.**

- Cable Community Registration Statements
- Operator, Mail Address, and Operational Information Changes
- Basic Signal Leakage Performance Report (FCC Form 320)

To use the online filing option, access the Cable Operations and Licensing Systems (COALS) on the FCC's website at [gulfoss2.fcc.gov/csb/coals](http://gulfoss2.fcc.gov/csb/coals). Use of COALS continues to be optional.

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Please visit our website at [www.cm-chi.com](http://www.cm-chi.com) to learn more about our lawyers and practice. You can reach Cinnamon Mueller at 312-372-3930.

*This update is provided by the law firm of Cinnamon Mueller. The document is intended for informational purposes only as a service to clients of Cinnamon Mueller and to the members of the American Cable Association. It is not intended to provide specific legal advice or to substitute obtaining appropriate legal counsel. We encourage you to consult with counsel to address special compliance issues and for assistance in negotiating or handling any such matter referred to in Client Update.*

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