

**The Importance of Retransmission Consent  
(or Will Consumers Be Upset if They Cannot Watch the Super Bowl, World Series, and  
Academy Awards?)**

**By Suzanne Yelen**

In today's marketplace, television programming consumers have more choices of providers than ever. Customers are regularly bombarded with advertising from satellite, cable companies, and over-builders; and many can also choose a competitive wireline cable provider, such as Verizon or AT&T. In addition, more and more video programming is available online, with some customers choosing to drop all video subscription services in favor of Internet offerings.<sup>1</sup> However, as consumers have made clear, certain programming is "must-see" programming – for which there is no substitute.

As explained below, until relatively recently, local broadcast affiliates of the major networks and network-owned affiliates allowed cable providers to retransmit their feeds in exchange for carriage of other network-owned channels and similar non-monetary compensation. However, beginning around 2004, networks and broadcasters have used the entry of new competitors into the video programming market and their leverage as providers of critical programming to demand increasing monetary compensation from cable and satellite providers. Battles over the appropriate level of compensation for network programming have led to several "blackouts," in which the broadcaster withholds permission for retransmission of its signal while during negotiations. For example, Cablevision's New York viewers lacked the first two games of the 2011 World Series due to a transmission dispute between Cablevision and Fox. These blackouts have raised the ire of consumers, causing concern both in Congress and at the Federal Communications Commission ("FCC" or "Commission").

While broadcasters argue that the majority of retransmission consent agreements are resolved without blackouts and that the retransmission consent regime is working, multi-channel video programming distributors ("MVPDs"), such as incumbent and competitive cable companies and satellite providers, claim that it is these increasing retransmission consent fees that are causing consumers to suffer losses of programming and increased costs. Further complicating matters is increased network demands that local affiliates rebate a portion of retransmission fees back to the network, and efforts by at least one network to offer the network feed to an MVPD directly if the MVPD is unable to come to agreement with the local affiliate.

A number of the major MVPDs have requested that the FCC initiate a rulemaking to revise the retransmission consent process, although the FCC's authority in this area is limited by statute. Based on the conditions the Commission included in its approval of the Comcast/NBC merger, it is possible that the Commission might pressure broadcasters by allowing MVPDs to maintain offering the broadcast programming during a negotiations impasse and requiring binding

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<sup>1</sup> Jenna Wortham, *Crowded Field for Bringing Web Video to TVs*, N.Y. Times (Aug. 23, 2010), available at <http://www.nytimes.com/2010/08/23/technology/23startup.html?ref=hulullc>.

arbitration. However, the FCC's recent Notice of Proposed Rulemaking on retransmission consent issues concludes that the Commission does not have the statutory authority to require these measures and instead seeks comment on a number of less stringent means of encouraging retransmission agreements and avoiding programming blackouts.

The reality is that the number of retransmission disputes is growing. This trend is likely to continue with increased competition among MVPDs and mounting involvement by networks in local affiliate retransmission negotiations. While the FCC's proposals, if adopted, may have some effect on retransmission negotiations, the Commission's authority is limited by statute and any significant change will need to come from Congressional legislation.

No video competitor or potential market entrant can afford to ignore its need to offer certain network programming. Increased broadcaster and network demands as well as possible changes in the regulatory environment make it critically important that any company keep abreast of these developments and may warrant participation in the FCC's ongoing proceedings.

### *Evolution of the Current Retransmission Consent and Must-Carry Regime*

Cable television originated in the late 1940s as a retransmission service for areas that were not able to receive a high quality signal from broadcast television stations using standard antennas.<sup>2</sup> Cable television did not initially compete with broadcasters, but rather expanded the audience broadcast stations were able to reach. Consistent with this, in 1958 the Federal Communications Commission ("FCC") declined to regulate cable television stating that it was not a common carrier or a broadcaster under the Communications Act of 1934 and reaffirmed this view in 1959.<sup>3</sup>

As cable operators began adding "distant" signals to their offerings, cable television became more valuable to consumers and a potential threat to local broadcasters.<sup>4</sup> In response to these developments, in 1963, the Court of Appeals for the District of Columbia upheld a Commission decision refusing to grant a microwave license to a cable operator unless the cable operator agreed to carry the signal of the local broadcast station.<sup>5</sup> These rules were later extended, requiring cable systems to transmit to their subscribers the signals of any station into whose service area they have brought competing signals (must-carry)<sup>6</sup> and prohibiting the import of

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<sup>2</sup> Charles Lubinsky, *Reconsidering Retransmission Consent: An Examination of the Retransmission Consent Provision* (47 U.S.C. § 325(b)) of the 1992 Cable Act, 49 Fed. Comm. L.J., 99, 104 (1996) ("Lubinsky"); National Cable & Telecommunications Association, *History of Cable Television*, available at <http://www.ncta.com/About/About/HistoryofCableTelevision.aspx> (last visited Feb, 28, 2011).

<sup>3</sup> *Frontier Brdcast. Co. v. J.E. Collier & Carl O. Krummel*, Memorandum Opinion and Order, 24 F.C.C. 251, ¶ 7 (1958); *Inquiry Into the Impact of Community Antenna Sys., TV Translators, TV "Satellite" Stations, and TV "Repeaters" on the Orderly Dev. of TV Brdcast.*, Report and Order, 26 F.C.C. 403, ¶ 60 (1959).

<sup>4</sup> Lubinsky, *supra* note 2, at 2.

<sup>5</sup> *Carter Mountain Transmission Corp v. FCC*, 321 F.2d 359 (1963).

<sup>6</sup> *Microwave Relays First Report and Order*, 38 F.C.C. 683, ¶¶ 85-92 (1965) (applying rules to all cable providers using microwave relay systems). The requirement was expanded to all cable systems in 1966; *CATV Regulation Second Report and Order*, 2 F.C.C.2d 725, ¶ 48 (1966) ("*CATV Second Report and Order*").

distant signals into the 100 largest television markets without FCC approval.<sup>7</sup> These rules were upheld by the Supreme Court in 1968.<sup>8</sup> In 1972, the FCC revised its rules and added a program exclusivity requirement which gave local television stations that had purchased exclusive exhibition rights and copyright holders, the ability to demand that local cable systems delete a program from retransmitted distant signals.<sup>9</sup> However, in 1985, the D.C. Circuit held that the FCC's must-carry regulations violated cable operators' First Amendment rights.<sup>10</sup> Although the FCC attempted to make its rules consistent with the D.C. Circuit's decision, these rules were similarly struck down.<sup>11</sup>

In addition to reviewing FCC regulation, the courts were also addressing questions raised by broadcast retransmission over cable systems. In response to two Supreme Court decisions finding that the retransmission of broadcast programming did not implicate copyright issues,<sup>12</sup> Congress revised the Copyright Act in 1984 to establish a compulsory licensing scheme. These changes required cable operators to compensate copyright owners for retransmitted programming based on a government-set formula, but did not require payment to broadcasters for retransmission of local or distant signals.<sup>13</sup> After these changes to the Copyright Act, the idea of retransmission consent was proposed to the FCC by the National Telecommunications and Information Administration (NTIA),<sup>14</sup> but no such scheme was adopted.

The retransmission and must-carry laws in place today were passed as part of the 1992 Cable Act. Congress sought to address number of issues, including consumer complaints regarding rising cable rates and poor service quality.<sup>15</sup> The Act reregulated basic tier cable rates,<sup>16</sup> which had been deregulated in 1984, eliminated exclusive cable franchises,<sup>17</sup> and increased consumer

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<sup>7</sup> *CATV Second Report and Order*, *supra* note 6, at ¶ 141.

<sup>8</sup> *Southwestern Cable v. United States*, 392 U.S. 157 (1968).

<sup>9</sup> *Amendment of Pt. 74, Subpart K, of the Commission's Rules and Regs. Relative to Community Antenna TV Sys.*, Report and Order, 36 F.C.C.2d 143, ¶ 60 (1972).

<sup>10</sup> *Quincy Cable TV v. FCC*, 768 F.2d 1434 (D.C. Cir. 1985).

<sup>11</sup> *Century Communications v. FCC*, 835 F.2d 292 (D.C. Cir. 1987).

<sup>12</sup> *Fortnightly Corp. v. United Artists Television Inc.*, 392 U.S. 390 (1968); *Teleprompter Corp. v. Columbia Broadcasting Systems, Inc.*, 415 U.S. 394 (1974).

<sup>13</sup> 17 U.S.C. § 111(f).

<sup>14</sup> Lubinsky, *supra* note 2, at 112.

<sup>15</sup> Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (codified in scattered sections of 47 U.S.C.).

<sup>16</sup> 1992 Cable Act, § 3, 106 Stat. at 1464-65 (codified at 47 U.S.C. § 543(a)(2)).

<sup>17</sup> *Id.* §§ 7, 18, 24, 106 Stat. at 1483, 1493, 1500 (codified at 47 U.S.C. §§ 541, 546, 555 (respectively))

protections.<sup>18</sup> In addition, while leaving the 1984 copyright payment scheme intact, Congress added retransmission consent requirements and must-carry provisions.<sup>19</sup> The retransmission provision states that “[n]o cable system or other multichannel video programming distributor shall retransmit the signal of a broadcasting station, or any part thereof, except – (A) with the express authority of the originating station;” or – (B) pursuant to the must-carry provisions, “in the case of a station [so] electing.”<sup>20</sup> Thus, if a broadcaster selects must carry, it is guaranteed carriage on cable systems operating within its broadcast footprint, but will receive no compensation. If a broadcaster chooses retransmission consent, it is not guaranteed carriage, but can negotiate “in good faith” for compensation. Broadcasters were required to choose between retransmission consent and the must-carry within one year of enactment and thereafter every three years.<sup>21</sup>

The Act also required the FCC to establish rules to implement these provisions.<sup>22</sup> In 1993, the FCC determined that retransmission consent applies to both distant and local signals, but only local broadcasters have the option of selecting must carry.<sup>23</sup> In addition, the Commission held that failure to choose either must-carry or retransmission consent by the applicable deadline would result in must-carry status for applicable broadcasters and that broadcasters must bargain over only the signal right, and not for rights in the individual programming, in regard to securing retransmission consent.<sup>24</sup> However, the FCC’s authority to require retransmission consent agreements is limited because the only restriction on broadcasters is that they negotiate in good faith.

The impetus for the retransmission consent and must-carry provisions was to protect broadcasters and strengthen their position vis-à-vis the growing popularity of cable television. Although the Conference Committee Report for the Act does not provide much information regarding the inclusion of the retransmission consent and must-carry provisions, they evolved from the Senate Committee on Commerce, Science, and Transportation.<sup>25</sup> That Committee’s report stated:

Cable systems now include not only local signals, but also distant broadcast signals and the programming of cable networks and premium services. Cable

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<sup>18</sup> *Id.* §§ 8, 19, 20, 106 Stat. at 1484, 1494, 1497 (codified at 47 U.S.C. §§ 552, 548, 551 (respectively)).

<sup>19</sup> 47 U.S.C. § 325(b); 47 U.S.C. §§ 534, 535 (1994).

<sup>20</sup> 47 U.S.C. §325(b)(1).

<sup>21</sup> *Id.* § 325(b)(3)(B).

<sup>22</sup> 1992 Cable Act, §§ 12, 106 Stat. at 1488 (codified at 47 U.S.C. 325(b)(3)).

<sup>23</sup> *Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Report and Order*, 8 FCC Rcd 2965, ¶ 176 (1993).

<sup>24</sup> *Id.*

<sup>25</sup> Lubinsky, *supra* note 2, at 119.

systems compete with broadcasters for national and local advertising revenues. Broadcast signals, particularly local broadcast signals, remain the most popular programming carried on cable systems, representing roughly two-thirds of the viewing time on the average cable system. It follows logically, therefore, that a very substantial portion of the fees which consumers pay to cable systems is attributable to the value they receive from watching broadcast signals. Due to the FCC's interpretation of section 325, however, cable systems use these signals without having to seek the permission of the originating broadcaster or having to compensate the broadcaster for the value its product creates for the cable operator.<sup>26</sup>

The Report further explained that this created a “distortion in the video marketplace which threatens the future of over-the-air broadcasting”<sup>27</sup> and “the intent of [the retransmission consent provision] is to ensure that our system of free broadcasting remain vibrant, and not be replaced by a system which requires consumers to pay for television service.”<sup>28</sup> In 2005, the FCC summarized that Congress intended “to establish a marketplace for the disposition of the rights to retransmit broadcast signals” but did not intend “to dictate the outcome of the ensuing marketplace negotiations.”<sup>29</sup>

#### *Retransmission Negotiations under the 1992 Cable Act*

Although broadcasters tried to use the new Act to seek monetary compensation in return for retransmission consent, cable operators strongly resisted this and instead offered to compensate broadcasters with advertising time, cross-promotions, and carriage of affiliated channels.<sup>30</sup>

Many broadcasters were able to reach agreements that involved in-kind compensation by affiliating with an existing non-broadcast network or by securing carriage of their own newly-formed non-broadcast networks. Broadcast stations that insisted on cash compensation were forced to either lose cable carriage or grant extensions allowing cable operators to carry their signals at no charge until negotiations were complete. [By 2005], cash still has not emerged as a principal form of consideration for retransmission consent. Today, virtually all retransmission consent agreements involve a cable operator providing in-kind consideration to the broadcaster.<sup>31</sup>

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<sup>26</sup> S. Rep. No. 102-92, at 35, *reprinted in* 1992 U.S.C.C.A.N. 1133, 1168.

<sup>27</sup> *Id.* at 35, *reprinted in* 1992 U.S.C.C.A.N. 1133, 1168.

<sup>28</sup> *Id.* at 41, *reprinted in* 1992 U.S.C.C.A.N. 1133, 1174.

<sup>29</sup> Federal Communications Commission, *Retransmission Consent and Exclusivity Rules: Report to Congress Pursuant to Section 208 of the Satellite Home Viewer Extension and Reauthorization Act of 2004*, ¶ 9 (rel. Sept. 8, 2005) (footnote omitted).

<sup>30</sup> *Id.* ¶ 10.

<sup>31</sup> *Id.* (footnotes omitted).

However, despite the fact that broadcasters were generally not able to negotiate cash compensation, the FCC still found that:

Together, must-carry and retransmission consent provide that all local stations are assured of carriage even if their audience is small, while also allowing more popular stations to seek compensation (cash or in-kind) for the audience their programming will attract for the cable or satellite operator. Must-carry alone would fail to provide stations with the opportunity to be compensated for their popular programming. Retransmission consent alone would not preserve local stations that have a smaller audience yet still offer free over-the-air programming and serve the public in their local areas.<sup>32</sup>

In 2000, the FCC adopted rules governing what constituted “good-faith” negotiations between cable providers and direct satellite providers<sup>33</sup> (together MVPDs) and broadcasters.<sup>34</sup> These rules require that broadcasters negotiate in good faith, but that “it shall not be a failure to negotiate in good faith if the television broadcast station proposes or enters into retransmission consent agreements containing different terms and conditions, including price terms, with different multichannel video programming distributors if such different terms and conditions are based on competitive marketplace considerations.”<sup>35</sup> In addition, a broadcaster must not: (1) refuse to negotiate retransmission consent with any multichannel video programming distributor; (2) refuse to designate a representative with authority make binding representations on retransmission consent; (3) refuse to meet and negotiate retransmission consent at reasonable times and locations, (4) refuse to put forth more than a single, unilateral proposal, (4) fail respond to a retransmission consent proposal of an MVPD; (5) enter into an agreement which requires a broadcast station to refrain from granting retransmission consent to any MVPD, and (6) refusing to execute a written retransmission consent agreement with an MVPD.<sup>36</sup> These rules were originally to terminate in 2005, but have been extended on multiple occasions.

At the time this report was published, the relative bargaining position of broadcasters began to increase vis-à-vis that of MVPDs. Broadcasters were first able to negotiate monetary compensation in a significant way from MVPDs beginning in 2005.<sup>37</sup> Cable providers, who had

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<sup>32</sup> *Id.* ¶ 33.

<sup>33</sup> Satellite providers are governed by separate but similar retransmission consent and must-carry requirements. *See* 47 C.F.R. §§ 76.65-66.

<sup>34</sup> *Retransmission Consent Issues: Good Faith Negotiation and Exclusivity*, First Report and Order, 15 FCC Rcd 5445 (2000). The good faith requirement was extended to all MVPDs in 2004. Satellite Home Viewer Extension and Reauthorization Act of 2004, Pub. L. No. 108-77, 118 Stat. 2809 (2004).

<sup>35</sup> 47 C.F.R. § 76.65.

<sup>36</sup> *Id.*

<sup>37</sup> Time Warner Cable, et al., Petition for Rulemaking to Amend the Commission’s Rules Governing Retransmission Consent, MB Docket No. 10-71, at 14 (filed Mar. 9, 2010) (“Time Warner, *et al.* Petition”).

long had a monopoly position, were now competing with direct broadcast satellite providers and telephone companies entering the video market, and broadcasters were beginning to explore additional outlets for their programming using the Internet. The satellite providers and telephone companies were new entrants in the market, and with their smaller customer bases were more likely to give in to broadcaster demands for monetary compensation. As these competitors to cable increased their market share, broadcasters were able to increase pressure on the cable companies to make similar deals.<sup>38</sup>

Broadcasters had a few additional advantages that further strengthened their bargaining position. In addition to increased leverage from MVPD competitors, broadcasters had the protection of the network non-duplication rule, which allows a television broadcast station that has purchased exclusive rights to network programming within a specified area to demand that a local cable system's duplicate carriage of the same program from an otherwise distant station be blacked out,<sup>39</sup> and the syndicated program exclusivity rule, which is similar to the network non-duplication rule, but applies to exclusive contracts for syndicated programming, rather than for network programming.<sup>40</sup> Finally, despite the increasingly broad array of non-broadcast programming, the broadcast networks are still regarded as showing "must have"<sup>41</sup> programming. The FCC recognized this when reviewing the News Corp./DIRECTV transaction. The Commission described local broadcast stations as "without close substitutes"<sup>42</sup> and said that News Corp. "possesses significant market power in the DMAs [Designated Market Areas] in which it has the ability to negotiate retransmission consent agreements on behalf of local broadcast television stations."<sup>43</sup> There have been few complaints filed at the FCC regarding the good-faith negotiation requirement so there is little precedent regarding what constitutes "good faith."<sup>44</sup> Indeed, the FCC has explicitly recognized that even good faith negotiations may not result in an agreement.<sup>45</sup>

With critically important, popular programming, multiple MVPDs in each market, and the non-duplication and syndicated program exclusivity rules, the power of the broadcasters to demand substantial monetary compensation from MVPDs has continued to increase.

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<sup>38</sup> *Id.*

<sup>39</sup> 47 C.F.R. §§ 76.92(f).

<sup>40</sup> *Id.* § 76.106(a).

<sup>41</sup> *Hughes Electronics Corporation, Transferors, and The News Corporation Limited, Transferee, For Authority to Transfer Control*, Memorandum Opinion and Order, 19 FCC Rcd 473, 476-77 (2004).

<sup>42</sup> *Id.* at 565.

<sup>43</sup> *Id.*

<sup>44</sup> *Amendment of the Commission's Rules Related to Retransmission Consent*, Notice of Proposed Rulemaking, MB Docket No. 10-71, ¶ 12 (rel. Mar. 3, 2011) ("2011 NPRM").

<sup>45</sup> *Mediacom Communications Corporation v. Sinclair Broadcast Group, Inc.: Emergency Retransmission Consent Complaint and Complaint for Enforcement for Failure to Negotiate Retransmission Consent Rights in Good Faith*, Memorandum Opinion and Order, 22 FCC Rcd 47, ¶ 24 (2007).

## *Current Retransmission Consent Negotiation Environment*

Expirations of retransmission consent agreements are now loud, public affairs punctuated by ad campaigns by the relevant MVPD and broadcast station each blaming the other for any impasse in negotiations and the possibility of a blackout, in which the broadcaster will withdraw its programming from the MVPD. For example, the March 2010 Academy Awards broadcast was marred for about 3 million viewers in New York, New Jersey, and Connecticut because ABC's New York affiliate – WABC – and Cablevision, the incumbent cable operator, when ABC required Cablevision to block out its signal on March 7 because of a retransmission consent dispute. The signal was restored thirteen minutes into the Awards ceremony.<sup>46</sup> During the dispute Cablevision said that Disney, the owner of ABC, was putting its “own financial interests above their viewers,” while Disney/ABC criticized “Cablevision’s legendary greed and disregard for the needs of their customers.”<sup>47</sup> In October 2010, Cablevision viewers endured a two-week blackout of Fox’s local affiliate, which prevented Cablevision customers from watching a significant part of the Major League Baseball playoffs. The parties settled their dispute prior to the beginning of the World Series, with Cablevision stating “In the absence of any meaningful action from the FCC, Cablevision has agreed to pay Fox an unfair price for multiple channels of its programming including many in which our customers have little or no interest.”<sup>48</sup> A further interesting feature of the Cablevision/Fox dispute was that Fox blocked Cablevision’s Internet subscribers from accessing Fox shows on Hulu.com, extending retransmission consent issues to the Internet.<sup>49</sup> In January 2011, Time Warner and Sinclair Broadcast Group came to an agreement that prevented the blacking out of certain ABC, Fox, and CBS stations throughout the country.<sup>50</sup>

MVPDs blame broadcaster demands for higher retransmission consent fees for increased cable rates<sup>51</sup> levied on consumers and the “recurring losses of programming for consumers.”<sup>52</sup>

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<sup>46</sup> Barry Paddock and Richard Huff, *ABC-Cablevision Blackout Lifted Just After Oscars Begin As Two Companies Reach Agreement*, N.Y. Daily News (Mar. 7, 2010), available at [http://www.nydailynews.com/entertainment/tv/2010/03/07/2010-03-07\\_abccablevision\\_blackout\\_lifted\\_just\\_after\\_oscars\\_began\\_as\\_two\\_companies\\_try\\_to\\_c.html](http://www.nydailynews.com/entertainment/tv/2010/03/07/2010-03-07_abccablevision_blackout_lifted_just_after_oscars_began_as_two_companies_try_to_c.html).

<sup>47</sup> Sam Schechner and Ethan Smith, *Cablevision, Disney End Dispute*, Wall. St. J. (Mar. 8, 2010), available at <http://online.wsj.com/article/SB10001424052748704706304575107971968110014.html>.

<sup>48</sup> Tom McElroy, *Fox, Cablevision Reach Deal to End NY Blackout*, ABC News/ESPN Sports (Oct. 31, 2010), available at <http://abcnews.go.com/Sports/wireStory?id=12013239>.

<sup>49</sup> Cecilia Kang, *Fox To Restore Internet Videos to Cablevision Customers*, Wash. Post (Oct. 16, 2010), available at [http://voices.washingtonpost.com/posttech/2010/10/fox\\_blocks\\_cablevision\\_from\\_fo.html](http://voices.washingtonpost.com/posttech/2010/10/fox_blocks_cablevision_from_fo.html).

<sup>50</sup> David Goetzl, *Fox, Sinclair Extend Carriage Agreement*, MediaDailyNews, (Jan. 12, 2011), available at [http://www.mediapost.com/publications/?fa=Articles.showArticle&art\\_aid=142831&nid=122596](http://www.mediapost.com/publications/?fa=Articles.showArticle&art_aid=142831&nid=122596).

<sup>51</sup> Cable rates have increased at a rate substantially above that of inflation, though the price per channel increased at a lower rate than inflation. *Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992, et al.*, Report on Cable Industry Prices, MM Docket No. 920266 (rel. Feb. 14, 2011).

<sup>52</sup> Time Warner, *et al.* Petition, *supra* note 37, at 24-27.

Conversely, broadcasters argue that most retransmission consent agreements are resolved without blackouts, there is no evidence showing a relationship between increased retransmission consent fees and increased cable rates, and that reducing retransmission consent fees would harm both the quality and quantity of broadcast television.<sup>53</sup>

Network involvement in retransmission consent is also increasing the likelihood of disputes. The networks have recently begun pressuring local affiliates for increasing shares of retransmission consent fees. Fox has been particularly aggressive, threatening to terminate the network affiliation if a local station does not agree to share retransmission fees and even demanding that the local station pay the network itself if the local station cannot negotiate sufficient retransmission fees.<sup>54</sup> Although NBC, CBS, and ABC are also looking for contributions from their local affiliates, they so far do not seem to be threatening to terminate station affiliations.<sup>55</sup> In addition, the Time Warner/Sinclair negotiations mentioned above revealed that Time Warner and Fox had entered into an agreement which allowed Time Warner to purchase Fox programming if the cable operator loses its rights to carry the signals of a FOX affiliate.<sup>56</sup> Carrying the network feed rather than the affiliate feed deprives the MVPD of local news and programming, but allows the MVPD to continue showing the network's "must-see" offerings.<sup>57</sup> This type of side agreement allows the network to profit directly from the MVPD, but reduces the local affiliates leverage vis-à-vis the MVPD, which in turn decreases any retransmission consent fees that can be shared with the network.

### *Consumer Anger and Government Reaction*

Consumer complaints regarding these high profile blackouts and loss-of-programming threats have attracted attention from both Congress and the FCC. Government officials describe consumers as innocent bystanders injured by fights between greedy corporations. For example, the Fox/Time Warner dispute resulted in Senator John Kerry of Massachusetts stating that a programming blackout would "neglect the core interests of the millions of households that

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<sup>53</sup> Letter from Erin L. Dozier, National Association of Broadcasters, to Marlene H. Dortch, FCC Secretary, MB Docket Nos. 07-198, *et al.*, at 204 (filed May 6, 2010).

<sup>54</sup> Joe Flint, Fox TV Demands Share of Stations' Retransmission Fees, L.A. Times (Feb. 12, 2011), *available at* <http://www.latimes.com/business/la-fi-ct-fox-affiliates-20110212,0,1121048.story>.

<sup>55</sup> *Id.*

<sup>56</sup> Joe Flint, Fights Between Programmers and Distributors Heat Up As 2011 Nears, L.A. Times (Dec. 30, 2010), *available at* <http://latimesblogs.latimes.com/entertainmentnewsbuzz/sinclair-broadcast-group/>.

<sup>57</sup> Use of this option by an MVPD could implicate the local affiliates non-duplication rights. However, some broadcasters have not been diligent about protecting these rights, opening an opportunity for negotiations between the network and the MVPD. In addition, if the network is only offering the network feed and not any other programming, that may not conflict with the FCC's rules. *See* Joe Flint, Fox Clause Is Focal Point of Fight Between Time Warner Cable and Sinclair Broadcast Group, L.A. Times (Dec. 6, 2010), *available at* <http://latimesblogs.latimes.com/entertainmentnewsbuzz/2010/12/fox-clause-is-focal-point-of-fight-between-time-warner-cable-and-sinclair-broadcast-group.html>.

subscribe to Time Warner Cable in affected markets.”<sup>58</sup> In addition, Congressional officials and public interest groups strongly condemned Fox for limiting Internet access to its online programming.<sup>59</sup>

In October 2010, Senator Kerry introduced legislation that would require broadcasters to keep their signals up during a negotiation impasse and give the FCC increased authority to require arbitration.<sup>60</sup> According to Kerry, his legislation would come into play in four possible ways:

**Scenario 1** - The FCC finds that the broadcaster is negotiating in good faith and making an offer consistent with market conditions but the distributor is not. In this case, the distributor shall agree to the broadcaster’s last best offer or terminate carriage and the FCC may fine the distributor for negotiating in bad faith. In lieu of termination of the signal, the broadcaster can withdraw the last best offer and ask the Commission to require binding arbitration.

**Scenario 2** - The FCC finds that the broadcaster is not negotiating in good faith or making an offer consistent with market conditions and the distributor is negotiating in good faith and making an offer consistent with market conditions, then the FCC can require binding arbitration. The penalty for the broadcaster is forced participation in binding arbitration.

**Scenario 3** (This will be the most likely scenario in most cases). The FCC finds that both parties have negotiated in good faith but reached a true impasse based on an honest disagreement on the value of the signal. In this case, the FCC may request them to submit to binding arbitration. If one party or the other refuses to engage in binding arbitration, then the FCC will provide both parties with a model notice by which to inform consumers of the potential loss of service as well as the difference in offers on the table so that consumers can judge for themselves who was making the fairest offer. This adds a more consumer friendly and transparent way to end transmission of services if necessary and creates an attractive option for arbitration for both parties.

**Scenario 4** - The FCC finds that neither party is negotiating in good faith, then it can require binding arbitration and fine both parties.<sup>61</sup>

Although hearings were held by Senate Communications Subcommittee of regarding this proposed legislation, further Congressional action is not expected in the near future.

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<sup>58</sup> Andrew Feinberg, Sen. John Kerry Wades Into Retransmission Consent Spat, *BroadbandBreakfast.com* (Dec. 22, 2009), *available at* <http://broadbandbreakfast.com/2009/12/sen-john-kerry-wades-into-retransmission-consent-spat/>.

<sup>59</sup> Brian Stelter, Internet Is a Weapon in Cable Fight, *N.Y. Times* (Oct. 19, 2010), *available at* <http://www.nytimes.com/2010/10/20/business/media/20hulu.html>.

<sup>60</sup> John Eggerton, Kerry Outlines Retrans Bill to FCC, *Broadcasting & Cable* (Oct. 19, 2010), *available at* [http://www.broadcastingcable.com/article/458696-Kerry\\_Outlines\\_Retrans\\_Bill\\_To\\_FCC.php](http://www.broadcastingcable.com/article/458696-Kerry_Outlines_Retrans_Bill_To_FCC.php).

<sup>61</sup> *Id.*

The FCC is facing substantial pressure to take action to prevent or at least mitigate future programming blackouts. In March 2010, several MVPDs, both cable and satellite providers, and several public interest groups filed a petition for rulemaking requesting that the FCC modify the retransmission consent process to prevent future programming blackouts and MVPD rate hikes caused by excessive retransmission consent fees paid to broadcasters.<sup>62</sup> This petition has generated over 250 comments and *ex parte* notices, according to the FCC's records.<sup>63</sup> In December, FCC Media Bureau Chief William Lake stated that the FCC initiate a rulemaking to examine retransmission consent practices in an effort to ensure that these fees are set by market forces while also protecting the interests of consumers. In describing the effect of programming blackouts on consumers, Lake quoted an African proverb that "when the elephants fight, it is the grass that suffers."<sup>64</sup> Although the FCC's authority to regulate retransmission consent is limited, the agency can consider regulations regarding the definition of "good faith" negotiations as well as other rules, such as the network non-duplication requirements, that give broadcasters leverage in negotiations. As Lake explained:

One thing we've heard is that uncertainty exists about what good faith means. Our rules provide some limited guidance on this; but, if we can provide greater certainty to the marketplace, that could help to guide the negotiating parties and reduce the number of failed deals and dropped signals. We may try to identify additional practices that will be treated as *per se* violations of the duty to bargain in good faith. We may be able to provide more specifics about the meaning and scope of the "totality of the circumstances" test. Because a principal concern is to protect consumers when talks break down, we may propose to strengthen our notice requirement and extend it to non-cable distributors and broadcasters. If some of our broadcast rules are thought to interfere with market negotiations, we may want to look at those rules.<sup>65</sup>

An indication of what the FCC might want to do (without consideration of any statutory authority limitations) can be found in the recent conditions attached to the merger of Comcast and NBC. The FCC frequently uses merger applications to obtain "voluntary" agreements from parties that they will comply with certain requirements which the FCC may not have the authority to adopt under statute.<sup>66</sup> One of the conditions attached to the Comcast/NBC transaction requires that NBC affiliates owned by the combined Comcast/NBC entity submit to a

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<sup>62</sup> Time Warner Cable, *et al.* Petition, *supra* note 37.

<sup>63</sup> A search of the FCC's Electronic Comment Filing System (ECFS) for MB Docket No. 0-71 shows that there were more than 250 submissions as of March 1, 2011.

<sup>64</sup> Remarks of William T. Lake, Chief, Media Bureau, FCC, to The Media Institute (Dec. 8, 2010), *available at* [http://www.fcc.gov/mb/Media\\_Institute\\_Remarks.pdf](http://www.fcc.gov/mb/Media_Institute_Remarks.pdf).

<sup>65</sup> *Id.*

<sup>66</sup> *See, e.g.,* Bryan N. Tramont, *Too Much Power, Too Little Restraint: How the FCC Expands Its Reach Through Unenforceable and Unwieldy "Voluntary" Agreement*, 53 Fed. Comm. L.J. 49 (2000).

baseball-style arbitration process during which time Comcast/NBC must continue to provide the programming at issue in the event of a dispute regarding the provision of programming. In addition, Comcast agreed to honor NBC's agreements to preserve network non-duplication to prevent importation of another affiliate's broadcast station signal into an NBC affiliate's market and Comcast will not use an NBC network direct feed in any NBC affiliate's market when an NBC affiliate withdraws retransmission consent in connection with retransmission negotiations between Comcast/NBC and the NBC affiliate. Comcast also agreed not to seek repeal of the current retransmission consent regime.<sup>67</sup>

However, the FCC recognizes that its ability to reform the retransmission consent process without Congressional action is limited. On March 3, 2011, the FCC adopted a Notice of Proposed Rulemaking with a goal "to protect consumers from the disruptive impact of the loss of broadcast programming carried on MVPD video services."<sup>68</sup> In this Notice, the Commission states that it does not believe that it has the authority to require interim carriage or mandatory binding dispute resolution procedures.<sup>69</sup> However, it does ask for comment on certain measures to reduce retransmission consent disputes, including:

- whether it should be a *per se* violation for a station to agree to give a network with which it is affiliated the right to approve a retransmission consent agreement with an MVPD or to comply with such an approval provision.<sup>70</sup>
- whether it should be a *per se* violation for a station to grant another station or station group the right to negotiate or the power to approve its retransmission consent agreement when the stations are not commonly owned.<sup>71</sup>
- whether it should be a *per se* violation for an MVPD or broadcaster to refuse to put forth *bona fide* proposals on important issues.<sup>72</sup>
- whether it should be a *per se* violation for an MVPD or broadcaster to refuse to agree to non-binding mediation when the parties reach an impasse within 30 days of the expiration of their retransmission consent agreement.<sup>73</sup>

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<sup>67</sup> *Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. For Consent to Assign Licenses and Transfer Control of Licensees*, Memorandum Opinion and Order, MB Docket No. 10-56, ¶ 168, App. A (rel. Jan. 20, 2011).

<sup>68</sup> 2011 NPRM, ¶ 17.

<sup>69</sup> *Id.* ¶ 18.

<sup>70</sup> *Id.* ¶ 22.

<sup>71</sup> *Id.* ¶ 23.

<sup>72</sup> *Id.* ¶ 24.

<sup>73</sup> *Id.* ¶ 25.

- what it means to “unreasonably” delay retransmission consent negotiations, to give more substance to the reasonableness requirement in Section 76.65(b)(1)(iii).<sup>74</sup>
- whether a broadcaster’s request or requirement, as a condition of retransmission consent, that an MVPD not carry an out-of-market “significantly viewed” station violates Section 76.65(b)(1)(vi) of the Commission’s rules.<sup>75</sup>
- whether the Commission provide more specificity in defining what would be a breach of good faith under the “totality of the circumstances” in Section 76.65(b)(2) and, if so, how.<sup>76</sup>
- whether the Commission should revise its rules requiring notice to consumers of programming blackouts.<sup>77</sup>
- whether the Commission should eliminate the network non-duplication and syndicated exclusivity rules.<sup>78</sup>

Although these proposals would put some additional pressure on MVPDs and broadcasters to come to agreements on retransmission consent, they are unlikely to have a substantial effect because the Commission would not have the authority to require binding arbitration or even interim carriage in the event of an impasse. Eliminating the network non-duplication and syndicated exclusivity rules might sound as if they would give MVPDs greater leverage to bargain among broadcasters, but as the FCC recognized, these rules were derived from private contracts between broadcast networks and their affiliates.<sup>79</sup> Thus, even if the FCC were to remove them, the parties could enforce these agreements through litigation.

Without congressional modification of the laws governing retransmission consent, it is likely that the current battles between broadcasters and MVPDs will continue regardless of whether the FCC adopts its proposed changes. Broadcast networks and MVPDs, who are more and more frequently direct competitors in originating programming, are under increasing pressure to enhance revenues. Networks are also putting pressure on their affiliates for additional revenue and even percentages of retransmission consent fees. The cost of programming, especially sports, continues to rise. Consumers are able to get more programming for free on the Internet. These and other factors will push broadcast affiliates and networks to demand greater compensation from MVPDs, while impelling MVPDs, who face consumer anger over rate increases, resist.

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<sup>74</sup> *Id.* ¶ 26.

<sup>75</sup> *Id.* ¶ 27 (footnote omitted).

<sup>76</sup> *Id.* ¶ 33.

<sup>77</sup> *Id.* ¶ 37.

<sup>78</sup> *Id.* ¶ 42.

<sup>79</sup> *Id.*

## *Retransmission Consent in a Changing Environment*

To prevent future consumer programming blackouts, Congress must give the FCC the authority to require interim carriage and binding arbitration to resolve impasses in negotiation. Otherwise, MVPDs and broadcasters will continue their brinkmanship negotiations in an effort to gain a strategic advantage.

However, Congress would be better off taking a step back and determining whether the current legal structure makes sense given the vast changes that have occurred in the video programming market. In 1993, one year after the 1992 Cable Act was adopted, 40 percent of television households relied on over-the-air television.<sup>80</sup> By 2009, only 11 percent of households were still doing so.<sup>81</sup> Similarly, in 1993, almost all multichannel video subscribers were cable customers.<sup>82</sup> By the end of 2010, cable had a little over 60 percent of the multichannel video market, with satellite providers at around 33 percent and telcos at about 6.4 percent.<sup>83</sup>

Other market developments also point to the need for a complete reexamination of cable and broadcast regulation. Cable channels and broadcasters are now direct competitors in programming. Cable networks produce their own original programming, although not to nearly the same degree as the networks,<sup>84</sup> and are starting to challenge network dominance.<sup>85</sup> Cable providers can rely on two revenue streams, subscriber fees and advertising, while broadcasters are dependent on advertising and to a lesser extent on retransmission consent fees.<sup>86</sup> Broadcast television is watched by almost 90 percent of consumers via an MVPD subscription in the same way as cable channels; however, broadcasters have substantially higher regulatory burdens, such as restrictions on indecency and requirements for children's programming. In addition, the availability of content over the Internet and on demand continues to increase. Wireless providers are openly calling for the repurposing of television broadcast spectrum to meet the growing

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<sup>80</sup> *Competition in the Video Programming Distribution Market*, First Report, 9 FCC Rcd 7442, ¶ 19 (1994) (“*First Cable Report*”).

<sup>81</sup> United States Statistics, What You Need To Know About the Digital TV Transition, *available at* [http://www.dtv.gov/dtv\\_stats.htm?yourState=US#sources\\_of\\_information](http://www.dtv.gov/dtv_stats.htm?yourState=US#sources_of_information).

<sup>82</sup> *First Cable Report*, *supra* note 80, ¶ 201.

<sup>83</sup> Dan O’Shea, SNL Kagan: Q3 video subscriber net loss hits 119,000 (Nov. 18, 2010), *available at* [http://connectedplanetonline.com/residential\\_services/news/SNL-Kagan-Q3-video-subscriber-net-loss-hits-119000-1118/?imw=Y#](http://connectedplanetonline.com/residential_services/news/SNL-Kagan-Q3-video-subscriber-net-loss-hits-119000-1118/?imw=Y#).

<sup>84</sup> Joe Flint, Cable vs. broadcast isn’t a fair fight, L.A. Times (Nov. 2, 2009), *available at* <http://latimesblogs.latimes.com/entertainmentnewsbuzz/2009/11/cable-vs-broadcast-isnt-a-fair-fight.html>.

<sup>85</sup> Gary Levin, In 2010, cable TV’s ratings put networks on notice, USA Today (Dec. 24, 2010), *available at* [http://www.usatoday.com/life/television/news/2010-12-23-cableyear23\\_ST\\_N.htm](http://www.usatoday.com/life/television/news/2010-12-23-cableyear23_ST_N.htm).

<sup>86</sup> Joe Flint, Cable vs. broadcast isn’t a fair fight, L.A. Times (Nov. 2, 2009), *available at* <http://latimesblogs.latimes.com/entertainmentnewsbuzz/2009/11/cable-vs-broadcast-isnt-a-fair-fight.html>.

demand for wireless broadband services<sup>87</sup> and while broadcasters note the emergence of wireless television which can rely on over-the-air broadcasts.<sup>88</sup>

Rather than considering the relative merits of MVPD arguments that broadcasters are price gouging and broadcaster arguments that they are only seeking appropriate compensation for their programming, it is time to rethink the laws and regulations governing cable and broadcast as a whole. Tinkering with retransmission consent will mitigate consumer blackouts in the short term but does nothing to address the fundamental changes in the video distribution industry.

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<sup>87</sup> CTIA, the Wireless Association, and Consumer Electronics Association, Broadcast Spectrum Incentive Auctions White Paper (Feb. 15, 2011), *available at* [http://files.ctia.org/pdf/CTIA\\_CEA\\_TV\\_Spectrum\\_Whitepaper\\_Summary.pdf](http://files.ctia.org/pdf/CTIA_CEA_TV_Spectrum_Whitepaper_Summary.pdf).

<sup>88</sup> Open Mobile Video Coalition, About Mobile DTV, *available at* <http://www.openmobilevideo.com/about-mobile-dtv/> (last visited Mar. 9, 2011).