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Post-Transition Must-Carry Picture Coming Into Focus

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The FCC has adopted long-awaited rules dictating how cable systems will carry over-the-air television signals after the February 17, 2009, transition to digital is complete. The new rules will require cable operators to provide the digital signal of local television stations to their analog subscribers in analog format. In the alternative, the signals may be provided in digital format only – *if* all subscribers have the necessary equipment to view digital signals. The FCC refused to adopt a blanket exception for small cable operators but signaled a willingness to consider waiver requests from small operators. The FCC also affirmed that (a) cable operators must carry high definition broadcast signals in HD format without material degradation, but (b) cable operators do not need to “carry all the bits” of a digital broadcast to satisfy the prohibition against material degradation.

February 17, 2009, marks the end of the digital television transition. On that date, all U.S. television stations are expected to cease broadcasting in analog and commence digital-only operations. For those viewers with either a subscription to a digital cable service or a television set with digital tuner, this change-over should not be a problem. The estimated 40 million households that subscribe to analog-only cable service and lack the necessary equipment to decode over-the-air DTV signals, however, faced the prospect of losing access to broadcast television. While most cable operators argued that they would take steps to protect these viewers, there were no clear-cut rules mandating how digital format broadcast signals would be provided to analog-only subscribers. The FCC’s new rules seem to address this gap.

The complete text of the new rules has not been made available as of the time of this writing. The news release issued by the FCC, however, indicates that the new rules do not actually mandate “dual carriage” as many broadcasters have urged for many years now. Rather, the new rules are based on the Communications Act’s requirement that cable operators deliver local broadcast signals in a manner that is viewable by all subscribers.

To meet this “viewability” requirement, cable operators have a choice: Either they must ensure that all of their subscribers have the necessary equipment to view digital signals (presumably through digital set-top boxes), or they must downconvert broadcasters’ digital signals and provide those signals in analog format for their analog subscribers. Digital subscribers, of course, would receive the digital signal. The FCC did not adopt an exception for small cable operators, as some in the cable industry wanted. Rather, systems with channel capacities of 552 MHz or less may request waivers of the new rules (presumably based on an economic hardship standard).

The new rules affect only those stations being carried pursuant to the FCC’s must carry rules. Stations that elected to negotiate for retransmission consent will continue to operate under the terms of their retransmission consent agreements. In addition, the new rules have an expiration date of three years after the transition date, with the expectation that the FCC will revisit the continued need for the rules by 2011.

At the same time, FCC reaffirmed that cable systems must carry HDTV signals in HDTV format, consistent with the current standards prohibiting “material degradation” of broadcast signals. The FCC did not, however, adopt a “carry all the bits” requirement sought by some broadcasters. Rather, cable operators may use compression technology to preserve bandwidth so long as it does not materially degrade the broadcast signal and the picture quality of such signals remains at least as good as the quality of any other programming carried on the system.

The FCC’s decisions drew a relatively muted response from the National Cable & Telecommunications Association. The NCTA, which represents many of the largest cable operators, had previously announced a voluntary plan for dual carriage that largely tracked the FCC’s new rules. The American Cable Association, which represents small cable operators, was more hostile to the measure, predicting that some small operators would have no choice but to shut down in the face of such a burdensome requirement. Indeed, while generally supporting the item, the NCTA nevertheless urged the FCC to “act quickly” to provide relief to “very small systems.”

We are still waiting on the final text of the FCC’s decision. Watch this space and – and our blog at <http://commlawblog.com> – for updates as they happen.