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Affiliate Autonomy Affirmed

FCC clarifies permissible scope of “right to reject” provisions

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A little over seven years ago, the Network Affiliated Stations Alliance (NASA) filed a petition seeking an inquiry into network practices. Specifically, NASA asked the FCC to investigate whether the affiliation agreement which the major commercial networks (ABC, CBS, NBC and Fox) routinely force their affiliates to sign complied with the FCC's rules. The FCC has now issued a Declaratory Ruling addressing issues raised in the NASA petition. The Commission's ruling clarifies what affiliation agreements may or may not say. It also sheds important light on affiliates' rights.

The FCC declaration addresses three areas of concern.

First, with regard to the ultimate control of the station, the FCC declared that: (1) licensee affiliates must retain ultimate control over station programming, operations and other critical decisions with respect to their stations; and (2) the network affiliation agreements must not undercut that control.

Second, with respect to the right-to-reject rule, the Commission affirmed that that rule is not limited solely to the right to substitute breaking news, local news or public affairs programming. This could be the most significant aspect of the declaratory ruling. The right-to-reject rule prohibits a TV station from entering into any contract with a network that prevents the station from either (i) rejecting or refusing network programming, or (ii) substituting a program which the station believes is of greater local or national importance. Some parties – primarily the networks – have viewed that rule as affording local affiliates a relatively narrow opportunity to override network programming decisions. The declaratory ruling, however, establishes that the right-to-reject is much more expansive, allowing an affiliate to substitute sports or entertainment or other programming as long as the licensee does so in the good faith belief that the replacement program is of greater local or national importance. In addition, the FCC found that networks cannot penalize affiliates for invoking the right-to-reject – meaning that the nets cannot impose financial or other penalties (including having the preemption count against

a preemption basket) for rejections or substitutions even if the rejections/substitutions were not related to breaking news.

Third, the FCC ruled on the option-time rule which relates to the attempts by the networks to control an affiliate's analog or digital spectrum. The option-time rule prohibits any clause in an affiliation agreement that "prevents or hinders the station from scheduling programs before the network agrees to utilize the time during which such programs are scheduled, or which requires the station to clear time already scheduled when the network organization seeks to utilize the time." The FCC determined that network affiliation agreements should not allow the networks to reserve an option to use an affiliate's broadcast time without committing to supply programming for the optioned time. In addition, the FCC stated that network affiliation agreements may not require affiliates to carry, at some unspecified future date, unspecified digital content that the network may or may not ever offer.

In sum, all of these aspects of the FCC's ruling are in the affiliate's favor. Each licensee affiliate should keep these considerations in mind when negotiating its network affiliation agreement.