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Cable Carriage Considerations 101

Pitfalls: Posturing and Precision

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With the October 1, 2008 deadline for broadcasters to elect must-carry or retransmission consent for carriage of their TV stations on cable TV systems, broadcasters seeking retransmission consent should be entering into negotiations soon, in order to have time for the negotiation process to play out prior to the election deadline. Broadcasters generally should not place themselves in a position of electing retransmission consent without knowing the terms of the final agreement, since that creates a risk that the broadcaster may forsake its must-carry rights but not reach an agreement with a cable operator prior to January 1, 2009, potentially resulting in losing carriage on certain cable systems.

In the process of negotiating a retransmission consent agreement (RCA), there are many issues for a broadcaster to consider. Here are two “insider” tips for broadcasters to keep in mind:

Termination Date of the Agreement

The must-carry/retransmission consent election is made as part of an on-going three-year cycle, with elections due by October 1 of a year, with the election in effect for the following three years. For example, elections are due this October 1, 2008; those elections will be in effect from January 1, 2009 through December 31, 2011. It is thus natural and common for the terms of RCAs to be for three or six years, with the termination date being the last calendar day of the last year of a three-year election cycle. However, cable operators occasionally seek or demand that the termination date of an RCA be in the middle of a three-year cycle. Often the cable operator attempts to justify this practice by suggesting that it needs to “stagger” the termination dates of the RCAs for all of the stations that it is carrying on the cable system, in order to stagger the work load of negotiating the agreements.

Regardless of the alleged justification, a termination date in the middle of a three-year cycle creates a *potential trap for the station*: if for some reason the operator decides to drop the station at the end of the term of the RCA, then the station has no carriage rights

for the remainder of the three-year election cycle, because the retransmission consent agreement has ended, but the station has no must-carry rights, because it could not effectively elect must-carry for a cycle in which it was being carried pursuant to retransmission consent, at least for the beginning of that cycle. Cable operators understand this result very well, and it gives them leverage against the station in negotiating carriage for the following cycle. There are ways to try to limit the damage of an RCA that ends in the middle of a three-year cycle, but the best approach is to avoid such a termination date in the first place.

Retransmission of the Station Using “Alternate” Technologies

Sometimes a cable operator will seek the right to retransmit the Station’s signal not only on its traditional cable systems, but also on undefined “alternate platforms” or using undefined “alternate technologies.” The cable operator may be attempting to provide for use of satellite master antenna TV systems (SMATVs) to serve apartment buildings. If that’s what the cable operator wants to do, and if that’s acceptable to the broadcaster, that’s fine – but the RCA should then make specific reference to SMATVs. Most importantly, the RCA should avoid such vague terms as “alternate platforms”, “alternate technologies”, etc.

While such amorphous language would likely encompass SMATVs, it would also extend well beyond them. In particular, that language could be read to authorize cable operators to stream the station’s TV signal on the Internet. But that would raise a world of potential problems for all concerned. A cable operator’s attempt to stream the station’s signal onto its Internet site: (1) would likely violate the station’s syndicated programming and network agreements; and (2) would probably also create potentially large copyright problems for the station (as well as for the cable operators). Moreover, as a basic negotiating tactic, the station should not be giving away unknown distribution rights for free. If a cable operator wants to use SMATVs to distribute programming to apartment buildings, then the language in the RCA should explicitly limit the grant of that right to SMATVs.

Of course, there are many other issues to be mindful of in negotiating RCAs. It is always wise to consult with your attorney *during* the negotiation process – *i.e.*, *before* the RCA is signed – in order to avoid problems *after* it’s signed.