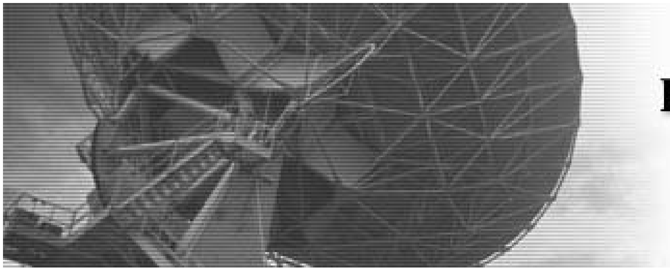

FLETCHER, HEALD & HILDRETH, PLC
Telecommunications Law & Regulation

July 2008

Retrans Revamps Requested

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Several cable operators have been stepping up attacks on the retransmission consent rules that they say unfairly favor broadcasters. In particular, the American Cable Association (ACA), which represents smaller cable operators, has been pressing the case before Congress and the FCC that broadcasters have too much leverage in the negotiation for retransmission consent. The ACA is (a) urging Congress to investigate the retransmission consent regime while (b) asking Congress and the FCC to rewrite rules to allow cable operators to carry out-of-market stations. One group of cable operators is even pushing the broadcast DTV transition as a reason for limiting broadcasters' retransmission consent rights.

The central issue, of course, is the ongoing struggle over how much compensation cable operators should pay to broadcasters for retransmitting their over-the-air signals. The cable operators, of course, would prefer to pay nothing for those signals. That desire, however, is typically blocked by the fact that broadcasters that elect retransmission consent status usually have the exclusive right to broadcast a particular network's programming within a given market. Thus, if a cable operator in a given market wants to continue to retransmit *American Idol* to its subscribers, it will need to reach a deal with the Fox affiliate in that market.

None of this is new, of course, but as the next round of retransmission consent negotiations comes around – the deadline for the next election is October 1, 2008 – many cable operators are facing an increasing number of broadcasters determined to receive compensation for allowing their signals to be carried on cable. These cable operators claim that broadcasters' exclusive rights to popular broadcast content gives the broadcasters an unfair ability to demand unreasonable sums for the right to retransmit that content. Broadcasters counter that they only want whatever their signals are worth. If the price is too high, the cable operators are free to pass. Indeed, given that much lower-rated cable networks command fees between $1 and $3 dollars per subscriber, broadcasters argue that the much lower fees demanded by broadcasters cannot be considered unreasonable.

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Thus, the ACA and some cable operators are turning to that time-honored Washington, DC, approach to regulatory difficulties – trying to get the rules changed in their own favor. In connection with the FCC's localism rulemaking, for instance, the ACA filed comments urging the FCC to allow cable systems to carry TV stations from adjacent, in-state markets. Pointing out that DMA lines occasionally do not coincide with state lines, the ACA argued that current arrangements block cable subscribers from receiving the signals of stations that are in the same state but different markets – thus denying such subscribers access to in-state news, sports, and weather programming.

The ACA is also supporting a House bill introduced by Congressman Mike Ross (D-AR), which would permit cable operators to offer TV signals from adjacent markets in circumstances in which a cable system is physically in one state but is part of the DMA of a bordering state, allowing cable subscribers access to in-state-but-out-of-market broadcast stations. The current version of the bill would not merely allow such carriage but would eliminate retransmission consent, network nonduplication, syndicated exclusivity, and sports blackout rules with respect to such in-state/out-of-market stations. ACA, obviously, supports this approach, arguing that consumers should be entitled to access stations licensed to their own state. Of course, giving cable operators the ability to pick up such out-of-market stations (without the consent of the stations involved) would just happen to eliminate the exclusivity – and the bargaining power – of the in-market stations.

In a separate move, a group of cable operators is seeking to eliminate the threat of broadcasters' withholding retransmission consent, at least for the months surrounding the DTV transition date. Claiming that a "quiet period" is needed to avoid disruptions of the DTV transition, the cable operators asked the FCC to prohibit TV stations from pulling their signals during the months surrounding the February 17, 2009, transition date. Coincidentally, the proposed quiet period would cover one of the critical ratings "sweeps" periods – when some of the most in-demand broadcast programming is aired. Thus, regardless of whether such a quiet period would help the DTV transition, it certainly would help cable operators by ensuring that no broadcaster could refuse retransmission consent during the February, 2009 sweeps.

While it is unclear that any of these cable-sponsored efforts will gain any traction in Congress or before the FCC, television broadcasters that are counting on retransmission consent revenues would be well-advised to keep up with the latest developments. With the October 1, 2008 election date (which will affect carriage arrangements for the 2009-2011 cycle) fast approaching, stations should already have their own strategies at least roughed out – but stations should also be prepared to shift gears if necessary in light of the on-going cable efforts to change the rules.