

A Big Price Tag: \$2.5 Billion in Retrans Fees: Who Will Pick Up the Tab?

What You Need to Know About the 2011 Retransmission Consent Cycle

By: Heidi Schmid and Andrea Person

The 2011 retransmission consent cycle will be here shortly and now is the time to begin preparations. Why? Because this year the fees are expected to skyrocket and independent cable providers will be forced to pay part of the tab.

\$2.5 Billion in Retrans Fees? Until recently, broadcast affiliates retained retransmission consent fees as “compensation.” Now, powerful broadcast networks like ABC and CBS, suppliers of network programming to their affiliates, are reportedly demanding, and obtaining, a cut of affiliate retransmission consent revenue. Reports indicate that ABC now requires affiliates to pay the network 50% of retransmission consent revenues. More shocking is that companies like CBS think that current fees are not high enough. Recent media reports quoted CBS Corp. president and CEO Leslie Moonves telling investors that CBS’ retransmission revenue target of \$250 million for 2012 is too low. Mr. Moonves stated that he believes broadcast networks should be able to get up to \$2.5 billion in fees.

That is a lot of money: where is it coming from? To receive retransmission consent fees in the billions, broadcasters are demanding more money from more cable operators. Originally, broadcasters targeted smaller operators for significant

fees. Now, broadcasters have moved up the ladder and target larger operators too.

Not Afraid of the Dark. Broadcasters continue to show confidence in the value of high demand content. Recent blackouts have ended only when cable companies agreed to pay. The stakes are high with must have programming on the line. Previous standoffs threatened only to shut televisions off during major television events like the Sugar Bowl or the Oscars. But, recent impasses have kept consumers in the dark for days causing them to miss highly desired television content. The most controversial dispute to date took place in New York this past October when negotiations between Cablevision and News Corp. broke down. The result? Three million consumers were hit hard with a 15-day standoff that cut access to Fox at the start Major League Baseball’s World Series. More recently, a breakdown in March between LIN Media and DISH Networks negotiations caused consumers to lose service in Terre Haute, Indiana just before hometown favorite Indiana State University competed in the Missouri Valley basketball tournament.

Reform on the Horizon. When televisions go dark, consumers complain. After a media storm following the Cablevision News Corp blackout, the American Cable Association with a consortium of other cable providers, DBS providers, and public interest groups filed a petition with the FCC. ACA’s involvement highlighted the critical need for reform for small cable companies. With consumer complaints high and industry calling for reform, the FCC decided to release a Notice of Proposed Rulemaking (“NPRM”) concerning retransmission consent. The NPRM seeks comment on a series of proposals to streamline and clarify FCC rules concerning retransmission consent negotiations, including:

1. Strengthening the good faith negotiation standards by adding *per se* violations;
2. Improving notice requirements to consumers in advance of service disruptions;
3. Extending to non-cable MVPDs the prohibition on deleting or repositioning stations during “sweeps” periods; and
4. Eliminating the network non-duplication and syndicated exclusivity rules.

Comments collected from the NPRM will analyze the need to release new rules.

The FCC’s decision to review retransmission consent is significant but the impact may be minimal. The FCC believes that Congress limited its authority to reform the retransmission consent process to a small slice of retransmission consent - the good

About the Authors

Heidi Schmid and Andrea Person are attorneys with the law firm of Cinnamon Mueller. With offices in Chicago and Washington, DC, CM focuses its practice on representing small and medium-sized cable operators. CM is also outside counsel to the American Cable Association, and has been closely involved in ACA’s retransmission consent reform efforts for more than 15 years. For more information about Cinnamon Mueller, visit us online at www.cm-chi.com.



Heidi Schmid



Andrea Person

faith standard. Accordingly, the NPRM will not address valuable negotiation mechanisms like required interim carriage or mandatory binding dispute resolution.

Not a Time for Foot Dragging. After over a decade of retransmission consent, the retransmission consent system needs repair. But, independent cable providers should be cautious in how they view the NPRM. Commissioner McDowell and Chairman Genachowski both made public statements to warn parties against relying on the NPRM as a signal that the FCC will act soon. Commissioner McDowell's statement cautioned providers to remember that:

No party should assume that the Commission will act in a particular way, or at a particular time, in this docket. So those of you who are working on retrans deals in 2011 and beyond should stay seated, and engaged, at the bargaining table, and reach a deal on your own.

Chairman Julius Genachowski reiterated the need for parties to remain engaged, stating:

No one should interpret our initiation of this proceeding as . . . or an excuse - to drag their feet on reaching retransmission consent agreements. Foot dragging or any bad-faith conduct won't be tolerated under our existing rules or any new rules we adopt in this proceeding.

So Start Now! Participants in the upcoming retransmission consent cycle should listen to the Commissioners' recommendation. Start now and decide to make 2011 retransmission consent cycle a priority. Already there are things you can do to participate in this year's cycle.

- **Budget for higher costs.** Consider all available evidence points to continuing sharp increases in retransmission consent costs. Programming budgets and rate increase plans should reflect this.
- **Trim programming costs.** Video providers should look for opportunities to reduce programming costs, by removing weaker channels when contracts expire, thereby saving license fees. In the face of spiraling retransmission consent costs, operators face tough choices.
- **Educate customers.** Smaller providers benefit from closer customer relationships. You are truly local businesses, with goodwill and trust built over years. That can provide a basis for customer outreach well in advance of December 2011, educating

customers on retransmission consent, the possibility of losing signals and the certainty of increasing costs. For that, they can blame the broadcasters.

- **Know the rules.** Retransmission consent remains a highly regulated transaction. All players must follow a detailed set of rules governing elections, negotiations, and carriage. Mistakes by either side can impact carriage rights. In our view, it is essential that a smaller provider have a working understanding of these rules, or risk being taken advantage of and missing opportunities. If you do not have the expertise on staff, retain someone that does. It will be worth it.
- **Read the fine print!** Coming from lawyers who have dealt with thousands of retransmission contracts: Beware! Many broadcaster contracts contain costly traps for the unwary. Scrutinize the fine print with care, and negotiate terms and conditions.
- **Talk to other independent cable providers.** Other providers in your area are struggling with the same questions as you are. Knowing how to best prepare, budget, and inform consumers are concerns shared by everyone. Talk to colleagues in your community. The more you understand about what other providers are doing in your area, the better you will be prepared to meet this year's obstacles.
- **Support reform.** Finally, if you agree that retransmission consent is broken (and you should), the FCC and Congress cannot hear this message too often. Through organizations like ACA, you can help deliver the message: Retransmission consent hurts consumers and smaller providers. Fix it! □

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Robert A. Searle — Editor & Publisher — rsearle@searlepub.com
Phone: 303-730-3006 — Fax: 303-797-0276

Roderick Robles — Associate Publisher — rrobles@searlepub.com
Phone: 805-683-2831

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