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Broadcast Retransmission Negotiations and Free Markets

by

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In recent years, rising broadcast retransmission fees have been the source of increasing friction between broadcasters and multichannel video programming distributors (MVPDs) negotiating over rights to retransmit broadcast signals. Just witness this past weekend's loss of Fox TV's network television programs by Cablevision's subscribers in New York, Philadelphia, and the surrounding areas. Not surprisingly, in light of the increasing number of blackouts and threatened blackouts of network television programming by broadcasters, there is now an important debate emerging concerning whether the FCC should adopt a set of negotiation and dispute resolution rules to address "must-carry" and retransmission consent rights.

There is a fundamental issue, however, that needs to be addressed before considering whether, or what kind, of new rules should be adopted governing the negotiations between the broadcasters and the multichannel video distributors. This is the issue concerning whether, as the broadcasters often claim, the government ought to take a completely "hands off" policy towards the negotiations because they take place in a "free market" context, or whether, instead, there are conditions that exist that make the context of the bargaining a rather "un-free" market.

At the Free State Foundation, we aspire to play second-fiddle to no one in favoring unfettered bargaining between private parties in a true competitive, free market context. Private bargaining, in which the parties know their own interests, and can contract freely to place a market value on their interests, benefits consumers more than a regime in which government substitutes its judgment for that of the private parties and handicaps the negotiations. But, at FSF, we know a free market when we see one. And under the existing legal and regulatory regime, retransmission consent negotiations simply don't take place in a free market setting.

Rather, as described below, the negotiations occur in the context of a federal law and regulation overlay that mixes elements of private bargaining with forced-access and protectionist elements. This creates artificial constraints that make the negotiations anything but a free market situation. Indeed, the statutory and regulatory constraints have the effect of conferring certain advantages that may work to the negotiating advantage of broadcasters and against the MVPDs.

Beginning with the Cable Act of 1992, Congress mandated that broadcasters may compel cable operators to carry their broadcast content on a basic tier channel. The broadcaster simply has to declare its content "must-carry" to invoke its statutory program carriage rights against cable providers. And Congress has mandated that the "must-carry" broadcaster, which has been granted its spectrum free of charge, gets to pick which particular cable channel must carry its content. (Since passage of the Satellite Home Viewing Improvement Act of 1999, Direct Broadcast Satellite providers are under many of the same must carry-type mandates as cable operators.)

Alternatively, broadcasters can elect to forego the "must-carry" option and instead negotiate directly with video distributors for retransmission of their broadcast signal. But cable providers are again restricted from freely negotiating in the bargaining process. The FCC's network non-duplication regulations allow local stations to block cable systems from importing network programming from another affiliate of the same broadcast network - even if the out-of-market broadcast affiliate and the cable network otherwise could reach a negotiated agreement. Similarly, syndicated exclusivity regulations allow local stations providing syndicated broadcast programming to prevent cable systems from carrying the same programs broadcast by out-of-market broadcast stations.

In passing the 1992 Act, Congress was motivated by what was then perceived to be a bottleneck for video distribution. The congressional restrictions sought to "protect" broadcasters in local broadcast markets from competing content offered by cable companies or from retransmission of out-of-market broadcasting content. "Must carry" mandates, in particular, were enacted out of a professed concern that, absent regulatory intervention, cable's perceived dominance over multichannel video distribution could result in local broadcasting being "blacked out."

Put aside for now any disputes concerning whether, even in 1992, cable had the stranglehold over multichannel video distribution upon which the Cable Act was premised. No matter. There can be no dispute that the video marketplace of 2010 is vastly more competitive than it was in 1992. With two major DBS providers offering nationwide service, and firms formerly known as "telephone companies" rolling out their own multichannel video services, cable operators today face serious competition. And consumers are now able in many instances to choose between two, three, or even four video service providers. These market developments have rendered whatever worries that existed in 1992 all but obsolete. And this is even more so with broadband Internet and wireless services now offering consumers even more avenues for receiving video content – of which they are very rapidly availing themselves.

Over the last few years, however, broadcasters have demanded that MVPDs pay larger retransmission fees based on the number of video subscribers receiving broadcasting content. MVPDs paid approximately $738 million to broadcasters in retransmission fees in 2009, with the number expected to increase to as much as $1.6 billion by 2015. Also, with increasing frequency, broadcasters are threatening to withhold retransmission consent prior to major viewing events, such as the Super Bowl. And we are now seeing that these threats are real. When negotiations over retransmission consent have broken down, MVPD consumers have, in fact, experienced blackouts of major events. For instance, earlier this year, an ABC station owned by Disney withheld its programming from Cablevision in New York and briefly interrupted the Academy Awards show. And, we have this past weekend's episode of a blackout in connection with the Fox/Cablevision dispute.

Contending that the 1992 Cable Act and FCC regulations no longer reflect the realities and incentives of today's video marketplace, a broad array of MVPDs – cable operators, satellite providers, telephone companies; note they all compete against each other - have petitioned the FCC to adopt one or more dispute resolution mechanisms. The petition suggests, for instance, mandatory arbitration or similar proceedings when negotiations break down. It also suggests that the FCC adopt mandatory interim carriage on the same terms contained in prior agreements when negotiations break down. Other rules are suggested both in the petition and in public comments submitted to the FCC.

The point here, however, is not to debate the wisdom of the proposed rules. I am sure there are pros and cons that ought to be carefully weighed regarding the proposals.

Rather the point here is much more fundamental: Despite any suggestions to the contrary, negotiations between broadcasters and cable operators over retransmission consent do not take place in a "free market" context. There are significant government-imposed conditions and constraints, such as those discussed above, that alter the claimed free market context.

It is necessary to understand this fundamental point as a predicate to consideration of the changes suggested to the retransmission consent negotiation process.

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