

Imagining a World Without Retrans

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Last year, a client told me something I'd never heard before: *"I really don't care if we get a deal done with these TV stations."*

Now, I've probably spoken with clients about retransmission consent hundreds of times over the years. They always think they need to carry major network affiliates regardless of price.

This particular client, however, thought that its subscribers had begun to care more about broadband service than traditional cable service. And it believed that subscribers wouldn't particularly mind losing the stations in question—at least at the prices the stations were demanding. So it was just as happy to walk away from negotiations as it was to ink a deal.

I'll bet many more ACA Connects members will find themselves feeling the same way in the coming years as they continue to emphasize broadband. What does this mean?

On the one hand, not needing to make a deal certainly makes negotiations much easier! Yet broadcasters aren't going to much like a world in which cable operators are less eager to pay to carry them. They're going to use every tool at their disposal to convince regulators to punish any failure to carry (and pay for) their stations. And regulators -- who think broadcasters offer unique local programming essential to public safety -- may be inclined to listen.

So if you think you might not want to renew an expiring retransmission consent deal, here are a few legal and policy issues to consider (you will, of course, already have thought through the business considerations):

- **FCC Good Faith Rules.** FCC rules are supposed to ensure "that broadcasters and MVPDs meet to negotiate retransmission consent and that such negotiations are conducted in an atmosphere of honesty, purpose and clarity of process." Among other things, parties have to meet and cannot simply put forth a "single, unilateral proposal." Presumably, then, a cable operator cannot simply announce that it will not negotiate with broadcasters at all. But what can it do? How many negotiating sessions must it participate in? Can it tell the station group that it will not pay at all for retransmission consent?
- **Franchise Requirements and Renewal.** Franchise agreements aren't supposed to regulate programming (other than PEG channels and the like). And franchise authorities aren't supposed to consider "the mix or quality" of programming at renewal time. But we know that franchise authorities have considerable discretion and may not like it if the cable operator stops carrying local stations—especially if it stops carrying all such stations. How can a cable operator protect itself?
- **Elected Officials.** It's not hard to imagine stations calling Members of Congress, state officials, and city council members to put pressure on a cable operator to cut a deal. In fact, it's happened before. How can a cable operator prevent this?

As is often the case, the best time to think about this is before a problem occurs. That is, if you suspect your negotiating position with broadcasters will change before the next election cycle, you might consider talking with your lawyer about it now so that you can have a strategy in place when the time comes.

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