



December 10, 2007

## MEMORANDUM TO CLIENTS

### Re: FCC Staff Clarifies “Dual Carriage” Order

As we reported last week, the FCC has released the text of the “dual carriage” rulemaking order adopted at its September meeting. The order requires cable operators to ensure that, following the February 17, 2009 digital transition deadline, all local must carry broadcast stations are “viewable” by all subscribers, either by providing customers with both a digital and downconverted analog version of such stations (and in some instances also providing a standard definition digital signal) or by deploying an “all-digital” system platform prior to the February 17, 2009 deadline.

**All-analog system carriage obligations.** On their face, the rules adopted by the FCC state that a cable operator is required to retransmit local must carry signals without “material degradation,” which is defined in terms of an operator’s obligation to provide must carry signals with no less than the same quality of signal processing and carriage provided other television signals. This approach arguably could be read as suggesting that an “all-analog” cable system can meet its signal carriage obligations if it delivers downconverted analog versions of local must carry stations in lieu of digital versions of those signals since the fact that the system doesn’t carry any digital signals means that the quality of a digital signal that has been downconverted to analog is no less than the quality of any of the other signals being delivered to subscribers.

However, after discussing the matter with Commission staff, we have confirmed that the FCC reads the rules (and its accompanying orders) as requiring **all** cable systems – even those that are all-analog – to provide customers with a HDTV signal for any must carry station that is broadcasting in HDTV. In particular, the staff cited statements made in the FCC’s 2001 digital must carry order (but not expressly incorporated in the rules) indicating that cable operators who do not provide any digital cable programming can fulfill their carriage obligations with respect to broadcast HD signals by passing through the broadcaster’s 8 VSB signal without alteration. To the extent that passing through an 8 VSB high definition broadcast signal requires the allocation of more than 6 MHz of bandwidth, the 2001 order indicates that the operator may count against its one-third must carry cap all of the bandwidth that is used (or rendered otherwise unusable) by such pass through.

**All-digital system carriage obligations.** Our discussions with the FCC staff also clarified the application of the dual carriage rules to all-digital systems. First, such systems also are required to retransmit in high definition those local must carry signals that broadcast a high definition signal. In addition, although the FCC's order suggested that cable operators can avoid a "dual carriage" obligation by going "all-digital," the staff confirmed that there could be situations in which an all-digital system would still have to provide local must carry signals in both high definition and downconverted standard definition formats. In particular, if a cable operator provides its standard definition digital customers with "standard definition-only" set-top boxes that are not capable of receiving the operator's retransmission of the local station's high definition signal, the operator will have to carry not only the local station's high definition signal, but also a downconverted version of that signal that can be received by the subscribers with standard definition-only boxes.

We would be pleased to respond to any questions regarding these matters.

**FLEISCHMAN AND HARDING LLP**