



October 1, 2008

MEMORANDUM TO CLIENTS

Re: **FCC Clarifies Digital Television (“DTV”) Station Carriage Obligations**

The FCC has released a Declaratory Order (“Order”) that clarifies: (1) the effect of a full-power television station’s October 1, 2008 must carry/retransmission consent election with respect to the upcoming analog-to-DTV conversion deadline; (2) a full-power DTV station’s channel position election; and (3) the rights of digital-only low power television (“LPTV”) stations.

Specifically, the Order states that, with respect to the January 1, 2009 – December 31, 2011 period (for which television stations were required to make their must carry/retransmission consent election by October 1, 2008), a station need only make a single must carry/retransmission consent election that will cover both the station’s analog signal prior to the DTV transition and the station’s DTV signal after the transition. For example, if a station elects must carry (or makes no election at all, which results in the station “defaulting” to must carry status), the cable system will have to carry the station in analog format from January 1, 2009 until the station ceases analog operations (currently slated for February 17, 2009). At the time that the station no longer is broadcasting in analog format, the cable system would have to immediately carry the station in digital format, with no gap in carriage. In the event that a station ceases analog operations between January 1, 2009 and February 17, 2009 and provides 30 days’ notice to the cable operator of the date on which DTV-only operations will commence, the operator would have to carry the DTV signal as of that date.¹ If a station elects retransmission consent, the cable system will have to carry the station, both before and after the DTV conversion date, in accordance with the negotiated terms of the retransmission consent agreement.

With respect to the FCC’s channel positioning rules, which apply only to must carry stations,² the Order clarified that a must carry station may demand carriage on its major (*i.e.*, analog) channel number as identified in the station’s program and system information protocol (“PSIP”). Accordingly, a must carry station now may elect to be carried on: (1) its former off-air analog broadcast channel; (2) its channel position as of July 19, 1985; or (3) its channel position as of January 1, 1992. If a DTV must carry station elects its former analog (*i.e.*, PSIP) position, the cable operator will be required to “map” the “primary” DTV signal designated by the broadcaster to that channel on all digital boxes, and by passing through PSIP, the station should appear on that channel on any DTV set that is equipped with a tuner that enables direct reception of digital signals (known as a “Clear QAM” set).

¹ Notably, however, the FCC failed to explain how a cable operator can be expected to comply with the requirement to provide 30 days’ notice to subscribers and LFAs of programming or channel changes when the broadcaster has only given 30 days’ notice to the cable operator.

² For stations that elect retransmission consent, channel positioning is governed by the parties’ agreement.

Significantly, the Order expressly stated that the Commission is not resolving at this time the issue of how the channel positioning rules apply when a cable operator is required to carry more than one version of a must carry station's signal (*i.e.*, a downconverted analog version of a DTV station carried pursuant to the FCC's "viewability" rule).

With respect to the carriage rights of LPTV stations that are "qualified" under the FCC's must carry rules, the Order clarifies that a digital-only LPTV station has the same limited must carry rights as an analog LPTV station. Accordingly, if a qualified LPTV station becomes digital-only, it may elect carriage of its signal in digital format or it may choose to pay the costs of downconverting the signal for carriage in analog format. In addition, the Order clarified that a digital LPTV station must deliver a signal of at least -61 dBm to the cable system's primary headend in order to be considered "good quality." This signal strength level is the same that is required of commercial and non-commercial full power stations.

Please call us with any questions regarding these issues.

FLEISCHMAN AND HARDING LLP