



December 22, 2008

MEMORANDUM TO CLIENTS

Re: Federal District Court Upholds Right of Rate-Deregulated Cable Operator to “Move” Analog PEG Channels to Digital Basic

In the most recent case to address a controversy over a cable operator’s decision to convert PEG channels from analog to digital, the United States District Court for the Middle District of Florida has dismissed a complaint filed the cities of Tampa and St. Petersburg (the “Cities”) alleging that Bright House Networks (“BHN”) violated the Communications Act and its franchise agreements with the Cities. The court found that because BHN has been determined to be subject to effective competition in both of the Cities, the provisions of the Communications Act that require carriage of PEG channels on the basic tier are not applicable and that the Cities cannot regulate how those channels are offered. In addition, the court found that the state franchising law enacted by Florida prior to filing of the complaint by the Cities expressly allows cable operators to carry PEG channels as part of the “lowest digital tier of service.”

Background. In December 2007, BHN, after giving notice to the Cities, implemented a basic tier channel realignment whereby several PEG channels previously transmitted as analog signals were converted to digital and offered as part of an enlarged basic tier that included both analog and digital signals. Prior to this channel realignment, all of the channels on BHN’s basic tier were analog. Subscribers with analog cable-ready television sets could receive the entire analog basic tier without any additional equipment; however, BHN was leasing over 2000 analog boxes (at \$0.39 per month) to subscribers with older television sets that could not receive all of the analog signals. After the realignment, subscribers who had digital cable ready sets with QAM tuners could receive all of the basic tier channels – analog and digital – without additional equipment. Basic-only subscribers who did not have such sets could lease a digital converter from BHN for \$1.00 per month or could purchase a digital to analog converter at retail.

Discussion. In their complaints, the Cities argued that Section 623(b)(7)(A) of the Communications Act required BHN to provide all subscribers with the PEG channels as part of the basic tier and with no additional equipment cost beyond that needed to receive other basic tier channels, and that their franchises with BHN dictated that the PEG channels be offered on the analog portion of the basic tier. In addition, the Cities claimed that Congress intended to require PEG channels to be made available at the lowest “reasonable” rate and that allowing BHN to convert the PEG channels to digital would cause the Cities to incur substantial expense to “re-brand” government access channels and to equip government offices with television sets capable of receiving the PEG channels.

The court rejected the Cities' arguments. Specifically, the court held that the specification of the minimum contents of the basic tier in Section 623(b)(7)(A) did not apply to cable systems that had been determined to be subject to effective competition, as was the case for BHN's systems serving the Cities. The court found that both the statutory language and the legislative history was clear in this regard. The court also stated that it was not persuaded by the decision of the United States District Court in a suit brought by the City of Dearborn against Comcast in which the court issued a temporary restraining order in favor the city prohibiting Comcast from converting PEG channels to a digital format. The court noted that the Michigan case did not address the merits of the issue and was supported by "very little analysis." Furthermore, it was noted that the Michigan court had subsequently decided to refer the issue to the FCC.

Finally, the court ruled that the Florida state franchising law, which was enacted before BHN realigned its basic tier, expressly permits cable operators to do exactly what BHN had done – place PEG channels on the lowest-priced digital service tier. The court found that the state franchising provision applied to all cable operators in Florida, even those that had not obtained a state-issued "certification." Thus, the fact that BHN obtained it state-issued certification after it realigned its basic service (and after the Cities filed suit) was immaterial.

Please call us with any questions regarding this matter.

FLEISCHMAN AND HARDING LLP