

UPDATE May 18, 2021

FCC Rejects Broadcaster Good Faith Claim Against Cable Operator

Last month, the FCC released an [Order](#) denying Gray Television's retransmission consent complaint alleging that Frontier Communications had failed to negotiate in good faith and alleging that Frontier violated the FCC's customer notification rules.

Background. Frontier and Gray were subject to a retransmission consent agreement, expiring December 18, 2020 at 5pm for carriage of WWSB on Frontier's cable system serving the Tampa and Sarasota, Florida areas, and WMBF and WCSC on Frontier's cable system serving the Myrtle Beach/Charleston, South Carolina area. The parties were unable to reach an agreement, and Frontier removed the stations from its systems on December 18th at the deadline.

Four days later, Gray filed a good faith complaint against Frontier, alleging that Frontier violated (i) its duty to negotiate in good faith, and (ii), its obligation under FCC rules to notify its customers "as soon as possible" once it knew it would no longer retransmit the station. Regarding the "good faith" allegations, Gray argued that Frontier violated two *per se* retransmission consent standards by allegedly (i) refusing to negotiate retransmission consent and (ii) refusing to designate a representative with authority to make binding representations. Gray also argued that Frontier violated the *totality of the circumstances* test.

Retransmission Consent. In 1992, Congress passed the Cable Act, amending existing law to prohibit cable operators from retransmitting a commercial broadcast station without the station's express consent. In 2000, the FCC issued regulations addressing for the first time the conduct of broadcasters in retransmission consent negotiations, and later made these good faith requirements reciprocal to both broadcasters and MVPDs. These regulations (since amended) contain nine *per se* negotiation requirements and also allow a party to demonstrate, based on the totality of the circumstances of a particular retransmission consent negotiation, that the other party breached its duty to negotiate in good faith.

Customer Notices. Last fall, the FCC revising its rules governing the rate and service change notices that cable operators must provide subscribers and local franchise authorities. This included clarifying that cable operators must only provide notice to subscribers as soon as possible if a retransmission consent or programming carriage negotiation leads to the loss of a channel when such negotiation is within the final 30 days of a contract.

Order. The FCC found that Frontier negotiated in good faith, agreeing that Frontier had a business reason for not accepting Gray offers (that the carriage was not as valuable as it had been). As evidence, the FCC noted that Frontier and Gray negotiated prior to the agreement's expired, exchanging at least eight drafts of a proposed new agreement. The FCC also noted that Frontier proposed counteroffers which, had Gray accepted, would have resulted in a retransmission consent agreement. The FCC also concluded Frontier gave notice to customers "as soon as possible" in accordance with its rules.

Cinnamon Mueller represented Frontier in this matter.

If you have any questions about retransmission consent and good faith negotiations, please contact Scott Friedman at (314) 462-9000 or sfriedman@cinnamonmueller.com.

FCC Proposes FY 2021 Cable Regulatory Fees

On May 4, 2021, the FCC released a [Report and Order and Notice of Proposed Rulemaking](#) seeking comment on its proposed regulatory fees for fiscal year 2021. Congress requires the FCC to annually collect regulatory fees to cover its operational costs, and the FCC sets the fees by calculating the proportion of the total number of FCC employees needed to regulate a particular service.

Proposed Regulatory Fees. The FCC has proposed the following regulatory fees:

- **2021 Cable/IPTV regulatory fee:** The FCC has proposed that cable systems (including IPTV systems) that had subscribers as of December 31, 2020 pay \$0.96 per subscriber, a \$0.07 increase from 2020.
 - **DBS regulatory fee:** In 2015, the FCC made DBS a sub-category of the Cable/IPTV fee category and adopted an initial regulatory fee of \$0.12 per subscriber. This year, the FCC proposes fee parity with cable and IPTV – \$0.96 per subscriber.
- **CARS licenses and permits:** The FCC has proposed that CARS facilities operating on October 1, 2020 pay \$1,500.00, even if the facility's license expired after October 1, 2020.
- **Interconnected VoIP regulatory fee:** The FCC proposes an ITSP fee of \$0.00388 for each dollar of interstate and international telecommunications revenue that a provider reports on its Form 499-A.

Filing Procedures and Window. Following adoption of its FY 2021 Fee Order (likely in August), the FCC will collect these fees during a subsequent filing window (likely in September). All licensees must use their FRN and password to access the [Fee Filer System](#), and review, create, update, or change the fees owed. Then, each licensee must make payments electronically – online payment with a credit card, online payment from a bank account, or by sending a wire transfer. Fee Filer will print a Form 159-E for users to transmit via fax for wire transfers.

If you have any questions about regulatory fee payments, please contact Scott Friedman at (314) 462-9000 or sfriedman@cinnamonmueller.com.

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