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**Will High Retransmission Consent Fees Hamper
a Successful Incentive Auction?**

by

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In recent years, over-the-air broadcasters, under the current retransmission consent regime, have been able to exact increasingly higher fees for permitting Multichannel Video Program Distributors ("MVPDs"), such as cable and satellite operators, to carry their TV programming. Both sides of the retransmission fee debate complain about the other parties' relative market power, and policymakers, including [some in Congress](#), complain about the consumer disruption that TV blackouts cause. Indeed, in the last three years, the number of blackouts has grown and the consumer inconvenience has been real.

These retransmission consent battles, such as the lengthy recent standoff between Time Warner Cable and CBS, have triggered a question in our minds concerning whether [skyrocketing retransmission consent fees](#) may hinder the success of the incentive auction. For the auction to have a chance of being successful, of course, broadcasters must decide to volunteer their spectrum to be auctioned.

The connection between retransmission consent and the incentive auction at first may appear somewhat speculative, but a [new study](#) released last week by the American Consumer Institute ("ACI") finds that the way the retransmission consent regulations operate will adversely impact the chances of the incentive auction's success. According to the ACI study, this is because the

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increasing retransmission fees will discourage broadcasters from relinquishing spectrum that they otherwise might put up for bid but for the impact of the retransmission consent regulations. Aside from the validity of the ACI study, the retransmission consent issue and the consumer disruption that attends blackouts resulting from retransmission consent standoffs are part of a larger market issue of which regulators and legislators ought to be aware, and which ought to be addressed.

Consumer welfare is promoted when consumers are allowed to choose what video programming they want to watch, regardless of the technology platform over which such programming is delivered. This consumer choice is best effectuated when consumers have access to various delivery mechanisms, such as over-the-air broadcasts, cable, satellite, telco MVPDs, or online distributors. Instead of focusing on consumer access, however, the current retransmission consent battles have focused more on a particular MVPD's access to TV programming and the broadcaster's provision of such programming. A broader focus would more likely enhance overall consumer welfare.

More spectrum for mobile broadband services holds the promise of adding enough capacity to permit consumers to more easily watch their favorite shows on a smartphone or tablet. This additional delivery mechanism already is becoming a boon to consumer video choice. The ability to obtain more mobile broadband capacity is in turn directly dependent on the success of the incentive auctions in making more spectrum available.

The incentive auction is expected to motivate broadcasters to voluntarily contribute a significant amount of over-the-air broadcast spectrum to a two-sided auction. The spectrum contributed by the broadcasters would then be auctioned off to the highest bidder, presumably service providers who wish to use the spectrum for mobile broadband use. If properly conducted, the two phases of this incentive auction could create up to 125 MHz of additional needed mobile broadband spectrum – at least that is the hope. This would accomplish a critical step in achieving [the Administration's goal](#) of allocating to wireless broadband 500 MHz of spectrum. Both the [FCC](#) and [Congress](#) recognize that maximization of volunteered broadcaster spectrum is key to the overall success of the incentive auction.

As the [new ACI study](#) suggests, a broadcaster's decision to contribute spectrum to the incentive auction will be driven by the economics of its business, including potential retransmission consent revenues, among others. The ability of a broadcaster to leverage control over its cost advantage by virtue of its grant of free local spectrum and certain regulatory protections may well contribute to a broadcaster's power to exact increasing retransmission consent revenues. (MVPDs, of course, had to privately finance their own delivery systems, and with respect to the use of spectrum, largely had to pay for it.) The amount of the broadcasters' retransmission consent revenues realized likely is not correlated directly with the amount of revenues that would be achievable in a truly free market environment. Fees in excess of those that otherwise would prevail in a free market could hinder either contribution of broadcast spectrum to the auction or increase the minimum price at which the broadcaster is willing to part with its spectrum.

How did we get to our present situation?

Originally, the most technologically feasible method of enabling consumer access to video programming involved the FCC granting individual broadcast spectrum licenses to local TV stations throughout the country. Market forces linked up local broadcasting stations into nationwide networks, the primary source of over-the-air broadcasting market power. Regulations were adopted in part to protect local broadcasters, arguably for what may have been assumed to be good reasons back in their day. Other regulations were intended to regulate nationwide network market power. But, in any event, most of the significant legacy rules were created in a much different market environment.

These legacy regulations allow broadcasters to enjoy favored channel positioning, buy-through protection, syndicated exclusivity and network non-duplication protection, and carriage rights, all of which no other video programmer enjoys. Cable and satellite TV operators have some advantages too. For example, they enjoy a compulsory copyright license. They benefit from cross-ownership rules that limit the aggregation of TV broadcast stations in individual markets (and hence may limit the broadcasters' market power), although to some extent these ownership limitations appear to have been eroded by the rise of "local marketing agreements" and other devices that, in recent years, have allowed broadcast stations effectively to combine local operations. Bruce Owen previously pointed out these advantages in an [FSF Perspectives](#) entitled, "The FCC and the Unfree Market for TV Program Rights." These market distortions have been well documented in earlier FSF blog postings [here](#), [here](#), and [here](#).

Since the successful launching of over-the-air TV, however, many other alternative programming delivery mechanisms have developed, from cable TV to satellite TV, to telco DSL, hybrid fiber, and fiber, and more lately, to Internet delivery, all of which the FCC repeatedly [have recognized as market participants](#). With the growth of companies that offer these competing delivery mechanisms, much of the rationale for the older broadcast TV rules is gone, as well as other rules that, to some extent, may favor cable TV providers.

Rep. Scalise [previously introduced](#) the "Next Generation Television Marketplace Act of 2011," that was designed to get rid of the outdated legacy regulations in the video marketplace. This bill proposed to eliminate many of the laws and regulations cited above that created artificial distinctions between video providers that no longer are relevant in a more competitive environment. The proposed bill would have returned to the realm of contract law much of the relationship among programmers and companies that operate delivery mechanisms. Adoption of legislation like the Scalise bill would be an important step in the right direction.

Admittedly, the connection between high retransmission consent fees and the success of the incentive auction is not one that can be precisely quantified, and precise quantification is not the point. But it is wrong to deny there is at least some connection, or that the broadcasters' free access to spectrum is without any economic consequence whatever. If the policymakers' stated concern – protection of consumer access to video programming – is to be achieved, the current focus on the retransmission consent battles needs to be seen in a much broader context of video marketplace policy reform.

Consumer choice can be most efficiently achieved by eliminating market-distorting regulations affecting video programming and facilitating repurposing of broadcast spectrum to mobile

broadband use. These reforms would be an important move toward a free market-oriented video marketplace subject to vigorous competition. As now FCC Chairman Tom Wheeler said at his June 18 confirmation hearing: “Competitive markets produce better outcomes than regulated or uncompetitive markets.”

Refocusing efforts to improve consumer choice by eliminating legacy regulatory distortions in the video marketplace would be an important step in diminishing the likelihood of TV blackouts.

And could moving in this direction also improve the likelihood of success of the incentive auction? Just food for thought!

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