



Broadcasting Public Notice CRTC 2007-13

Ottawa, 7 February 2007

Exemption order for mobile television broadcasting undertakings

In this notice, the Commission exempts from licensing requirements and associated regulations those mobile television broadcasting undertakings that provide mobile television services that are received by way of mobile devices and that meet the other criteria set out in the exemption order appended to this notice.

Introduction

1. In *Regulatory framework for mobile television broadcasting services*, Broadcasting Public Notice CRTC 2006-47, 12 April 2006 (Public Notice 2006-47), the Commission announced that certain mobile television broadcasting services provided via cellular telephones by Bell Mobility Inc., TELUS Mobility and Rogers Wireless Inc. (the wireless carriers) were “delivered and accessed over the Internet” and thus fell under the Commission’s exemption order set out in the appendix to *Exemption order for new media broadcasting undertakings*, Public Notice CRTC 1999-197, 17 December 1999 (the New Media Exemption Order). As a result, these services are not subject to licensing and other regulatory measures under the *Broadcasting Act* (the Act).
2. In Public Notice 2006-47, the Commission noted arguments put forth by parties that mobile television broadcasting services, as described in the proceeding, are unlikely to compete significantly with traditional broadcasting services due to the limitations of the wireless technology employed, the battery life and screen size of the handset, the reduced image and audio quality, and the type and range of programming choices offered by the mobile broadcasters.
3. The Commission also announced that it would initiate a further proceeding on a proposed new exemption order that would include mobile television broadcasting undertakings that provide mobile television services that are not delivered and accessed over the Internet. In *Call for comments on a proposed exemption order for mobile television broadcasting undertakings*, Broadcasting Public Notice CRTC 2006-48, 12 April 2006 (Public Notice 2006-48), the Commission set out the proposed text of an order to exempt mobile television broadcasting undertakings from regulation under Part II of the Act, pursuant to section 9(4) of the Act. In particular, the Commission proposed to exempt undertakings that:

- provide television broadcasting services that are delivered and accessed through mobile devices, including cellular telephones and personal digital assistants; and
 - have obtained the prior consent of the broadcaster for the retransmission of its signal.
4. In response to Public Notice 2006-48, the Commission received 15 comments in the first phase of the proceeding and seven reply comments in the second phase.
5. The following sections address the specific issues and concerns raised by the parties, as well as the Commission's analysis and determination on each of these issues.

Scope of the exemption order

Positions of parties

First phase comments

6. The Canadian Wireless Telecommunications Association (CWTA) and MTS Allstream Inc. (MTS) expressed concern that the scope and wording of the proposed exemption order may not be broad enough to include all types of mobile broadcasting.
7. CWTA, in particular, submitted that the Commission's conclusion in Public Notice 2006-47 that mobile television broadcasting services are unlikely to compete significantly with traditional broadcasting services applies equally to all mobile broadcasting services, not just to television services, and thus there is no reason to limit the proposed exemption order in its scope and application to only mobile television services.
8. In addition, CWTA and MTS expressed concern that the proposed exemption order's reference to specific forms of mobile technology may unintentionally limit its application in a dynamic and changing technological environment. Specifically, these parties submitted that the phrase in the first proposed criterion, "including cellular telephones and personal digital assistants," might be interpreted as an exhaustive list, as opposed to examples of mobile devices. Accordingly, CWTA and MTS submitted that the wording in the description section of the proposed exemption order should be changed to read:

The undertaking provides broadcasting services that are delivered and accessed through mobile devices, including but not limited to cellular telephones, PCS telephones, and personal digital assistants.

9. Shaw Communications Inc. (Shaw), the Canadian Association of Broadcasters (CAB), the Canadian Film and Television Production Association (CFTPA) and CTV Television Inc. (CTV) expressed concern that the proposed wording of the exemption order could result in an interpretation that is too broad.

10. Shaw was of the view that the proposed exemption order should be limited to mobile television services that are not delivered and accessed over the Internet to prevent any confusion as to which exemption order governs any particular mobile service. According to Shaw, limiting the exemption order in this way will also prevent the imposition of inappropriate limitations on the development of such services and on the scope of the content that they are able to offer to Canadians.
11. Specifically, Shaw submitted that the following provision should be included as part of the description section of the new order:

The undertaking is not exempt from regulation pursuant to the Exemption order for new media broadcasting undertakings.

12. The CAB, CFTPA, and CTV were concerned that the wording of the proposed exemption order might apply to mobile services currently being developed that could eventually become substitutes for traditional broadcasting since these services could also be received by a stationary receiver in the home.
13. The CAB submitted that the proposed exemption order should be revised to ensure that it is limited to services that are “of the type or similar to” those contemplated in Public Notice 2006-47. The CAB noted that systems for the transmission of television to mobile devices being developed in other countries, which the CAB referred to as “broadcast-based,” are far more advanced than the mobile television platforms currently deployed in Canada, which the CAB referred to as “telephony-based.” Types of broadcast-based technologies cited by the CAB included Digital Video Broadcasting – Handheld (DVB-H) and Digital Multimedia Broadcasting (DMB).¹ The CAB submitted that, while the current Canadian systems are offshoots of digital telephony and consequently poorly adapted to delivering television, the new systems are developments of digital broadcasting technologies and have been designed from their inception for the delivery of television.
14. The CAB further noted that, on the telephony-based platforms currently in use in Canada, the transmitter must provide a separate video and audio stream for each receiver – like telephony, or like video-on-demand. The CAB submitted that the new platforms, however, have the characteristics of traditional broadcasting. That is, one signal can be received by an unlimited number of receivers in the coverage area, potentially by millions of receivers at the same time, and thus the new platforms have all the advantages of over-the-air broadcast transmissions, including high capacity and robust reception characteristics. The CAB also indicated that, on the broadcast-based platforms, some receivers are able to plug into a TV set and produce quite acceptable images, which makes them, in effect, mobile set-top boxes.

¹ DMB and DVB-H are competing broadcasting standards that can be used to provide both digital video and audio services to mobile devices.

15. In light of the above, the CAB proposed that the Commission exempt telephony-based mobile television broadcasting services that meet the following description:

The undertaking uses transmission technology through which:

- the video and related audio share capacity with the telephone voice signals offered to the subscriber;
 - the majority of the spectrum capacity is used for telephony; and
 - each receiver requires the use of a separate stream of broadcast video and audio, i.e., “unicasting.”
16. CTV submitted that the proposed exemption order should be interpreted so that it applies only to mobile devices when being used as mobile devices, i.e., devices whose primary use is for the transmission of telephony or data, but that can also accommodate a broadcast signal for video. CFTPA expressed concern that, without precise definitional parameters, the Commission’s intention to exempt from regulation the mobile television broadcasting applications presently in existence could potentially undermine a substantial portion of the Canadian broadcasting system.

Second phase reply comments

17. The CAB opposed CWTA’s position that the proposed exemption order should be broadened to apply to all broadcasting services that are delivered and accessed through mobile services, not just television services. The CAB argued that a broadening of the scope of the exemption order in such a way would have the unintended consequence of exempting all radio services, including commercial radio and subscription radio services.
18. In their reply comments, CFTPA, CTV and the CAB reiterated their concerns regarding the potential for consumers to output video programming from their mobile telephones to their televisions in the home, citing the current availability of telephones that allow for the output of images from the mobile telephone to a standard TV set.
19. CTV again argued that the exemption order should apply only to mobile devices whose primary use is for the transmission of telephony or data, but that can also accommodate a broadcast signal for video. CTV suggested the following wording to describe mobile undertakings in the exemption order:

The undertaking provides television broadcasting services that are delivered to, accessed by, and viewed solely on a mobile device, such as a cellular telephone or personal digital assistant.

20. In response to the proposals by CTV, CFTPA and the CAB to limit the exemption order to broadcasting using telephony-based technologies, CWTA argued that the whole purpose of the new exemption order is to address the mobile distribution of broadcasting, stating that “the idea that mobile devices or personal digital assistants could also be used as set-top boxes strains credulity.”

Commission’s analysis and determinations

21. CWTA submitted that the scope of the exemption order should be expanded to apply to all broadcasting services that are delivered and accessed through mobile services, not just television services. The Commission considers that expanding the scope of the exemption order in such a way would, in essence, exempt all radio services, including commercial radio and subscription radio services, since most radio services can easily be provided to mobile devices. At the very least, it would be difficult to differentiate between “mobile radio undertakings” and conventional radio undertakings. In light of this, the Commission considers that the proposed exemption order should continue to apply only to undertakings that provide mobile television services.
22. The Commission notes that the parties also expressed concern that the reference to specific forms of mobile technology in the exemption order may unintentionally limit its application to those specific technologies. The Commission notes that the description “the undertaking provides television broadcasting services that are delivered and accessed through mobile devices, including cellular telephones and personal digital assistants” was not intended to limit the type of device that could be used to receive mobile television broadcasting services, provided that the device used is in fact a mobile device. Further, the Commission does not consider that it would so limit the scope of the exemption order. However, in the interests of succinctness, the Commission has revised the relevant criterion to read as follows:

The undertaking provides television broadcasting services that are received by way of mobile devices, including cellular telephones and personal digital assistants.

23. Shaw submitted that the Commission should clarify that the new exemption order applies only to mobile television services that are not delivered and accessed over the Internet. In this regard, the Commission considers that, under its proposed wording, some undertakings may indeed fall under both exemption orders. Undertakings that did not fall under both orders, i.e., those that provide mobile services that are not accessed and delivered over the Internet, would be limited to operating under the order under consideration here, and thus the Commission does not consider it necessary to include the language proposed by Shaw.
24. With regard to the concerns expressed by the CAB, CFTPA and CTV that mobile services being developed for future deployment, using broadcast-based technologies, could eventually become substitutes for traditional broadcasting, the Commission considers that there are significant differences between the technologies that the CAB referred to as “telephony-based,” such as the technology used for the television services

currently offered by the wireless carriers, and new technologies on the horizon that the CAB called “broadcast-based.” These broadcast-based technologies will have considerable advantages over the current technologies being used for mobile television broadcasting.

25. A key feature of the new broadcast-based mobile technologies is that their networks engage in point-to-multipoint delivery, like traditional broadcasting networks, rather than point-to-point delivery, as is used in the mobile television applications currently provided by the wireless carriers. While point-to-point delivery provides users with a greater degree of choice and interactive capabilities, the disadvantage of such networks is that each user requires a separate data stream, thereby potentially consuming considerable network bandwidth overall. As an increasing number of users try to access content, the point-to-point network becomes congested, which, in turn, can prevent new users from accessing content and detract from the experience of current users.
26. In the Commission’s view, the parties did not provide compelling evidence to support their claims that the new mobile receivers will have the ability to function as set-top boxes or that some receivers will be able to “plug into a TV set and produce quite acceptable images.” However, the broadcast-based technologies will transmit the broadcast signal continuously, like terrestrial TV, which provides faster and improved reception. The new broadcast-based technologies are also predicted to produce a more robust, higher quality signal and provide a longer battery life than that of telephony-based technology.
27. In the Commission’s view, these point-to-multipoint mobile technologies, which are still in their infancy, appear to address many of the limitations of the point-to-point technologies used in the mobile services that were the subject of the proceeding that resulted in Public Notice 2006-47. Whether that would make them a substitute for conventional television remains to be seen. However, given that, at present, much remains unknown about the potential impact of the broadcast-based technologies, the Commission has decided not to include them in the exemption order at this time.
28. The Commission notes that the wording used in Public Notices 2006-47 and 2006-48 was intended to limit the scope of the exemption order to the type of services that were similar to those provided by the wireless carriers because of the limited market impact of the technology under examination. However, to provide greater clarification, and in light of the above, the Commission will adopt the following criterion:

The undertaking uses point-to-point technology to deliver the service; that is, the undertaking transmits a separate stream of broadcast video and audio to each end-user.

29. The Commission notes that the CAB proposed other criteria such as “the video and related audio share capacity with the telephone voice signals offered to the subscriber” and “the majority of the spectrum capacity is used for telephony.” The Commission considers that restricting the exemption order to point-to-point technologies is sufficient to address the concerns raised about the new broadcast-based technologies, and that it is unnecessary to add such other criteria to the exemption order.

Retransmission consent

Positions of parties

First phase comments

30. CWTA, Shaw and MTS objected to the condition in the proposed exemption order requiring that the undertaking obtain the prior consent of a broadcaster for the retransmission of its signal. CWTA argued that section 31 of the *Copyright Act* establishes a regime of rights and obligations with respect to the retransmission of the programming in a broadcaster’s signal; however, no similar rights or obligations exist with respect to the signal itself. CWTA and MTS argued that the Commission’s proposed signal retransmission consent requirement would amount to the creation of an entirely new and very controversial right for over-the-air broadcasters, one that Canada has specifically rejected with respect to Canadian over-the-air signals.
31. Shaw submitted that the proposed condition is inappropriate given that the retransmission of broadcast signals by mobile retransmitters that do not use the Internet would not affect programmers in any manner materially different from that of other non-Internet retransmitters such as cable, direct-to-home (DTH), multipoint distribution system (MDS) and digital subscriber line (DSL) broadcasting distribution undertakings (BDUs). According to Shaw, there is therefore no “harm”-based rationale in copyright that would justify the introduction of a consent requirement for mobile distributors vis-à-vis broadcasters.
32. FWS Joint Sports Claimants (FWS),² CFTPA and the Association des producteurs de films et de télévision du Québec supported the proposed condition regarding retransmission consent, and recommended the addition of a further condition requiring that the mobile television broadcasting undertaking obtain the prior consent of each program rights holder for the retransmission of their programs. CFTPA argued that a broadcast programming undertaking that has been licensed to broadcast copyrighted program content is not in a position to grant a further use of that content without the specific authorization of the content creator and payment of appropriate compensation. CFTPA suggested, therefore, that the condition be reworded as follows:

The undertaking has obtained the prior authorization of a broadcaster for the retransmission of its signal and the prior authorization of the program rights holder.

² FWS is a collective society under section 71 of the *Copyright Act*, whose members are the National Hockey League, the Canadian Football League, the National Basketball Association and the National Football League.

Second phase reply comments

33. The CAB and CTV argued that the requirement to obtain prior consent from the broadcaster for the use of its signal does not establish any new right, but rather allows broadcasters an opportunity to negotiate the terms of carriage of their signals on mobile television platforms. The Canadian Motion Picture Distributors Association submitted that the Commission has the jurisdiction to impose conditions on broadcasting undertakings, including conditions related to program rights and broadcaster consent, and has done so a number of times.
34. In its reply comments, CWTA noted that concerns about the application of the distant signal retransmission regime to Internet retransmitters were linked to “the unbounded, global reach and interactive nature of the Internet.” CWTA was of the view that none of these concerns is relevant with respect to domestic mobile television broadcasting undertakings that offer services that are not delivered or accessed over the Internet.
35. Shaw, CWTA, MTS and the CAB objected to the proposal by some parties that the exemption order require mobile television broadcasting undertakings to obtain the consent of all program rights holders prior to the broadcast of a broadcast signal. The CAB submitted that this additional requirement is unnecessary and that matters relating to the underlying rights are most appropriately left to negotiations between the broadcaster and the relevant rights holders.

Commission’s analysis and determinations

36. The Commission acknowledges, as some parties argued, that the delivery of content over closed networks, as opposed to over the Internet, does not raise the same issues with respect to control of the signal in terms of geographical boundaries and the need to protect territorial rights. However, the Commission notes that the delivery of broadcast signals via point-to-point technology, and their reformatting for display on a small screen, will generally result in a significant reduction in the quality of the broadcast signal. The Commission considers that broadcasters should have control over whether or not their signals are subjected to such treatment.
37. As noted by the parties to the proceeding, the Commission has, on prior occasions, required that distributors obtain the prior consent of the broadcaster for the use of its signal. For example, in *Small cable systems – Digital migration policy*, Public Notice CRTC 2001-130, 21 December 2001, the Commission stated that it “considers that consent for carriage generally is fundamental to the programmer’s right and ability to control its product.” Accordingly, the Commission does not consider that a requirement for consent represents an unprecedented new right for broadcasters, and it will include a requirement for retransmission consent in the new exemption order.³

³ Because section 31 of the *Copyright Act* applies only to the retransmission in their entirety of local or distant (i.e., over-the-air) signals, parties would be required to obtain consent in any event for the retransmission of all other types of broadcasting services (e.g., specialty services).

38. Some parties also proposed that the mobile television broadcasting undertaking obtain the prior consent of each program rights holder for the retransmission of their programs. This issue was also raised in the context of the proceeding that resulted in Public Notice 2006-47. The Commission considers that this is a matter that should be addressed as part of the contract negotiations between producers and broadcasters at the time that the programming is initially licensed to the broadcaster. Therefore, the Commission will not require, as a term of the exemption order, that a mobile television broadcasting undertaking obtain the prior consent of each program rights holder for the retransmission of the program.

Eligibility to hold a Canadian broadcasting licence

Positions of parties

39. The CAB and the Association québécoise de l'industrie du disque, du spectacle et de la vidéo (ADISQ) recommended that the Commission add a condition to the exemption order specifying that the undertaking should be an entity that is eligible to hold a Canadian broadcasting licence. Specifically, the CAB submitted that the Commission should adopt the same criterion that it has used for most other exemption orders, i.e., that the “Commission would not be prohibited from licensing the undertaking by virtue of any Act of Parliament or any direction to the Commission by the Governor in Council.”

Commission's analysis and determination

40. Section 3(1)(a) of the Act states that “the Canadian broadcasting system shall be effectively owned and controlled by Canadians.” While section 16 of the *Telecommunications Act* requires that carriers, including those benefiting from a forbearance order, must be Canadian-owned and -controlled, this requirement does not apply to non-facilities-based service providers. Non-facilities-based wireless service providers are generally referred to as mobile virtual network operators or resellers. Since there are no ownership requirements for resellers, the Commission is concerned that, without a Canadian ownership requirement in the proposed exemption order, it would be possible for non-Canadian companies to offer mobile television services in Canada, which would be inconsistent with the policy expressed in section 3(1)(a) of the Act. Therefore, the Commission will include a criterion in the exemption order that the entity should be eligible to hold a Canadian broadcasting licence.

Canadian programming requirements

Positions of parties

41. The CAB, CTV, ADISQ and three trade organizations representing artists (the Unions)⁴ were of the view that the Commission should add additional exemption criteria to ensure that mobile television broadcasting undertakings contribute to the goals of the Act with respect to Canadian programming. The following suggestions were made:

⁴ A joint submission was filed by the Directors Guild of Canada, the Writers Guild of Canada and the Alliance of Canadian Cinema, Television and Radio Artists.

- Both the CAB and ADISQ recommended that the Commission adopt criteria to ensure that the undertaking provides a majority of Canadian services among the television channels accessed by each subscriber.
- The CAB and CTV submitted that the Commission should prohibit mobile television broadcasting undertakings from carrying non-Canadian television services that have not been authorized for distribution on the Commission's Lists of Eligible Satellite Services (the Lists). In CTV's view, allowing mobile broadcasters to carry non-Canadian television services that are not on the Lists could result in a mobile broadcaster carrying solely, or a preponderance of, services available through no other Canadian BDU. Neither the CAB nor CTV objected to the distribution of clips created by these services or to the distribution of other specialized content created for delivery specifically over mobile telephones.
- In addition to the condition above, the CAB also submitted that, where the undertaking distributes existing programming services rather than specialized content created specifically for the mobile platform, the undertaking should source such services from licensed Canadian programming services.
- ADISQ recommended that the exemption order include a condition that the undertaking distribute a proportion of Canadian French-language services that reflects the market that it serves.
- Lee Weston recommended that a mobile television broadcasting undertaking making use of terrestrial transmitters should make a contribution to community programming "commensurate with its size."
- The Unions submitted that the exemption order should require that mobile broadcasters contribute 5% of their gross annual revenues to assist in the creation of original Canadian programming for mobile television, as well as to require that they broadcast adequate amounts of under-represented categories of programming, including drama.

Commission's analysis and determination

42. As stated in paragraph 28 above, the Commission is limiting the scope of this exemption order to undertakings using point-to-point technology to deliver their services, i.e., to undertakings that transmit a separate stream of broadcast video and audio to each end-user. The Commission remains of the view that the services offered pursuant to this exemption order are unlikely to have a significant impact on traditional broadcasters due to the limitations of the wireless technology employed, the battery life and screen size of the handset, the reduced image and audio quality, and the type and range of programming choices offered by the mobile broadcasters. The Commission also considers that the devices that will be used to view the services provided by undertakings exempted by virtue of this order will likely not be well adapted to prolonged viewing. Further, in the

early stages of their development, such services may have difficulty obtaining suitably formatted content. Given these factors, the Commission considers it unnecessary and potentially detrimental to the development of these services to impose in this exemption order the obligations typically imposed on BDUs.

Accessibility

Positions of parties

43. The Canadian Association of the Deaf (CAD) expressed concern that the Commission “is prepared to abrogate its responsibilities to ensure mobile TV complies with regulations and legislation (such as the *Canadian Charter of Rights and Freedoms*) that require equality of accessibility for persons with disabilities, including deafness and hearing loss.” The CAD requested that the Commission require mobile television broadcasting undertakings to explain in detail their plans to ensure that their mobile television broadcasting services will be fully accessible to Canadians with disabilities. The CAD also requested that the Commission itself establish a strong and enforceable policy to protect the rights of deaf and disabled Canadians to full and equal access to mobile television broadcasting initiatives.

Commission’s analysis and determinations

44. The Commission notes that there are practical difficulties in providing features such as closed captioning on mobile services such as those that will operate pursuant to this exemption order. The data rates that the networks in question can presently support are low. As noted above, point-to-point delivery of mobile television services consumes considerable bandwidth. At this stage, adding additional information to the signal, such as closed captioning, would add to the challenge of delivering video over such networks and in fact doing so would be at the expense of image quality.
45. Moreover, in order for a viewer to have adequate reception of programming, content will need to be designed to fit on very small handset screens. Therefore, even though captioning would likely already be available on the Canadian channels offered by the mobile broadcasters, it would have to be reformatted for the handset screen. Furthermore, considering the small size of the screen, captioning would either be too small to be readable, or so large that it would interfere with the image, or leave too little space on the screen for the image.
46. Cost issues must also be considered. At this point, the demand for these services is not yet known, and revenues from these services may prove to be minimal. The Commission considers that it would therefore be overly burdensome to impose any requirements for closed captioning or descriptive video on undertakings that will operate pursuant to this exemption order. Rather, the Commission maintains the view expressed in Public Notice 2006-47 that it is more appropriate to encourage the industry to explore creative and innovative means to deliver services such as these to people with disabilities, and to address the practical difficulties that can be associated with providing related features such as closed captioning.

Duration of exemption order

Positions of parties

First phase comments

47. The Society of Composers, Authors and Music Publishers of Canada, CFTPA, CTV and the Unions were of the view that, given the rapid pace of technological developments, mobile television services could become substitutes for traditional television services in the very near future. These parties recommended that the Commission should, therefore, review the exemption order within a specific time limit ranging from two to three years.

Second phase reply comments

48. In reply, CWTA objected to the proposal to impose a two- or three-year time limit on the new exemption order. CWTA noted that the Commission always retains the right and power to review its exemption orders as circumstances require. CWTA stated that:

... the Commission confirmed in [Public Notice] 2006-47 that it will continue to monitor the broadcast of television programming over the Internet, and the impact, if any, that it might have on the Canadian broadcasting industry and on licensed broadcasters in particular. The same undoubtedly holds true for mobile television broadcasting not delivered and accessed over the Internet. Accordingly, CWTA submits there is no need to build a specific, short term review date into the new Exemption Order.

Commission's analysis and determination

49. The Commission does not consider it necessary to include an expiration date in the exemption order as it has the ability to review its exemption orders at any time, regardless of whether or not any party applies to the Commission in this respect. In the Commission's view, setting an expiration date could, in fact, be a disadvantage, as it may require a review of the exemption order before one is actually necessary.

Secretary General

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Appendix to Broadcasting Public Notice CRTC 2007-13

Exemption order for mobile television broadcasting undertakings

Pursuant to section 9(4) of the *Broadcasting Act* (the Act), the Commission, by this order, exempts from the requirements of Part II of the Act and any regulations made thereunder, those persons carrying on broadcasting undertakings of the class defined by the criteria outlined below.

Purpose

The purpose of these broadcasting undertakings is to provide television programming received by way of mobile devices.

Description

1. The Commission would not be prohibited from licensing the undertaking by virtue of any Act of Parliament or any direction to the Commission by the Governor in Council.
2. The undertaking provides television broadcasting services that are received by way of mobile devices, including cellular telephones and personal digital assistants.
3. The undertaking uses point-to-point technology to deliver the service; that is, the undertaking transmits a separate stream of broadcast video and audio to each end-user.
4. The undertaking has obtained the prior consent of a broadcaster for the retransmission of its signal.