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WHAT THE INDUSTRY READS FIRST

## Full Circle: Circle City's Racial Discrimination Appeals Get Day in Court

DISH and DirecTV have made plenty of retransmission consent headlines in recent months, with DirecTV facing a potential blackout this week with **Cox Media Group** and DISH in a more than year-long blackout with CMG. But those aren't the only retrans fires burning. Last week, the 7th Circuit Court of Appeals heard oral arguments in **Circle City Broadcasting's** quest to gain carriage on both MVPDs.

The arguments provide some interesting insights into the intricacies of dealmaking. Circle City was formed in 2019 by **DuJuan McCoy**, who agreed to acquire **CW** affiliate WISH-TV and **MyNetwork TV** affiliate WNDY-TV in Indianapolis from **Nexstar** for \$42.5 million. That price was later lowered to \$15 million, which was reflective of Circle City not being assigned DirecTV and DISH's Nexstar retrans contracts, according to DISH's court filing. In separate racial discrimination lawsuits filed in 2020, Circle City claimed DISH and DirecTV offered it what it believes are only a tiny fraction of the retrans fees the satellite provider paid to Nexstar. Last March, the Southern District of Indiana granted DirecTV and DISH's motions for summary judgment, declaring that there wasn't evidence to support that the contract decisions were based on Circle City being a Black-owned business.

Both appeals cases were argued separately before a three-judge panel last week. "At summary judgment, the court's only function is to determine whether there's credible doubts about the reasons offered," said Circle City counsel *Andrew*

*McNeil* of Bose McKinney & Evans. In both appeals, Circle City argued it presented sufficient evidence that DirecTV and DISH's explanations for their decisions were "pretextual"—a legal term that describes false reasons that hide true intentions.

"What DirecTV is attempting to do is put evidence in a silo and say consider this silo. What we're saying is when you consider all of this evidence as a whole, the stated reasons offered by DirecTV show signs of inconsistency, suspicion and incompleteness," said McNeil.

McNeil, who argued Circle City's case in both appeals, said that DirecTV actually excluded Circle City by name in a change in control provision, knowing McCoy is a Black man (DirecTV's attorney claimed later that Nexstar actually proposed that anti-assignment clause).

Circuit Judge *Diane Wood* interrupted McNeil to ask for evidence that the carriage dispute happened for racially based reasons. "It seems to me that there are all sorts of reasons why that might have happened and I can't find race among them," she said. Wood sounded skeptical of Circle City's claims, saying that it's a different product when the stations are severed from an overall bundled package or programming offered for free on the internet. "I can't understand why, again, we're going to assume that the reason the price command is lower has anything to do with factors other than structural factors," she said.

McNeil took issue with DirecTV's argument that it has a policy of not paying retrans fees for standalone non-Big 4 stations



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(stations that aren't under common ownership with a Big 4 station), arguing that DirecTV negotiator *Julia Dai* didn't declare that stance until the eleventh hour.

Judge *John Lee* asked DirecTV counsel why this policy wasn't mentioned from the get-go. "This practice was no secret to either Mr. McCoy or his media attorney *Dan Kirkpatrick*... We ultimately don't know, assuming the allegations are correct that she waited until January 2020 to relay this information, why she did that," said DirecTV attorney *Brian Paul*, who contended that the **FCC** has held that DirecTV doesn't have to provide an explanation for its bargaining position. "In any event, she did ultimately explain that this was DirecTV's position, and she did so contemporaneously with the negotiations."

Between January 2016 and December 2020, DirecTV executed 10 new no-fee agreements with standalone non-Big 4 stations and zero fee-based agreements with such stations, according to its brief. "DirecTV's practice is driven by market dynamics, not racial animus, and in fact, Mr. McCoy admitted in his deposition that owning Big 4 stations increases a station owner's bargaining power. So the most that Circle City can do is argue that certain facts are fishy in the hopes of creating some metaphysical doubt about DirecTV's motives," Paul said.

The same three-judge panel heard Circle City's appeal of the DISH case later the same morning. This time, McNeil's argument focused on DISH negotiator *Melisa Boddie* suggesting in July 2019 that the provider wouldn't pay for the channels because it's no longer owned by a big broadcast group and then saying in September that it wouldn't pay because the stations were losing Cubs baseball and local newscasts are available online for free. "She's moved away from the original stated reason. And it's worse because internal documents at DISH show it's a phony explanation. DISH did an analysis of the top 500 programs for both stations. The Cubs were in less than 1% of the top 500 broadcasts for WISH-TV and its news package was in 96.4% of the top 500 programs even though it was available online for free," McNeil said.

DISH attorney *John Maley* said Boddie, who he added is Hispanic and married to a Black man, was simply addressing new issues that McCoy had raised, including an argument that she wasn't playing fair with him because of his company's size. Ultimately, DISH extended an offer with money, but Circle City didn't accept because it had struck a better deal with **Charter** and **Comcast**, according to Maley. "That's the market. That's America... There's simply no evidence of discrimination in this case and this is no lie from Ms. Boddie."

When Wood asked if there was any evidence in the record to support that this decision wasn't based on Circle City's ownership structure, Maley said DISH has over 500 customers that aren't receiving any rates.

## HARMONIC BROADBAND BIZ SOARS THANKS TO DOCSIS

**Harmonic** finished 4Q23 on a high with revenue hitting \$167.1 million thanks to a major boost from broadband. Broadband segment revenue skyrocketed to \$115.2 million, compared to \$96 million in the prior year period. On the company's earnings call Monday evening, CFO *Walter Jankovic* said business from **Comcast** represented 41% of total revenue during the quarter while **Charter** represented 15%. The number of global customers deploying Harmonic's broadband solution has increased 19% YOY to reach 108 million with 26.3 million DOCSIS cable modems now served worldwide. Its opportunities are only continuing to grow thanks to DOCSIS 4.0, and Harmonic President/CEO *Patrick Harshman* said it is successfully powering several early DOCSIS 4.0 deployments that were launched late in the year. At the same time, there are a number of Harmonic customers that are continuing to work out their plans and haven't begun scaling DOCSIS 4.0 or similar upgrades in earnest. "One of the things that has kept some folks on the sideline has been a question about DOCSIS 4.0 and different variants of that technology, and the success that we're seeing rolling that out I think is being very well received by the market, both existing customers who are trying to figure out exactly how to move forward, as well as prospective customers who are kind of waiting for the right stepping off point," Harshman said. He also reminded analysts that Harmonic's new DOCSIS 4.0 technology can be run in a DOCSIS 3.1 mode, and that optionality is something the vendor is trying to push in its messaging to operators as they think about their network upgrades. Harmonic announced during its 3Q23 earnings call that it was strategically reviewing its video business in part due to indications of interest it had received from a number of parties. There continues to be no established timetable for the completion of that review, and there is no news to share on that front for now.

## REGULATORS STAND UP AGAINST DIGITAL DISCRIMINATION RULES

The **U.S. Chamber of Commerce**, **Texas Association of Business** and the **Longview Chamber of Commerce** filed a lawsuit against the **FCC** over the agency's recently-adopted digital discrimination rules. The petition for review, filed in the Fifth Circuit Court of Appeals, asks the court to review the order on the grounds that it is in excess of the Commission's statutory authority, vacate it and provide any additional relief that may be appropriate. The debate on the digital discrimination rules spread to Congress. Reps. *Buddy Carter* (R-GA) and *Andrew Clyde* (R-GA) led 65 House Republicans in introducing a Congressional Review

Act joint resolution of disapproval to overturn the digital discrimination rules. They claim the digital discrimination rules adopted in November give the White House effective control of all internet services and infrastructure within the country and will allow the FCC unchecked authority to implement regulations on ISPs. Organizations supporting the joint resolution of disapproval include **USTelecom**, **CTIA** and the **Taxpayers Protection Alliance**.

## CANADA SHIFTS SPECTRUM LICENSING FRAMEWORK

Canada is pushing forward on its “use it or lose it” spectrum policies, adopting a new framework that aims to make unused licensed spectrum available in rural and remote areas. The hope is that current licensees will expand their coverage or give new users the opportunity to put the spectrum to work. Rules are also being developed to give Indigenous applicants priority access to the unused spectrum.

## BUCKS JOIN OTA TRAIN

The Milwaukee Bucks are the latest **NBA** franchise to make more of their games available over-the-air. The Bucks and **Weigel Broadcasting** agreed to put 10 games on the independent WMLW station this season. The first game under the agreement will take place Feb. 23 at 7pm with the Bucks facing the Timberwolves. **CBS** affiliate WDJT will simulcast the game as well. It’s the first time Bucks games have been available for free OTA since the 2006-07 season. The Bucks plan to announce additional TV stations outside of the Milwaukee area soon.

## DISH ADOPTS UNIFIED ID 2.0

**DISH** is adopting the Unified ID 2.0 solution and integrating it across its traditional TV and OTT services. The company claims it’s the first MVPD and largest vMVPD to do adopt UID2. The solution will work across DISH and **Sling TV** to allow advertisers to build media buys centered on first-party data. UID2 will also be used alongside DISH Connected, which lets DISH’s live linear inventory be executed programmatically in real-time.

## SPECTRUM OPTIMIZING ITS STORES

Johnson Controls’ global retail solutions portfolio **Sensormatic Solutions** is joining forces with **Charter** to implement Sensormatic’s in-store traffic analytics solutions into over 700 Spectrum stores in the U.S. over the next three years. The two companies have worked together before, having collaborated on a pilot program in 2022 that used shopper traffic and market intelligence data services to optimize employee staffing and boost product and sales support. Sensormatic offers industry-specific market intelligence

to show performance relative to retailers within a specific category or local market.

## RATINGS

It was a **Fox News** sweep for the weekly primetime and total-day cable ratings. Fox News recorded an average of 2.18 million viewers P2+ in prime. **MSNBC** followed with 1.23 million and **HGTV** came third at 891,000. **ESPN** appeared at a lower-than-usual spot in fourth with 766,000. **History Channel** completed the top five at 750,000. In total day, Fox News led with 1.35 million while MSNBC and ESPN had 825,000 and 510,000, respectively. **CNN** came fourth with 458,000 and HGTV fifth at 454,000. While it was a down week for ESPN, the sports net still took the primetime crown for the month of January with a commanding 2.99 million viewers. Fox News (1.98 million) and MSNBC (1.09 million) were the only other networks that breached 1 million for the month. Fox News did, however, take the monthly total-day prize with 1.25 million viewers. That squeaked by ESPN’s 1.13 million, while MSNBC followed in third with 761,000.

## PROGRAMMING

**A+E Networks** is forming a JV with a new full-service production company formed by *Rachel Ray*, *Brian Flanagan* and others called Free Food Studios. A+E will put forth a 50% equity investment and has ordered 278 new episodes of programming over the next two years to be included in the Home.Made.Nation lifestyle programming block. – **Disney’s** Black-focused multimedia brand **Andscape** and **ESPN** are releasing a new documentary on **Hulu** titled “Sacred Soil: The Piney Woods School Story” on Feb. 23. It’s part of the pair’s programming dedicated to honoring Black History Month as the doc spotlights one of the oldest Black boarding schools in America. – It’s almost transfer deadline day for the **Premier League**. **Peacock** will stream **Sky Sports News’** seven-hour “Premier League Transfer Deadline Special” starting Thursday at noon. — Production is underway for **Paramount+’s** “Star Trek: Section 31.” Premiere date and other details are still TBD. – Following its debut at the Sundance Film Festival, **Netflix** is acquiring the documentary feature “Skywalkers: A Love Story.”

## PEOPLE

**Verizon Business** named *Jeffrey Hulse* SVP/Group President, Verizon Partner Solutions. He’ll lead domestic and international wholesale revenue growth and strategy for the segment, reporting directly to Verizon Business CEO *Kyle Malady*. He joined Verizon in 1997, moving through the ranks before most recently serving as VP and leader of the Sales and Solutions Engineering teams. He succeeds *Eric Cevis*, who retired after 37 years at the wireless company.