

NAB BRIEFING PAPER:

An Inside Look at Retransmission Consent Negotiations

Advocacy Education Innovation



Consumer Benefits of Must Carry and Retransmission Consent as Defined by Congress*

- Consumers benefit from the must carry/retransmission consent system devised by Congress because it promotes the continued availability of free television programming not dictated by the cable or satellite operator – especially for viewers who are unable to afford other means of receiving programming.
- Consumers benefit from must carry requirements because they are assured access and channel placement with respect to local broadcast signals available in their community including locally originated programming that informs the electorate.
- Consumers have benefited from retransmission consent because broadcasters have used the fruits of the process to develop new programming channels including local and regional news channels.
- Consumers benefit from the must carry and retransmission consent system because it curbs the ability of cable systems to engage in anti-competitive behavior.
- Consumers benefit from retransmission consent because it provides cable and satellite subscribers access to many new digital channels.

* Cable Television Consumer Protection and Competition Act of 1992, Section 2(a)(6)-(19), Pub.Law 102-385, October 5, 1992.

Start Here

In 1992, Congress passed the Cable Television Consumer Protection and Competition Act ("The Act"). The Act, designed to give consumers more and better choices to cable, provided that every three years, commercial TV stations elect between must carry and retransmission consent ("RC"). Congress later extended RC to satellite local-to-local and other retransmitters of broadcast signals. Next formal election by 10/1/08 is effective 1/1/09, but RC deals can last more than three years.

Must Carry

If a broadcaster chooses must carry, they receive no compensation for use of their signal, but are assured carriage and channel position. Consumers benefit because they are assured access to the diversity of broadcast signals available in their community.

Retrans

If a broadcaster elects RC, it gives up any assurance of carriage or of a desirable channel position. All terms and conditions of carriage are subject to negotiation.

Level playing field – All RC negotiations start with a level playing field. Both broadcasters and cable systems negotiate all terms. Both broadcasters and cable have public, political and market pressure to complete a deal.

RC Negotiations: more than money – RC negotiations are complex business dealings that involve many variables beyond cash payments, including program insertion options, spot sales, fiber runs between transmitter and headends, promotion spot guarantees, channel position and tier placement, DTV channel carriage, distribution and construction costs, studio/personnel/equipment sharing deals and news insertion options, to name a few. This is precisely the process Congress envisioned. The Senate Report explaining The Act noted: "Often broadcasters may not seek monetary compensation, but instead negotiate other issues with cable systems such as joint marketing efforts, the opportunity to provide news inserts on cable channels, or the right to program an additional channel on the cable system."

Exclusive deals prohibited – Broadcasters are prohibited from providing RC to just one cable or satellite operator. They cannot provide consent to one such operator and refuse to negotiate with any other. Consumers benefit from this prohibition because it helps assure multiple sources from which to obtain local broadcast signals.

Good Faith

Both parties are required to negotiate in "good faith," as defined by the FCC. FCC has enforcement authority to deal with failure to negotiate in good faith. Good faith does not mean an agreement for retransmission must be reached. Consumers benefit because the FCC can facilitate negotiations that break down because one party is not fairly considering the other party's offer.

Full Signal Carriage – Currently, RC is the only way stations on cable or satellite can provide consumers with the benefits of the multiple digital channels they are offering. Because there is no requirement to carry these multiple channels, absent RC consumers will spend billions for new digital sets that, if hooked up to cable or satellite, will not receive these extra channels.

Mini History of Must Carry Rules

1960 - 1980

- In the 1960s, the FCC imposed a requirement that cable systems carry local stations in order to "make television service available, so far as possible to all people of the United States in a fair, efficient and equitable basis" and that it was "of the utmost importance to the public interest that extensions of television service by the auxiliary facilities of cable be accomplished in a fair and equitable manner." In the absence of must-carry, the FCC said, a television station would "face decreased revenues and profits, which would reduce its ability to serve the public interest."

1980 - Present

- In 1985 and 1987, a federal court invalidated FCC must-carry rules.
- In 1992, Congress dealt with the court's concerns and found substantial public policy reasons to restore must carry. According to Congress: "Television broadcasting's ... vital role in serving the public interest ... is in jeopardy if cable operators can use their market power either to refuse to carry local television broadcast signals or to extract favorable terms as consideration for carriage of those signals." Congress found that cable had denied carriage and changed the channel positions of local stations resulting in "stifling competition" and "in interfering with the ability of broadcasters to fulfill their obligations to serve their communities." Congress also noted that must carry was "part and parcel" of the compulsory license, providing free program licenses to cable.
- In 1994 and 1997, the Supreme Court affirmed the must carry rules, noting that broadcast television plays a central role in national discourse.

Mini History of Retransmission Consent

1934 - 1959

- The right of a station to authorize or prohibit other stations from retransmitting their signal was part of the Communications Act of 1934.
- In 1959, the FCC ruled that RC did not apply to cable.

1959 - 1991

- Cable operators grew larger and more successful in large part as Congress found "an effective subsidy of the development of cable systems by local broadcasters."

1992 - Present

- In 1992, Congress passed The Act, providing that RC does apply to cable.
- Congress' reasons for RC:
 - "a very substantial portion of fees which consumers pay to cable is attributable to the value they receive from watching broadcast signals."
 - The lack of RC has "created a distortion in the video marketplace which threatens the future of over-the-air broadcasting"
 - "The Committee ... does not believe that public policy supports a system under which broadcasters in effect subsidize the establishment of their chief competitors."
 - There is a need "to ensure that our system of free broadcasting remains vibrant, and not be replaced by a system which requires customers to pay for television service."

FCC Report

In a 9/05 Congressionally-mandated exhaustive FCC review of RC, the Commission recommended no changes to the statute or its rules.

Bottom Line

It's fair. It works. It benefits consumers.

Good Faith Enforcement -- A structured complaint process provides both cable and satellite and broadcasters a clear path for grievances when RC negotiations break down due to bad faith. Of the tens of thousands of RC deals completed since 1992, only a handful of cases have been referred to the FCC. No broadcaster has ever been found by the FCC to violate the good faith obligations.