

Welcome to

**Must-Carry and
Retransmission
Consent
2017**

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sure that the volume on your computer's
speakers is turned up.**

Must-Carry and Retransmission Consent 2017

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Must-Carry/Retransmission Consent Background and Basics

Pre-1992 – Prior versions of must-carry

1992 Cable Act – Established current Must Carry/Retransmission Consent regime

Stations can choose:

mandatory carriage (must-carry)

or

**carriage only with permission of the station
(retransmission consent)**

**1999 Satellite Home Viewer Improvement Act (SHVIA)
– established similar regime for DBS**

Must-Carry/Retransmission Consent Background and Basics

Retransmission Consent:

- >No obligation to carry station**
- >If carried, station can demand compensation**

Must-Carry:

- >Guaranteed carriage (under certain circumstances)**
- >No compensation**

Carry one, carry all:

- >DBS version of must-carry**

Election and Default Status

Elections between must-carry and retransmission consent status required every three years (by Oct. 1).

If station *fails* to make an *affirmative* election:

- > Defaults to must-carry on cable systems
 - > Carriage, but no compensation
- > Defaults to retransmission consent on satellite (Dish and DirecTV)
 - > Carriage only by negotiated agreement

Why You Need to Elect

Affirmative election is almost always the best approach.

- >For station needing must-carry, failure to elect could result in loss of carriage (satellite) or channel position (cable).**
- >For station that can get retransmission consent revenue, failure to elect would pass up such revenue.**
- >Failure to properly elect could result in breach of network affiliation agreements, financing agreements, or other contracts.**

Who Can Elect

Commercial full power TV stations

“Qualified” Noncommercial stations have must carry rights; election not required but advisable.

Small number of Class A and LPTV stations have limited must-carry rights.

Who Can Elect

“Qualified” Class A or LPTV Stations

Have right to elect must-carry on cable systems where:

- >“primary” headend w/in 35 miles of station;
and
- >station community of license and cable franchise area both outside top 160 MSAs as of 1990; and
- >there is no full power TV station licensed to the county served by the cable system.

Who Can Elect

“Qualified” Class A or LPTV Stations (cont.)

- > fulfill full power TV requirements for *political ads* and *kidvid*; and
- > minimum *hours* of operation (28/wk-LP; 18/day-CA); and
- > meet *local news* and *informational* programming needs; and
- > deliver good quality signal to cable headend *only* over-the-air
- > No must-carry rights on satellite

Where Can You Elect

Commercial Full Power Stations

- >Default is station's DMA (as defined by Nielsen in 2015-2016 Station Index).
- >Must-carry market may have been modified for individual stations by FCC order (may have removed or added counties or communities to a station's must-carry market)
- >If community of license is outside DMA, county in which community is located is also part of must-carry market.
- >In areas outside of a station's DMA, carriage is pursuant to retransmission consent only.

How to Find Cable Systems to Send Election Notices to

**FCC COALS database (will provide an “official”
address for sending elections to registered
cable systems)**

Existing agreements

Trade publications; Nielsen materials

Franchising authorities

Considerations in Making Election

Does cable or satellite operator have right to import distant signals?

Does station have network non-duplication/syndicated exclusivity protection?

- > Satellite can carry significantly viewed (if authorized) as long as subscriber receives the local package, not necessarily your station
- > Do neighboring market network stations have out-of-market distribution rights?

Considerations in Making Election (*continued*)

Could area served by cable system be removed from station's must-carry market?

Factors in market modification evaluation include:

- >Over-the-air signal coverage
- >Historical and current cable carriage
- >Economic and social links to community
- >Coverage of community issues in station programming
- >Evidence of viewership
- >If station is in state

Considerations in Making Election (*continued*)

Consistency among operators in same area (rules prohibit inconsistent elections in a single franchise area)

Other factors that could lead to loss of must-carry rights:

- > Duplication of programming (50% or more)
- > Multiple in-market network affiliates (cable system only required to carry closest)
- > Lack of good quality signal to headend

Carriage Issues for Must-Carry Stations

-Manner of carriage -- Cable

1. No Material Degradation

- >No perceptible difference from over-air signal quality**
- >No discrimination vs. non-broadcast channels**
- >HD broadcast must be carried in HD**

**downconversion to SD allowed to fulfill
requirement to make mc signals available to all
subscribers (basic tier)**

Carriage Issues for Must-Carry Stations

-Manner of carriage – Cable

2. Viewability:

Viewers with analog sets must be able to view MC signals – cable ops must downconvert or supply equipment (converter boxes) either free or at low cost.

-Manner of carriage – Satellite

More flexibility for satellite ops – where “technically feasible” – carry MC with same quality as RC stations.

HD in HD where at least one market station carried in HD.

Satellite operators may use digital compression.

Carriage Issues for Must-Carry Stations *(continued)*

Channel Positioning - Cable

Right to choose one of three options

- Over-the-air channel number
- Channel on which station was carried on July 19, 1985 or January 1, 1992
- Other mutually agreeable channel

Include desired channel in must-carry election

(Continued)

Carriage Issues for Must-Carry Stations*(continued)*

Channel positioning – Cable (continued)

If no channel requested, cable system may carry on “Major” or historical (1985 or 1992) channel; if both are occupied by another must-carry station with placement rights, system can choose channel.

Channel placement rights apply on most widely available tier (“basic” tier), not necessarily to HD.

Basic tier requirement removed for many systems

Carriage Issues for Must-Carry Stations *(continued)*

Channel positioning - Satellite

No right to a specific channel, just to placement contiguous to other local broadcast stations

Ability to negotiate even if must-carry, but cable/sat operator cannot receive any “valuable consideration” in return for channel position.

Issues in Retransmission Agreements

-Rates

- >Depend on many factors

-Term

- >Concurrent with election cycle?

- >Concurrent with affiliation agreements?

- >Do you want all agreements expiring at same time?

-Channel position

-Treatment in on-screen program guides

Issues in Agreements (*continued*)

-Out of market carriage

>Allowed or required?

>Check network affiliation agreements for any conflict

>Significantly viewed areas?

>Compensation?

-HD and SD carriage and channel position

Issues in Agreements (*continued*)

-Multicast channels

- >How many will be carried
- >Where will they be carried
- >Limits on content changes

-Signal delivery

- >If cable operator has fiber, will they provide signal delivery?

-Syndicated Exclusivity/network non-duplication

Issues in Agreements (*continued*)

-Alternative delivery and new technology

>TV Everywhere, internet carriage

May not have these rights from program suppliers

May not want to agree without knowing what conditions networks will impose

>Slingbox-type technology

>Dish “hopper” or similar technology

Issues in Agreements (*continued*)

Alternative delivery and new technology (*continued*)

>DVR, pausing, rewinding

Generally acceptable to suppliers

>Other unforeseen technologies

Consider limiting grant of rights to specific things included in agreement

>Can't grant more than you have from network

Out-of-market carriage

New technologies, etc.

Issues in Agreements (*continued*)

-Payment

>Rates

>Terms for submitting payment

>“Bulk-billed” subscribers

>Audit rights

>Alternative compensation

Advertising

Multicast carriage

Issues in Agreements (*continued*)

-Termination Rights

- >Cable operator will generally want right to terminate on loss of network affiliation
 - Agreement should make clear if carriage will stop or just payment
- >Loss of signal
- >Right to terminate for non-payment
 - How long before triggered

Issues in Agreements (*continued*)

-Assignments/Acquisitions

- >Can/must agreement be assigned by either station or cable operator to a new owner?**
- >If station owner buys another station, is it added to this agreement?**
- >If cable operator buys another system, is it added to this agreement?**

Issues in Agreements (*continued*)

-Confidentiality

>How long

>What is covered

-“MFN” clauses

>Fee-only

>Specific provisions (*e.g.*, new technologies)

>Overall value

Good Faith Negotiations

- Explicit standards establishing bad faith:
 - >Refusal to negotiate
 - >Refusal to designate representative
 - >Refusal to negotiate at reasonable times and locations or acting to unreasonably delay negotiations
 - >No joint negotiation by in-market stations
 - >Cannot block satellite from importing significantly viewed stations

(Continued)

Good Faith Negotiations *(continued)*

Explicit standards establishing bad faith *(continued)*

- >Refusal to put forth more than a single, unilateral, “take it or leave it” proposal
- >Failure to respond to a proposal, including reasons for rejection
- >Execution of any agreement that requires the other party to not enter agreement with another station or MVPD
- >Refusal to execute a written agreement setting forth the full terms of the parties’ understanding

Good Faith Negotiations (*continued*)

- Totality of the circumstances test
- In disputes, complaints often filed, but FCC very reluctant to actually find bad faith.

Questions?

Thank you!

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