

Commercial Television Stations Must Make Must-Carry or Retransmission Consent Elections by October 1, 2002

By **October 1, 2002**, all commercial television stations must make their next triennial election between must-carry status or retransmission consent rights for each of the cable systems in their Designated Market Area (DMA), as defined by Nielsen Media Research. These cable carriage elections will be effective for the three-year period from **January 1, 2003 through December 31, 2005**. This **Special Bulletin** is intended to remind our television station clients of the importance of these elections, the mechanics of effectuating the elections, and to help our clients better understand their rights and obligations under the must-carry and retransmission consent provisions of the Cable Act of 1992.

Stations made their last cable carriage election under the Cable Act on October 1, 1999, covering the calendar years 2000 through 2002. For that election period, the Commission mandated use of the DMA in lieu of the former Arbitron ADI (Area of Dominant Influence). We reported on the change in **Special Bulletin to Television Station Clients**, SB No. 99-6 (June 9, 1999). That **Special Bulletin** set forth the specific changes to the FCC rules, as well as the differences between ADIs and DMAs for each television market. We reported on the last election deadline in **Special Bulletin to Television Station Clients**, SB No. 99-14 (August 27, 1999).

What Steps Should You Be Taking?

The decision as to whether to elect retransmission consent rights, or to elect must-carry status, involves many considerations, and ultimately comes down to a business judgment. The licensee must weigh the potential benefits of retransmission consent -- possible compensation, promotion on

other cable channels, and the like -- with the risks caused by loss of must-carry status -- loss of channel positioning and possibly loss of carriage entirely.

Some licensees may find the choice between must-carry and retransmission consent an obvious one. For example, a station's affiliation agreement with a network may leave little choice regarding an election. Some stations may have no option but to elect retransmission consent because they already have carriage agreements in place that cover the election period. Other stations will have to undertake an analysis of the risks and benefits on a systematic basis. Below are a few thoughts that may prove useful in such an analysis.

Identify the Cable Systems in the Market

Before a station can make rational election decisions, it is necessary to survey the cable systems in the station's market to determine where the station has the right to elect must-carry. Stations should not merely duplicate the list of systems they used in past elections because a number of changes have occurred in the intervening years. First, as noted above, in 1999, the Commission mandated the use of DMAs rather than ADIs. To avoid disruption of service to viewers whose communities were assigned to one ADI, but to a different DMA, the FCC stated that where areas are not included in the DMA, but were included in the ADI, a cable operator had the option to continue to carry stations using the ADI market definition, copyright-free. In these systems, a station may want to contact the cable operator and offer to give retransmission consent as a means of encouraging the cable operator to continue carriage.

In addition, modifications to ADIs that were granted by the FCC are still effective, even though the measure is now the DMA. A station's market can be modified -- either adding or deleting communities -- on the basis of a petition for special relief filed with the FCC by either the station or a cable system. Thus, if a cable system has already been added to a station's ADI market, that system will still be part of the station's new DMA market. Similarly, systems deleted from a station's market will remain deleted. Stations must also be aware that system sales or consolidations may have occurred in their markets. In those rare cases where a station's DMA does not include its home county, the home county is considered part of the market for must-carry purposes.

Finally, cable systems that straddle two markets, and are unable to provide separate channel lineups in each market, are obligated to carry the stations that are local in both markets. Depending on the technology that the cable system uses, this may mean that a cable system on the edge of a station's DMA may need to carry the station's signal even on that portion of the system that is outside its DMA.

Must-Carry or Retransmission Consent?

While retransmission consent creates an opportunity for a station to bargain with cable systems for various benefits, the law requires a station to cede its must-carry rights in order to enter into negotiations with the cable operator. This presents an obvious dilemma, particularly to those for whom must-carry rights have represented a significant benefit.

Retransmission Consent

When a station elects retransmission consent, it gives up its right to mandatory carriage in exchange for whatever carriage rights it can negotiate with a particular cable operator.

One obvious factor to consider in deciding whether to elect retransmission consent is the extent to which a station has exclusive rights to valuable programming in the area served by a given cable system. A station's bargaining position is enhanced to the extent that its programming is uniquely valued by the operator's subscribers and the station can require the operator to delete the same programming from other stations. In particular, a station should review any network nonduplication and syndicated exclusivity rights that it may have. The principal elements of network nonduplication and syndicated exclusivity rights are that: (i) the cable system is within the geographic zone within

which exclusivity is permitted; (ii) the station has an agreement with the program supplier insuring territorial exclusivity; and (iii) proper notice has been provided to the cable operator. The network nonduplication and syndicated exclusivity rules are relatively complicated, so we recommend that stations contact the firm to discuss any questions they may have in this regard.

In addition to reviewing program supply contracts for exclusivity rights, a station also needs to review any role that the program supplier has created for itself in the retransmission consent process. There are a number of variations here among the different contracts that we have seen and we urge stations to contact us if they have any contract language that they would like us to review. Similarly, it is advisable for network affiliates to consult with their networks before making any final decisions regarding the must-carry/retransmission consent election.

In the first two rounds of retransmission consent negotiations, very few stations were able to bargain for monetary compensation. Some stations had more success in bargaining for promotional consideration and for agreements by cable systems to carry local or regional cable news or information channels. Stations must carefully evaluate whether particular cable operators will be willing to offer more or less in the upcoming round of negotiations. Stations should also consider whether they have sufficient bargaining power to insist on carriage of a broadcaster-operated cable channel, and whether they believe that creation of such a channel is likely to be profitable.

One new avenue of opportunity that stations should consider for negotiation is the impact of future digital transmissions by broadcasters on cable carriage. Broadcasters may be in a position to provide multiple signals, and they may want to consider bargaining for future cable carriage opportunities for those signals.

Finally, it may be useful to keep in mind the following practical considerations:

(1) Before a station begins negotiations, it should consider matters from the cable operator's perspective. Take advantage of any relationships that the station already has developed with local cable operators to learn as much as possible. What can the cable operator realistically offer in return for retransmission consent? What flexibility does the local manager have to negotiate with the station?

(2) Also, find out as much as possible about what the station's viewers think. Market research might be useful to: (i) determine the value of the station's signal to local cable subscribers; (ii) develop materials to present to cable

operators in support of any negotiations; and (iii) anticipate the best response to any controversy.

(3) A station may elect must-carry for some cable systems and retransmission consent negotiations for others; however, if two cable systems serve the same franchise area, a station must elect either must-carry or retransmission consent with respect to both.

Must-Carry

Under the must-carry provisions of the Cable Act of 1992, a full-power commercial television station can elect must-carry status on any or all cable systems within its DMA "market." With only limited exceptions discussed below, the station is *entitled to be carried* on any cable system for which it elects must-carry.

A station electing must-carry also has the right to choose a channel position from the following options: (1) the channel on which it broadcasts; (2) the cable channel on which it was carried on July 19, 1985; (3) the cable channel on which it was carried on January 1, 1992; and (4) any channel on which the station and cable operator agree. Note that we have drafted a model must-carry election notice included as part of this Special Bulletin in such a way as to indicate a preferred channel *which a station may not be legally entitled to demand*. However, it is designed to open negotiations regarding channel position, with the fall-back position of electing one of the three statutory channel positions if negotiations are unsuccessful. Stations should make a choice now as to which fall-back position they want to employ, and delete references to the other two before the letter is printed. Once must-carry is elected, stations cannot pay for carriage or channel position.

The key exceptions and limitations on must-carry rights are as follows:

Channel Space Limitations

A cable system with more than 12 usable activated channels is not required to fill more than one-third of its channels with local commercial stations. A cable system with 12 or fewer usable activated channels is not required to carry more than three local commercial stations. If there are more eligible commercial stations than a cable system is required to carry, then the *cable system* is free to choose the stations it wants to carry. This limitation has proved to be important in major metropolitan markets such as New York and on cable systems that serve more than one DMA.

Duplicating Signals

Cable operators are not required to carry stations that "substantially duplicate" the signal of another local station that is being carried on the system. A station is deemed to substantially duplicate the signal of another station if it broadcasts the same programming simultaneously for more than 50% of the broadcast week. Cable operators may choose which of the duplicating channels to carry, except that if two or more affiliates of the same network qualify as must-carry stations, the system is required to carry only the one whose city of license is closest to the cable system's principal headend. Currently, for purposes of these rules, the "networks" are ABC, CBS, FOX, NBC, UPN and WB.

Signal Quality

Cable systems are not required to carry stations that do not deliver a sufficient quality signal to the system's principal headend. The basic signal quality test is -45 dBm for UHF signals and -49 dBm for VHF signals, measured at the input terminals of the signal processing equipment at the cable system's principal headend. Any notice from a cable system informing a broadcast station of inadequate signal quality must include a detailed description of the reception and over-the-air signal processing equipment used, including sketches and a description of the methodology used for processing the signal at issue. Stations may eliminate this exception by taking steps to deliver the requisite quality signal to the system headend through use of a microwave feed, translator signal, fiber optic line, or otherwise.

Translators and LPTVs

Translators, passive repeaters and Class A television stations do not have their own must-carry rights. These stations can, however, be used to solve signal quality problems affecting carriage of a full power station.

A limited number of low power television stations will qualify for must-carry status. However, the must-carry rules for low-power TV stations are quite complex and must be examined on a case-by-case basis. For assistance in interpreting those rules, please contact any of the lawyers in the Communications Practice Group.

Retransmission Consent Election

Cable systems are not required to carry the signal of any station which has elected retransmission consent. Thus, if a station elects retransmission consent on a cable system, and fails to reach agreement with the system on terms of carriage, it will have no right to demand must-carry until

the next election, which must be made by October 1, 2005, and which takes effect on *January 1, 2006*.

The Mechanics of the Election

Once a station has decided whether it will elect retransmission consent on a particular system, the mechanics of doing so are straightforward. By **October 1, 2002**, a station must send a notice to any cable system in its DMA with which it intends to negotiate retransmission consent rights for the period January 1, 2003 through December 31, 2005. If no notice is sent, the station is deemed to have opted for must-carry for that period. By electing to exercise its retransmission consent rights, the station irrevocably forfeits its must-carry rights for three years, including the right to channel position, which becomes subject to negotiation. Although a station that does not send a letter is deemed to be a must-carry station, it will lose its opportunity to make its channel position election. Therefore, if you intend to choose must-carry status for a system, we recommend that you specifically inform the cable system of your must-carry election, and make a channel election in the same letter by the **October 1, 2002** deadline. Stations should send a notice to *each* cable system in their DMA advising the system operator of their election of *either* retransmission consent or must-carry status.

The notice of retransmission consent or must-carry election should be sent *by certified mail, return receipt requested*. It must be placed in the U.S. mail no later than **October 1, 2002**. You should maintain a log of all elections mailed by the station, with copies of the Post Office certified mail receipts attached to the log. Return receipts should be associated with the log as they are returned by the Post Office.

We recommend that you send a separate notice to each separately franchised system, addressed to the local business office of the system, with copies sent to the regional or national headquarters of any multiple system operators ("MSOs") operating systems in your DMA. Most MSOs are using a regional officer to handle retransmission consent discussions; we believe it advisable to identify his or her identity and address, and supply that person a copy of all election letters for that MSO.

As to cable systems on which a station does not have must-carry rights, such as those outside its DMA, and as to other multichannel distributors, such as wireless cable systems, no notice is necessary. The cable operator or multi-channel distributor may not carry a station's signal in such a case without the consent of the station. The station does not have to provide any notice of interest in

negotiating; instead, the burden is on the cable operator or the multi-channel distributor to approach the station and get its consent before carrying the station's signal. However, as noted above, in the special case of cable systems that were formerly part of a station's ADI market but are now outside of the DMA market, a station may want to contact the cable system and offer retransmission consent in order to encourage continued carriage.

We have included model retransmission consent and must-carry election notices in this Special Bulletin for station use. Stations may tailor them to the needs of their own situation. For example, if a station wishes to elect retransmission consent, but does not plan to seek monetary compensation, it may be desirable to make that point clear in the initial notification letter. Or, a station may wish to add language to indicate its desire to work cooperatively to achieve a "win-win" result for the cable system as well as the station. This will vary depending on the tone the station wishes to set with the cable system.

Promptly after the retransmission consent or must-carry election notices are mailed, a copy of each must be placed in the station's public inspection file. In the event that an election notice is returned as undeliverable, and service on the regional or national headquarters of the system operator was unsuccessful, please contact any of the lawyers in the Communications Practice Group to discuss the station's alternatives.

We urge stations to carefully consider information from as many sources as possible in making the choice between must-carry and retransmission consent. There are many different perspectives on these issues, and stations need to be as informed as possible on all of them.

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MODEL MUST-CARRY ELECTION NOTICE

[Station Letterhead]

[Date]

[Insert Address of Cable System]

Re: Election of Must-Carry Status

Dear _____:

[Name of Licensee], licensee of television station [Call Letters], [City of License], hereby provides written notice, pursuant to Section 76.64(f) of the Rules and Regulations of the Federal Communications Commission, that it elects must carry status on the cable system which you operate serving the communities of [insert cable communities] for the period beginning on January 1, 2002 and ending on December 31, 2005.

We prefer to have the signal of our station carried on cable channel _____. If that is not possible, we would like to discuss with you an alternative channel that is mutually acceptable. If we are unable to agree on an alternative, then, pursuant to Section 76.57 of the Rules and Regulations of the Federal Communications Commission, we elect to be carried on cable channel _____ on your system, which is [our over-the air channel][the channel on which we were carried on January 1, 1992][the channel on which we were carried by your system on July 17, 1985].

Please contact me immediately if you have any questions concerning this election.

Very truly yours,

MODEL RETRANSMISSION CONSENT ELECTION NOTICE

[Station Letterhead]

[Date]

[Insert Address of Cable System]

Re: Election of Retransmission Consent Status

Dear _____:

[Name of Licensee], licensee of television station [Call Letters], [City of License], hereby provides written notice, pursuant to Section 76.64(f) of the Rules and Regulations of the Federal Communications Commission, that it elects "retransmission consent" status on your cable system for the period beginning on January 1, 2003 and ending on December 31, 2005. It is our intent that this election be effective as to each community served by your system. Our present information indicates that your system serves the communities of [insert cable communities].

We intend to contact you shortly to discuss the terms under which we will grant our consent to your carriage of the signal of [Call Letters].

If there is a particular person or office charged with handling retransmission consent discussions for your company, we would be happy to contact that person or office directly upon being so notified and supplied with an appropriate address and telephone number.

Please contact me immediately if you have any questions concerning this election.

Very truly yours,