

# Broadcasters/MVPDs Spar over Retransmission Consent Rules

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Broadcasters and multichannel video programming distributors (MVPDs) painted very different pictures of the retransmission consent marketplace in comments and reply comments submitted in response to a Federal Communications Commission (FCC) *Notice of Proposed Rulemaking* (NPRM). From the broadcast perspective, the retransmission marketplace works as intended by Congress, with broadcasters able to negotiate for at least some of the value their programming contributes to the pay service offered by MVPDs. Despite the publicity and heated rhetoric that surrounds some retransmission consent negotiations, broadcasters point to the overwhelming number of negotiations that are resolved without any viewer disruption as evidence of the effectiveness of the existing system. MVPDs, however, argue that broadcasters control certain “must have” content, and that exclusivity rules shift the balance in retransmission consent negotiations by leaving MVPDs without an adequate substitute for local broadcast programming.

Initial comments in the proceeding were due on May 27, 2011, with reply comments due on June 27, 2011. In addition to broadcasters, MVPDs and some of their respective trade organizations, as well as public interest groups and state regulatory agencies, were among the 60 initial commenters and 30 reply commenters.

Several MVPD commenters united around a three-part proposal, originally offered by Cablevision, focusing on nondiscriminatory retransmission consent rates, transparency and a prohibition on tying retransmission to other programming. Under the proposal, (1) broadcasters would set their price for retransmission consent, but then be required to offer the same price in all subsequent negotiations; (2) broadcasters would have to include the rates that

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they receive for retransmission consent in their public inspection files; and (3) broadcasters would not be permitted to link retransmission consent to carriage of other programming or to any other noncash terms. Broadcasters, including the National Association of Broadcasters, networks and several large and small broadcast station groups, responded that the MVPDs' proposals favored cable programmers, who would not be subject to the proposed rules. Broadcasters also argued that, as recognized in the NPRM, several of the MVPD proposals constitute FCC interference with the substance of retransmission consent negotiations, contrary to both the statutory language and congressional intent.

Perhaps the most contentious issue in the comments related to the FCC's proposal in the NPRM to amend or eliminate its network nonduplication, syndicated exclusivity and sports blackout rules. Broadcasters argued that the exclusivity rules are part of a carefully balanced mosaic of rights (including must-carry, retransmission consent and compulsory copyright) that create an efficient system for program distribution, and that removing exclusivity would harm localism and shift popular programming away from free, over-the-air television. They emphasized that the exclusivity rules do not create rights, but instead provide for the effective enforcement of privately negotiated rights. MVPDs, on the other hand, portrayed exclusivity rules as government interference with their ability to negotiate with out-of-market stations. Several MVPD commenters urged the Commission to at least waive the rules where the broadcaster holding exclusivity rights has refused to grant the MVPD retransmission consent.

Other contentious issues included network involvement in retransmission consent negotiations and approval rights, joint negotiations between broadcast stations that are not commonly owned and whether MVPDs should be required to provide consumers with notice within 30 days of the expiration of a retransmission consent agreement.

While we do not expect any imminent action by the FCC in this proceeding, Congress could pressure the Commission to act, should retransmission consent disputes arise in the future.

\*District of Columbia Bar pending. Supervised by principals of the firm.