

The “Must Carry” Rules

This is the first in a series of *CTPAA* briefs on the transition of the current broadcast television system from analog to digital transmission – the so-called “DTV Transition.” The transition was mandated by the Federal Government when Congress adopted legislation in 1997 supporting an FCC plan to shift all television broadcasting from the analog to the digital format. There were many reasons for that decision, not the least of which were that the broadcasters asked for spectrum (“airwave”) allocations to allow for digital broadcasting – originally in “high definition” format, and the government wanted to reclaim the analog spectrum now being used by broadcasters so that it could be more efficiently reallocated for other purposes, and in order to make money by auctioning the newly reclaimed frequencies.

A future *CTPAA* brief will delve more deeply into the history and origins of the decision that now requires the “DTV Transition”. What is most important now, however, is to look at the list of current issues that have a direct effect on that transition, and understand the basics of the various arguments and the cable industry’s position on them. The Federal “Must Carry” rules, what they are, how they developed, and the arguments over what they should look like in a digital era of “multicasting” is at the top of the list.

In the Beginning...

First, let’s get clear what the “must carry” rules, in their essence, are. They are federal rules, written and enforced by the Federal Communications Commission (FCC) that require virtually every cable television system in the United States to carry all “local” broadcast stations.

Without going into all the legal detail, which is not the purpose of these briefs, what that means is that a cable system cannot choose to carry just the local stations that its subscribers are most interested in (typically the stations affiliated with networks such as ABC, NBC, CBS etc.); the system also has to carry every other local station, including foreign language stations, home shopping channels, etc. These rules date back to the 1960’s, when cable systems (or “CATV – Community Antenna Television” systems as they were called then) principally served the purpose of giving rural areas improved reception of over-the-air broadcast signals.

The rules were instituted in the late 1960’s in response to the growth of CATV systems and the fear that some systems might choose to carry one or two “favored” stations and not carry the rest. Since CATV was the primary method for being able to view television in smaller rural markets because of hilly terrain, any television station that might not be carried feared it would fail because viewers would not be able to see it. This was especially true of the newer UHF stations.

Another, related concern was that the CATV system might be built or controlled by one of the local broadcast stations and then it would

be able to keep its rivals off the system. So along with the "must carry" rules adopted at that time, the FCC also adopted ownership restrictions that disallowed local television stations from owning local cable systems.

Protecting Local Broadcasters

Was there really a problem of cable operators not carrying local television stations? There were few if any examples, at the time, of CATV systems "freezing out" one or another local broadcaster. In fact, the problem from the broadcaster's point of view was the opposite. Since cable systems got subscribers by delivering the television signals they could not easily get by themselves, the cable systems went to great lengths to carry as many broadcast signals as they could. This did

not please "local" broadcasters, who did not like the introduction of competition from "distant" television stations from other markets being carried by the CATV system. Remember, this was at a time when cable had no channels of its own. Its only source of television programs was the carriage of broadcast stations. That was its business, so there was very little incentive to try to "freeze out" anyone.

The broadcasters, on the other hand, while they liked the fact that CATV was helping them distribute their product by improving the pictures

in the home, wanted the cable systems to strictly adhere to the "market structure" that they had set up. That is, to use Washington, D.C. and Baltimore, Md. as the example, the D.C. signals should only be available on cable systems in D.C., and the Baltimore signals, likewise, should only be available on Baltimore systems.

Now while that made economic sense to the broadcasters, so they could exclusively show (and sell advertising) for *their* programs in *their* markets, the laws of physics came into play and consumers had a problem, because in many cases, particularly in the denser populated areas of the country, they could see signals from more than one "market" over-the-air! Thus, the "must carry" rules got very complicated as the FCC tried to define where signals really were, what the economic needs of the broadcasters were regarding protecting "their" territory and markets, and what the service was that cable operators could offer customers that would attract a loyal and sufficient customer base to afford to build the cable system. Not an easy task.

As the "must carry" rules evolved through the 1970's, the principal rationale for the rules focused on the economic wellbeing of the broadcasters. Federal law had long made clear that one of the economic jobs of the FCC was to promote "localism" and, thus, local "free, over-the-air" broadcasting. Interestingly, to this day it has never been conclusively argued or proved that the "must carry" rules are economically necessary to protect local broadcasting. That defense of the rules was made in numerous law suits arguing that they violated the First Amendment rights of cable operators and customers. In several lower court rulings, the operator's First Amendment rights won, because the FCC was unable to pro-

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vide definitive economic evidence that its rules were the minimum needed to protect the economics of broadcasting while at the same time interfering with the First Amendment rights of cable operators and customers as little as possible. As a result of these court rulings, there effectively were no "must carry" rules for much of the period between 1985 and the enactment of the 1992 Cable Act.

By the end of the 1980's, however, during the boom in the growth of both cable television and new broadcast outlets, difficulties developed. The cable systems were not capable of carrying the number of channels they are today, and new broadcasters, especially "specialty" UHF broadcasters like home shopping channels, were coming on the air rapidly. The cable systems ran out of room in some cases to carry both the

new broadcasters and the new cable programs from HBO, CNN, C-SPAN, etc. that had started to flourish.

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Cable prices were also going up as the operators were scrambling to both build new capacity and pay for new forms of programming to bring to their customers at the same time. This all culminated in a major legislative battle on Capitol Hill resulting in the Cable Television Consumer Protection and Competition Act of 1992. For the first time, the "must carry" rules were enshrined in legislation. This was very significant, because when they were again challenged in court on First Amendment grounds, the case went all the way to the

Supreme Court, where the rules were sustained (albeit by a narrow 5-4 margin). What had happened? Was there now solid evidence that without those rules broadcasting as we know it would fail? No, not really.

In fact, the economic analyses offered to support the "must carry" rules had not changed significantly, and the number of instances of broadcasters with any audience reach not being carried was still minimal. What had changed was the fact that the "must carry" rules were no longer simply administrative rules written by the FCC, but had been written into law. The fact that the legislation was part of a major political battle (the President vetoed the legislation, but was overriden by Congress) was irrelevant to the Court. It ruled that the "must carry" rules were supported by the "evidence" that Congress had made a "finding" as to their necessity. The Court deferred to the findings of Congress and never really required full economic support of the proposition that the rules were needed to protect broadcasting.

The State of the Law

That is the state of the current law. The "must carry" rules for cable television carriage of the current analog television signals of local broadcasters have been declared constitutional – at least so far as the First Amendment challenge to them is concerned (and that, too, is important, but we'll get to that in a minute.) What is not as clear is how that legal status transfers over to a new digital realm. That is the crux of the battle now going on regarding the carriage of digital broadcast television signals, and particularly "multicast" digital broadcast programming. Keep reading – we'll get to an explanation of "multicasting" in a moment, too.

UP TO SPEED

While some of you already know and understand all of this background to the current DTV Transition battles, we are reviewing it in this CTPAA brief both for those who are new to the industry (or not in the industry but have been given a copy of this brief so that they can better understand what is going on) and because the current battles over "multi-casting must carry" can only be understood if you know the context in which the "must carry" rules were first adopted and legally sustained.

Retransmission Consent

When Congress adopted legislation to "protect" broadcasting in 1992, by enacting the "must carry" rules, it added another set of rules as well: the so-called "retransmission consent" rules. Retransmission consent requires a cable operator that wants to carry a television broadcast station on a cable system to secure the consent of the broadcaster, before delivering that signal to customers, in those cases where the broadcaster has not demanded carriage through the "must carry" rules. The broadcaster is permitted to negotiate payments or some other form of compensation (like carrying additional affiliated channels) for that "retransmission consent."

In other words, Congress understood that there were some economically very strong broadcast stations in each television market. They did not need "must carry" to protect their interests. They wanted just the opposite, to charge the cable operator and customers for the right to see their signal even though it was "free, over-the-air." Retransmission consent was the way they got that right. So if you are a weaker broadcaster in the market, you get to demand free carriage on the cable system, but if you own a strong "free, over-the-air" channel in the market, you get to

negotiate with the cable operator for compensation of some sort before allowing customers of that system to see your "free" broadcast channel! A great political deal for broadcasters... at the consumers' expense.

The concept of retransmission consent is not new. It was first introduced in the late 1960's at the FCC as part of the original package of rules we mentioned earlier that were put in place when broadcasters first started to worry about cable affecting their market fiefdoms. At that time the "must carry" rules were put in place for the local signals, and retransmission consent was required for any out-of-market, or "distant" signal. Cable operators had to get consent before they could deliver any out-of-market television signal to their customers. In the over two years those interim rules were in effect while the FCC studied the whole issue of cable regulation, not one broadcaster granted "retransmission consent."

There was, in other words, a "freeze" on the development of cable television systems because as they moved into the bigger cities, they had nothing to provide their customers other than the local signals which in most cases could already be seen over-the-air. The FCC ended that freeze in 1972 by adopting a comprehensive set of rules on what signals a cable system could carry, and eliminating the retransmission consent rules. Twenty years later, they were back – but for a very different reason.

By 1992 local broadcasters not only wanted to be on the cable system, since most viewers were watching television via cable, but many of

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them wanted to be paid for that carriage as well. In the interim the copyright laws had changed and cable was required to pay copyright for carriage of "distant" signals. The development of strong independent cable programming made distant signal carriage far less important. But local broadcasters – especially the "strong" ones, who knew the cable operator had no choice but to deliver their signal to customers, wanted to make some money from that delivery. Thus the "retransmission consent" rules were re-instituted at the insistence of the broadcasters. This time for local signals, and as of now, it is estimated that about 80% of all carriage by cable systems of "free," local, over-the-air television is accomplished through the retransmission consent rules, not the "must carry" rules. Apparently the economic health of broadcasting was not as threatened as Congress thought when it adopted and justified the "must carry" rules.

The Digital Transition

There are many reasons – economic, technical and political – for the "digital transition." We are not going to explore all of them in this brief. Suffice it to say that what ultimately came out of the long political process of developing the rules for the transition at the FCC and in Congress was a design and a hope that local, free, over-the-air broadcasting would be preserved but would be distributed in a digital rather than an analog format.

Of course the "broadcasting" they were talking about was, and still is, the "broadcast television" we know today. The channels and programming,

whether independently owned or owned by a network we have all grown up with on ABC, NBC, CBS, Fox, the "independent" local channels and PBS. Each "channel" in the local market (whether VHF – 2 through 13, or UHF – 14 through 69) typically broadcasts an entire "program day." There has never been any ambiguity over what we think of as a broadcast "channel" or the programs distributed on that channel – until now.

When Congress decided that broadcasters should switch from analog to digital transmission of their channels, the original reason was that the broadcasters said they

wanted to transmit new, higher quality pictures – "high definition" television. That new HDTV, according to the broadcasters, required the same amount of bandwidth (spectrum) as they currently use – 6MHz. However it was recognized that consumers did not have the equipment in their homes to see a digital transmission. Standard television sets only receive analog pictures. So, there had to be some way to shift from the analog signals to the new digital ones. That's the "Digital Transition."

Congress decided that each over-the-air television broadcaster, who already was transmitting an analog channel using 6Mhz of bandwidth, would get another 6MHz of free public spectrum to start transmitting a digital copy of their

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channel as well. That way, over time, as new "digital" television sets (or receivers) were bought by consumers the majority of folks would start benefiting from the better pictures transmitted digitally, and ultimately the analog signal could be turned off as everyone switched over to watching the digital picture and then the analog spectrum would be given back to the government for other uses. At least that was the theory.

Digital "Must Carry" and "Multicasting"

It turns out that the digital transmission of television signals is far more efficient than analog transmission. So it does not really take all 6Mhz of digital bandwidth that the broadcasters were given to transmit their regular, or "primary" channel. Broadcasters, realizing this, decided that they wanted to use the "rest" of the bandwidth they had been given for other things. Some want to transmit data, others want to use that leftover bandwidth for other commercial purposes. Some even propose not transmitting in HDTV at all, or only some of the time, so that they can use all 6Mhz for three or more "standard channels." This is multicasting.

Dual Must Carry

There has never been any argument about cable operators continuing to have to carry the "free, over-the-air broadcaster's" program when it switched over from analog to digital transmission. The "must carry" rules still apply to the digital program. But how does that work during the "transition?" Well, the broadcasters demanded that cable operators carry BOTH the analog and the digital copy of their programs at the same time. This was known as "dual must carry." The burden on cable operators would have obviously been twice as big. Cable systems, as we all know, do not have unlimited bandwidth. The FCC decided in 2001 that "dual must carry" would place too great a burden on cable systems and would likely be unconstitutional. It ruled that cable would only have to carry the primary digital signal under the "must carry" rules once the analog signal was turned off.

Digital transmission is far more efficient than analog transmission.

UNCONSTITUTIONAL?

The FCC said in 2001 that "dual must carry" might place too great a burden on cable systems and may be unconstitutional.

Multicast Must Carry

But, the broadcasters weren't done. While the legislation mandating "must carry" of the broadcaster's digital signal clearly said it referred to the

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the right to create other free uses or non-HD programs, or if they want to, not transmit in high definition at all and use their 6MHz of over-the-air spectrum to send out multiple (it could be 5 or more “multicast”) channels of programming and the cable system should be required to carry them all! Not surprisingly, the argument for this is that the broadcaster’s economic wellbeing (remember that?) demands that cable support all of the broadcaster’s channel plans. Thus, this has become an economic argument – that the use of cable’s bandwidth will financially support over-the-air broadcasting. There has never been any proof of that, however.

“primary” signal – which the cable industry and FCC so far has interpreted as meaning a single digital programming stream, the broadcasters now argue that the word “primary” doesn’t mean that at all. Instead, they are trying to lay claim to “space” on the cable system, just as they have now under the analog “must carry” rules, no matter what they use their bandwidth for: so long as it is offered free over the air. In other words, “must carry” for the broadcasters, has now shifted from a rule to assure that their program can be seen by viewers to one that guarantees them a certain amount of free space on all cable systems.

From a technical point of view, a cable system can distribute a broadcaster’s HDTV program using roughly 3MHz of cable bandwidth or less. The broadcasters say they should have

In fact, during the battles over the digital transition, the broadcasters themselves have argued that if they were forced to “multicast,” it might create an economic *burden* that could hurt their “primary” channel service! It is simply not at all clear that a broadcaster, adding a home shopping channel, or a weather channel or a “repeat” channel of their primary programming can show any business plan that will result in a needed economic benefit for that broadcaster. If adding those other channels of programming weakened the ability of the broadcaster to fulfill primary local “public interest” obligations, then it would have the reverse effect of what the broadcasters claim. Of course expropriating all that bandwidth from the cable operator for the benefit of broadcasters would also make it more difficult for other diverse voices, such as other cable program-

mers, like TV One or Trinity Broadcasting Network to get on the system with their programming – a serious First Amendment issue. It would also force up prices for consumers.

So far, the FCC has not supported the idea of “multicast must carry.” But, the fight is still ongoing. The original plan for a “transition” from analog to digital transmission, with the analog channels being given back to the government by the end of 2006, will not happen. The reason is simple: people

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"multicast must carry". In both cases it could be anticipated that a challenge would be mounted not only on First Amendment grounds, as has been done in the past, but on Fifth Amendment constitutional grounds as well – that the government is "taking" the property of the cable operator without compensation.

While it is always chancy to guess what the outcome of legal proceedings might be, clearly the FCC is concerned about those potential legal challenges, since it has raised constitutional questions in the past regarding the "must-carry" regulations. They are once again studying the issue, and a decision is anticipated shortly. Whatever that decision, you can be sure the losing party will take the issue to court, and the question of "must carry" will remain a hot one for some time to come.

are not buying the new, expensive digital television sets fast enough to meet another condition of the law: that 85% of the television households must have the ability to see the digital signals before analog broadcasting is ended. The fight over digital carriage, therefore, has now gotten totally intertwined with the underlying question of when the analog spectrum will be turned back to the government for other uses – particularly now including homeland security.

As you can see, the Digital Transition has many moving parts, and how and when the cable industry carries broadcasters' digital signals is one key ingredient. While the industry has never opposed the idea of carrying the same programming in the digital realm that it now carries from analog, over-the-air broadcast signals, there would undoubtedly be court challenges to any regulation that required either "dual must carry" or

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CTPAA briefs is published by the Cable Television Public Affairs Association. For information about this publication or CTPAA member benefits, please contact Steve Jones, Executive Director.

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