

[FCC to Take a Fresh Look at Retransmission Consent Rules Governing Carriage of Broadcast Television Stations](#)

by [Brendan Holland](#)

March 6, 2011

Among the many items adopted by the Commission at last week's open meeting was a Notice of Proposed Rule Making (NPRM) regarding retransmission consent agreements and the carriage of broadcast television stations by cable and satellite providers. Retransmission consent has been a hot topic of late both in Washington and in the national press. During the past year, a few carriage negotiations between broadcast television stations and cable or satellite operators have resulted in interruptions - or threats of interruptions - in the carriage of local stations. As a result, both Congress and the public have paid increasing attention to retransmission consent negotiations, and the Commission's NPRM is an effort to review some aspects of its rules governing the relationship between local broadcast stations and the cable and satellite providers that retransmit their signals. A copy of the NPRM is available [here](#).

The NPRM is the outgrowth of a petition for rule making filed in March 2010 by cable and satellite providers, along with several public interest groups. These groups jointly petitioned the FCC seeking significant changes to the current retransmission consent process. Perhaps the most notable aspect of last week's NPRM is not the changes the FCC proposes, but rather the changes it refrains from pursuing. The Commission states in the NPRM that it does not believe that it has the authority to adopt either interim carriage mechanisms - to require the continued carriage of a station without a station owner's consent while negotiations continue - or mandatory binding dispute resolution procedures for retransmission consent negotiations, both of which were proposed by the cable and satellite providers in their petition for rule making. In both cases, the Commission found that it lacked the statutory authority to pursue the rule changes proposed by the petitioners.

While it proposes to refrain from action on those two elements of the petition for rule making, the Commission does propose to review several aspects of its rules in an effort to, in its words, "protect the public from, and decrease the frequency of, retransmission consent negotiation impasses within our existing statutory authority." To that end, the NPRM seeks input on strengthening the good faith negotiation rules, including whether it would be *per se* violation of the good faith negotiation rules for a station to give a network with which it is affiliated the right to negotiate for carriage, or for a station to grant another station or station group the right to negotiate for carriage, such as when a station is party to a local marketing agreement (LMA) or joint sales agreement (JSA). In addition, the NPRM proposes changes to the notice requirements

of its carriage rules to require advance notice to consumers if there is the possibility that a station will be dropped from a providers' programming line up. This advance notice would allow consumers to make alternative plans if negotiations ultimately fail and a station's signal is deleted from the lineup.

The Commission also seeks to clarify the current rule prohibiting the relocation or deletion of a commercial television station during a sweeps ratings period. While the legislative history suggests that the prohibition was intended to prevent a cable operator from dropping or repositioning a station during sweeps, the NPRM seeks comment on whether the rule would permit imposing a sweeps limitation on broadcasters. Finally, the NPRM seeks comment on the potential benefits and harms of eliminating the Commission's rules concerning network non-duplication and syndicated exclusivity. These rules support a station's exclusive rights to programming in a geographic area and prohibit a cable system from carrying another station with the same programming under certain circumstances. The cable and satellite petitioners assert that the rules are no longer justified and urge that they be eliminated, while broadcast stations argue that the rules are important to fostering localism. The NPRM seeks input regarding what effect elimination or modification of the rules would have on the marketplace and on retransmission consent negotiations.

The deadline for submitting Comments will be 60 days after publication of the item in the Federal Register with Reply Comments due 90 days after publication. Comments can be filed with the Commission in paper or online through its Electronic Comment Filing System. Interestingly, during the open meeting at least two of the Commissioners, including Chairman Genachowski, stressed in their comments that the release of this rule making should not be taken as an excuse by broadcast stations or cable and satellite operators to delay or suspend retransmission consent negotiations, or to look to the FCC to resolve impasses in such negotiations.

This advisory is a publication of Davis Wright Tremaine LLP. Our purpose in publishing this advisory is to inform our clients and friends of recent legal developments. It is not intended, nor should it be used, as a substitute for specific legal advice as legal counsel may only be given in response to inquiries regarding particular situations.