

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

NEW ENGLAND
CABLE NEWS

CSR-4190-P

Petition for Public Interest
Determination Under
47 C.F.R. §76.1002(c)(4)
Relating to Exclusive
Distribution of
New England Cable News

MEMORANDUM OPINION AND ORDER

Adopted: June 1, 1994;

Released: June 1, 1994

By the Commission: Commissioners Ness and Chong not participating.

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I. INTRODUCTION

1. The Commission has before it a petition filed by New England Cable News ("NECN"), a new regional cable news network, requesting a public interest determination pursuant to Sections 76.1002(c)(4) and (5) of the Commission's rules that will authorize NECN to enter into exclusive program distribution agreements with cable television system affiliates (the "Petition").¹ NECN contends that the

relief requested is authorized by and consistent with the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act"),² and is in the public interest because it will promote the development of diverse new program service offerings such as regional cable news services.

2. The petition was placed on public notice on January 26, 1994, and was not opposed.³ Pursuant to our program access regulations, in order to facilitate a complete analysis of the issues raised in the petition, the staff submitted a written request to NECN for additional information. Based on our review of the petition and of NECN's written responses to the staff's further inquiry, we have determined that granting the petition, thus allowing NECN to enter into exclusive distribution arrangements with cable operators, limited as described below, meets the public interest criteria set forth in the 1992 Cable Act and our implementing regulations.

II. BACKGROUND

3. Section 628(c)(2)(D) of the 1992 Cable Act provides that, in areas served by a cable operator, exclusive contracts for satellite cable programming between vertically integrated programming vendors and cable operators are prohibited unless the Commission determines that such exclusivity is in the public interest.⁴ In determining whether the proposed exclusivity is in the public interest, the statute directs the Commission to consider five specific factors:

- (a) the effect of such exclusive contract on the development of competition in local and national multichannel video programming distribution markets;
- (b) the effect of such exclusive contract on competition from multichannel video programming distribution technologies other than cable;
- (c) the effect of such exclusive contract on the attraction of capital investment in the production and distribution of new satellite cable programming;
- (d) the effect of such exclusive contract on diversity of programming in the multichannel video programming distribution market; and
- (e) the duration of the exclusive contract.⁵

The Commission has determined that vertically integrated programming vendors seeking to enter into exclusive distribution agreements with cable operators in served areas must first petition the Commission for a finding that the proposed exclusivity meets this public interest standard.⁶ NECN's petition seeks such a determination.

¹ Copies of the Petition and correspondence relating thereto are available to the public in the Commission's Public Reference Center, 1919 M Street, N.W., Room 242.

² Pub. L. No. 102-385, 106 Stat. 1460 (1992).

³ See 47 C.F.R. § 76.1002(c)(5)(ii).

⁴ See 47 U.S.C. § 543(c)(2)(D). Section 628(c)(2)(C) of the 1992 Cable Act contains a flat prohibition against "practices, understandings, arrangements and activities, including exclusive contracts... between a cable operator and a [vertically integrated

programming vendor]" in areas not served by a cable operator as of October 5, 1992. See 47 U.S.C. § 548(c)(2)(C). We note that this *per se* prohibition against exclusivity is not at issue in this case because the petition seeks authority for exclusive distribution in served areas only.

⁵ See 47 U.S.C. § 548(c)(4).

⁶ See *First Report and Order*, MM Docket No. 92-265 ("Program Access Order"), 8 FCC Rcd 3359, 384 (1993), *recon. pending*.

4. According to petitioners, NECN began operations on March 2, 1992. NECN provides 24-hour programming by satellite to cable television systems serving approximately 950,000 cable subscribers in Maine, New Hampshire, Massachusetts, Rhode Island, and Connecticut. NECN's programming consists of news, public affairs, weather, sports news, informational, and children's programming.⁷ NECN seeks authority to enter into exclusive programming agreements with cable system affiliates in the six New England states of Maine, New Hampshire, Vermont, Massachusetts, Connecticut and Rhode Island ("the New England states"), by which the affiliate would receive an exclusive license to distribute NECN within the affiliate's cable franchise area for seven years.

5. NECN is a general partnership owned by The Hearst Corporation ("Hearst")(50 percent ownership) and Continental Cablevision, Inc. ("Continental")(50 percent ownership). Hearst is a diversified media company that owns radio and television stations, television production facilities, newspapers, and magazines, and has ownership interests in several satellite cable program services.⁸ Hearst does not own any cable systems. Continental has minority interests in several satellite cable program services and owns numerous cable systems.⁹

6. Continental's 50 percent ownership of NECN is "attributable" pursuant to Section 76.1000(b) of the Commission's rules, making NECN a vertically integrated cable satellite programming vendor subject to our program access rules.¹⁰ Accordingly, NECN may not provide a cable system affiliate the exclusive right to distribute NECN within the operator's local franchise area absent an affirmative determination by the Commission that such exclusive distribution meets the public interest criteria set forth in Section 628(c)(4) of the 1992 Cable Act.¹¹ Thus, NECN has petitioned the Commission for a finding that its proposed exclusivity meets the statutory public interest standard.

7. NECN's proposed exclusivity provision would provide cable system affiliates in the New England states the exclusive right to distribute NECN by means of cable, wire and fiber within the area served by the cable affiliate, for a period of seven years. It further provides that during this seven-year period, NECN will not authorize distribution of

NECN by "SMATV, MMDS, DBS or any other multichannel video program provider within the area served by the cable system."¹²

III. Summary of Petitioner's Arguments

8. Citing the Commission's express recognition that exclusivity can meet the statutory public interest test if shown to be essential to the economic viability of local or regional programming services, NECN contends that it offers precisely the type of program service for which exclusivity is appropriate.¹³ NECN's program affiliation contract describes the service as a "regional (greater Boston area and New England) news, weather, sports and such other supplemental programming of regional interest in the New England area as NECN may, from time to time, elect to provide."¹⁴

9. Moreover, NECN points out that in the 1992 Cable Act's program access provisions, Congress expressly did not prohibit all cable program exclusivity agreements governing areas served by cable operators. NECN recites the underlying policy objectives of these provisions as (a) promotion of the development and distribution of new and diverse satellite cable program services, and (b) fostering the development of, and competition among, facilities based multichannel program distributors. NECN contends that both objectives would be advanced by Commission approval of the exclusivity requested by NECN.¹⁵

10. NECN argues that approving its request would enhance the development and distribution of new and diverse satellite cable programming. In support, NECN recites the current financial difficulties faced by NECN, and states that its operating losses cannot be sustained indefinitely. NECN contends that a principal cause of its financial difficulties has been the reluctance of cable operators in recent months to enter into affiliation agreements.¹⁶ NECN attributes this "reluctance" to an overall sense of financial uncertainty by cable operators in the new rate-regulated environment, and a perception that a regional news channel cannot be expected to yield the kind of profits for an operator that may be delivered by a national entertainment or sports programming channel.¹⁷ NECN also contends that its difficulty in securing carriage on cable systems is not

⁷ Petition at 2.

⁸ Hearst has ownership interests in ESPN, ESPN2, Arts and Entertainment (A&E), and Lifetime. Petition at n.4.

⁹ Continental is the third largest cable MSO in the United States and has interests in Turner Broadcasting System, Inc. (TBS), Digital Cable Radio, E! Entertainment Television, Home Shopping Network, Inc., QVC Network, Inc., Viewers Choice Pay Per View Network, and regional sports networks in Florida and Minnesota. Petition at n.5.

¹⁰ See 47 C.F.R. §§ 76.1000-1003.

¹¹ See paragraph 3, *supra*.

¹² Petition at 9. The specific proposed language is:

2. Grant of Rights

2.1 NECN hereby grants to Affiliate the exclusive license to distribute the service by means of cable, wire or fiber communication to subscribers within the territory served by Affiliate.

2.2 This license conveys to Affiliate only those rights expressly granted herein. All other rights with respect to the service are reserved to NECN. Nothing in this agreement shall restrict or be interpreted so as to restrict

in any manner the prerogative of NECN to distribute the Service in any area through any medium of communication by itself or through third parties; *provided however*, that NECN agrees that it shall not enter into any agreement authorizing the distribution of the service to any multichannel videoprovider (i.e. DBS, SMATV, MMDS, telco, etc.) competing with Affiliate within Affiliate's service area for a period of seven years from the date of this agreement or the expiration or termination of this Agreement, whichever is shorter. Notwithstanding anything to the contrary herein, NECN may, at its election as a matter of professional and social responsibility, share or exchange news or other video footage with other providers of national, regional or local news.

¹³ Petition at 6, citing *Program Access Order*, 8 FCC Rcd at 3385.

¹⁴ *Id.* See also petition at 7-9 for extensive description of various aspects of NECN's news and information programming.

¹⁵ Petition at 10.

¹⁶ Petition at 11.

¹⁷ Petition at 12-14.

due to limited channel capacity.¹⁸ NECN notes that, "[n]otwithstanding the award-winning quality of [NECN's] program service, it is, nevertheless, a specialized, regional program service whose appeal to mass audiences and local advertisers has not yet had time to develop fully."¹⁹

11. NECN contends that, given the growing demands and competition for cable channels, a program service that cannot be offered to a cable system on an exclusive basis is significantly less attractive to a cable operator than an exclusive service. Cable operators seek to distinguish their programming from that of their competitors. Thus, NECN states that cable operators are reluctant, or will refuse, to commit money to finance and promote a new service that might subsequently be carried by a competitor if it becomes successful.²⁰

12. Moreover, of the nation's five other existing regional news networks, all provide exclusive distribution to their cable affiliates.²¹ NECN contends that exclusivity is no less important to cable systems in New England than it is to cable systems in other regions of the country, and the fact that all five of these regional news networks provide exclusivity serves to underscore the importance of exclusivity to secure carriage of the programming by cable systems.²²

13. In addition, NECN submits that it competes head to head with 33 New England commercial television stations which provide news and informational programming, as well as with other cable networks which provide news programming. NECN indicates that it is "customary for broadcast networks to offer network program exclusivity provisions to their affiliates for the entire term of their affiliation agreements, and that the Commission's broadcast network non-duplication rules (47 C.F.R. §§76.92-76.97) require cable systems to provide broadcast networks program exclusivity for the life of their network affiliation agreements."²³ Moreover, NECN contends that its broadcast network competitors enjoy a further competitive advantage in that the must carry provisions of the 1992 Cable Act (47 U.S.C. §534) mandate carriage by cable systems within each television station's ADI.²⁴ Thus, NECN concludes that it would be placed at a serious competitive disadvantage if the Commission does not permit it to utilize the same flexibility and negotiating tools available to its broadcast and non-vertically integrated cable network competitors.²⁵

14. NECN further concludes that, should NECN fail financially because it is not permitted to offer a reasonable measure of program exclusivity, its failure will have a negative impact on the development of other new program services, particularly high quality, public interest services. NECN notes that the cost of launching a new service is

enormous, as are the financial risks, and "an indifference by the Commission to competitive market conditions will only discourage investment in and the development of these services."²⁶ NECN believes that a favorable ruling will send a positive message to the programming industry, and will stimulate investment in and development of other new satellite cable programming services.²⁷

15. NECN points out that it is experimenting with new and creative media partnerships, such as its innovative news sharing relationship with *The Boston Globe*, in an effort to increase television viewer choices and provide quality programming. NECN argues that a regulatory policy that would "encourage and promote, rather than discourage and impede, these kinds of new and innovative media partnerships and program services is in the public interest."²⁸ Thus, NECN seeks the "opportunity to be as competitive as it can in securing cable carriage that will enable it to fulfill its original mission of providing cable television subscribers of the six New England states additional program diversity and access to a wide choice, twenty-four hours a day, of high quality news, weather, sports, public affairs, information and children's programming."²⁹

16. NECN contends that the content of its programming service is "clearly in the public interest."³⁰ NECN states that local, regional and national news provide citizens with information necessary to participate effectively in a self-governing democracy, and notes that the Commission has traditionally viewed news and public affairs programming as having significant public interest value. In addition, NECN states that with the passage of the Children's Television Act of 1990,³¹ Congress has made it clear that programming that serves the special needs of children is highly valued from the standpoint of the public interest.³²

17. NECN further argues that granting its petition would have a pro-competitive effect on the New England video marketplace because the removal of regulatory encumbrances that threaten the financial viability of NECN would enhance rather than impair competition in the market for news, sports, public affairs, information and children's programming in New England.³³ NECN argues that granting its petition would not impede the development of competitive services by other programmers, and would in fact provide an incentive for new multichannel video programming distributors to develop competing regional programming services.³⁴ Further, NECN contends that grant of its petition would not adversely affect competition in the national programming marketplace because NECN is a regional service with more limited appeal.³⁵

¹⁸ Letter by NECN, dated April 4, 1994 ("Letter"), submitted in response to the Commission's written request for further information dated March 10, 1994, at 5.

¹⁹ Petition at 12.

²⁰ Petition at 15-18.

²¹ Petition at 19. Of the five services, three are not vertically integrated (Orange County Newschannel, Chicagoland TV, News 8), and thus are not subject to the program access rules. The two vertically integrated services (New York One News and News 12) are distributed to cable systems owned by the parent companies of the networks, and, according to NECN, are not governed by the program access rules because they are not "satellite" cable programming.

²² *Id.*

²³ Letter at pages 2-3.

²⁴ *Id.*

²⁵ Letter at page 3.

²⁶ Petition at 21.

²⁷ *Id.*

²⁸ Letter at page 5.

²⁹ Letter at pages 5-6.

³⁰ Letter at page 4.

³¹ 47 U.S.C. §§303a, 303b, 394.

³² Letter at page 4.

³³ Letter at page 3.

³⁴ *Id.*

³⁵ Petition at 22.

18. NECN also argues that the exclusivity it requests would have no adverse effect on the development of competition by competing multichannel distributors. NECN states that there are currently no MMDS operations in New England.³⁶ While there are several small SMATV systems operating in New England, serving approximately 5,000-10,000 subscribers, only one SMATV provider has even called to inquire about the existence of NECN's service, but did not seek to carry NECN.³⁷ Moreover, because NECN does not scramble its satellite feed, NECN is available to TVRO users.³⁸ Thus, NECN contends that granting its petition would not result in denial of access to its programming by alternative multichannel video distributors, except for a very small number of SMATV operators.³⁹ NECN points to its current difficulty in securing carriage by cable operators to support its conclusion that denying its service to others would have no adverse effect on the development of competitive local multichannel distributors.⁴⁰

19. NECN states that its request for exclusivity for seven years is linked to the term of affiliation agreements it hopes to negotiate with cable operators. NECN estimates that it will incur millions of dollars of operating losses each year for the next 7-10 years. Thus, NECN submits that securing long term network affiliation agreements during this critical time period is essential to its financial viability. Moreover, NECN contends that because "vigorous competition to cable from telephone companies, DBS, MMDS and other multichannel distributors is several years away, the prospect of assuring network exclusivity for seven years takes on an importance for cable operators now that it might not otherwise have."⁴¹ Finally, the extent of exclusivity is limited to the franchise areas of cable systems located within the six New England states.⁴²

IV. ANALYSIS

20. The program access provisions in the 1992 Cable Act were enacted to increase competition and diversity in the multichannel video programming market.⁴³ When adopting the statute, Congress was very concerned with the fact that the majority of cable operators enjoyed a monopoly in video programming distribution at the local level,⁴⁴ and concluded that the use of exclusive contracts between vertically integrated programming vendors and cable operators served to inhibit the development of competition among distributors.⁴⁵ In addition, Congress found that increased horizontal concentration of cable operators together with extensive vertical integration has created an imbalance of power between operators and unaffiliated programming vendors, and operators and their multichannel competitors, which also impedes the overall development of competition.⁴⁶

21. Thus, in the 1992 Cable Act, Congress absolutely prohibited exclusive contracts between vertically integrated programming vendors and cable operators in areas unserved by cable, and prohibited such exclusive contracts within areas served by cable absent a specific public interest showing, for a period of ten years.⁴⁷ Such Congressional restrictions on exclusive contracts for this ten-year period are intended to foster the development of emerging competitors to cable, allowing a transition to full competition in the market for programming distribution.

22. Congress recognized, however, that in areas served by cable some exclusive contracts between vertically integrated programming vendors and cable operators may provide countervailing benefits to the programming market or to the development of competition among distributors.⁴⁸ Congress provided that where such an exclusive contract is demonstrated to be in the public interest, it should be allowed. The public interest criteria set forth in the 1992 Cable Act reflect the benefits to the programming market that exclusivity in areas served by cable may provide in a particular case, which can ultimately rebut the presumption inherent in the statute's program access provisions that exclusive contracts between vertically integrated programming vendors and cable operators are anticompetitive.

23. Any agreement between a vertically integrated programming vendor and a cable operator that grants a cable operator the exclusive right to distribute programming within its franchise area must be approved by the Commission before it may be enforced.⁴⁹ A party seeking to enter into or enforce such an agreement must file a petition with the Commission seeking a determination that the proposed exclusivity meets the public interest standard articulated in the statute. Given Congress' express desire to foster the development of competition in the market for distribution of video programming, any party filing an exclusivity petition with the Commission bears the burden of demonstrating that the proposed exclusivity meets the statutory public interest standard.

24. The Commission has determined that the statute requires an examination of petitions for exclusivity on a case-by-case basis.⁵⁰ When engaging in this type of examination, we will examine the effect of a particular exclusive contract on each of the factors listed in Section 76.1002(c)(4) of our rules. We believe, however, that the public interest criteria must be considered as a whole in making the statutory determination. Thus, we must examine whether the proponent of exclusivity has met its burden of demonstrating that the statutory presumption that the public interest is served by requiring open access by emerging competing distributors to the programming at issue is offset by countervailing public benefits derived

³⁶ Petition at 22.

³⁷ Letter at page 3.

³⁸ *Id.*

³⁹ Letter at 4.

⁴⁰ Petition at 22.

⁴¹ Letter at page 2.

⁴² Letter at page 3.

⁴³ See 47 U.S.C. § 548(a).

⁴⁴ 1992 Cable Act, § 2(a)(4); House Comm. on Energy and Commerce, House Rep. No. 102-268, 102d Con. 2d Sess. (1992) ("House Report") at 42.

⁴⁵ 1992 Cable Act, § 2(a)(5); Senate Comm. on Commerce, Science, and Transportation, S. Rep. No. 102-92, 102d Cong., 1st Sess. (1991) ("Senate Report") at 25-26.

⁴⁶ See *Program Access Order*, 8 FCC Rcd at 3366.

⁴⁷ See 47 U.S.C. §§ 548(c)(2), (4), and (5).

⁴⁸ See 47 U.S.C. §§ 548(c)(2), (4).

⁴⁹ See *Program Access Order*, 8 FCC Rcd at 3386.

⁵⁰ See *Program Access Order*, 8 FCC Rcd at 3385.

from allowing exclusive agreements to create incentives for investment in the development and distribution of services that will promote diversity in the programming market.

25. Our application of the public interest standard, therefore, will begin with an evaluation of the effect of the proposed exclusivity on the development of competition in the distribution market. The statute requires the Commission to consider the effect of the proposed exclusivity on the development of competition in local and national multichannel video programming distribution markets, and on competition from multichannel video programming distribution technologies other than cable. In conjunction with this examination, we believe it is appropriate to evaluate the geographic extent of the proposed exclusivity to identify the relevant markets within which the proposal may affect the development of competing distributors.

26. Next, we will examine whether the petitioner has demonstrated that the proposed exclusivity benefits the public by creating incentives to invest in and support the creation and distribution of new and diverse programming. Exclusivity may be in the public interest where it is essential to the financial viability of the programming service. We will also examine whether the petitioner has demonstrated that the proposed exclusivity promotes diversity in programming. Exclusivity may enhance program diversity, for example, by encouraging promotion and carriage of programming which has a unique audience or subscriber appeal, or a limited distribution potential.

27. Finally, we will examine the duration of the proposed exclusivity. We will evaluate whether the proposed exclusivity has been sufficiently tailored to provide exclusivity for the minimum time period reasonably required to achieve the public interest benefits identified by the petitioner without imposing the kind of effect on the development of competition in the distribution market that Congress sought to ameliorate through the program access provisions.

A. Effects of Exclusivity on the Development of Competition in the Distribution Market

28. We have noted that Congress intended, by enacting the program access provisions of the 1992 Cable Act, to foster the development of "facilities-based" competition, which is defined as competition among distributors.⁵¹ Cable systems have generally developed without effective competition. As noted in the *Program Access Order*, in order for "facilities-based" competition to develop, "access to programming is an essential prerequisite."⁵² The statutory public interest factors address two aspects of the development of competition to cable. One factor that the Commission must consider is the effect of the proposed exclusivity on the development of competition in local and national programming distribution markets. Another factor the Commission must consider is the effect of the proposed exclusivity on competition from MVPD technologies other than cable.⁵³

29. We believe that the geographical extent of the exclusivity proposed should be tailored to that reasonably necessary to develop and establish the viability of the programming service, while minimizing the effect on the development of competition in the relevant distribution markets. With respect to the effect of the proposed exclusivity on competition by MVPDs in local distribution markets, while we anticipate in the long term competition to cable from MMDS operations, it does not appear that such competition presently exists or will exist in the near future. Indeed, at present the record demonstrates that there are no MMDS operations in New England that would be foreclosed from distributing NECN by the proposed exclusivity. In addition, because NECN does not scramble its satellite feed, it is available to local TVRO distributors and users. Moreover, while there are several small SMATV systems operating in New England that serve approximately 5,000-10,000 subscribers, only one SMATV has ever even inquired about the existence of NECN's service, and did not seek to carry NECN.

30. Thus, it appears that granting NECN's request will not result in denial of access to its programming by competing MVPDs in the relevant local markets, except for a small number of SMATV operators. We find it highly relevant to our analysis, moreover, that no SMATV operator has either formally or even informally requested carriage of NECN.⁵⁴ We conclude that the record does not indicate that the proposed exclusivity would have an effect on competition in local distribution markets that could not be offset by a demonstration of public interest benefits in the programming market.

31. With respect to the national distribution market, the extent of the proposed exclusivity in this case is limited to the franchise areas of the cable systems located within the six New England states. We note that no existing or potentially competing national MVPD has challenged NECN's request to provide its cable affiliates in these states the exclusive right to distribute NECN. Moreover, NECN is available to TVRO users nationally because its signal is not scrambled. Because of the regional limitations of NECN's programming, we believe that it is unlikely that DBS operators would be interested in carrying NECN immediately or in the near future.⁵⁵ Thus, the record does not indicate that the proposed exclusivity would have an effect on competition in the national distribution market that could not be offset by a demonstration of public interest benefits in the programming market.

32. As for the effect of the proposed exclusivity on competition by MVPDs using technologies other than cable, for the reasons discussed above it does not appear that NECN's request would unreasonably limit the distribution of its service by MMDS, TVRO or DBS distributors. The proposed exclusivity would deny NECN to only a very few SMATV operators who, again, have not opposed NECN's petition. Moreover, NECN has limited its request to exclusive distribution by cable operators within their franchises

⁵¹ See *Program Access Order*, 8 FCC Rcd at 3384, n.79 (quoting House Comm. on Energy and Commerce, H.R. Rep. No. 102-862, 102d Cong., 2d Sess. (1992) ("Conference Report") at 93, reprinted at 138 Cong. Rec. H8308 (daily ed. Sept. 14, 1992)).

⁵² *Id.* at 3384.

⁵³ See 47 U.S.C. §§ 548(c)(4)(A)-(B).

⁵⁴ Although not determinative of the result reached here, we do note that no SMATV operator, nor any other competing

MVPD or potential competitor, has opposed NECN's request for a finding that its ability to grant exclusive distribution rights to cable affiliates for seven years is in the public interest.

⁵⁵ Moreover, we emphasize that our ruling would not deny access to such programming in areas unserved by cable.

only in the six New England states. Thus, the request will not deny access to NECN by potential distributors using developing technologies outside New England or outside the franchise areas of NECN's cable affiliates within the New England states. Therefore, we conclude that the exclusivity proposed by NECN will not have an effect on competition from MVPDs using technologies other than cable that could not be offset by a demonstration of public interest benefits to the programming market.

B. Public Interest Benefits of Exclusivity

1. Attraction of Capital Investments in Production and Distribution of Programming

33. The 1992 Cable Act requires the Commission to consider whether exclusivity serves as an investment incentive for cable operators to finance, promote and carry a new service.⁵⁶ By including this criterion in the statutory public interest test, Congress recognized that exclusivity arrangements are typically used by suppliers to create incentives for distributors to aggressively promote and sell a particular product. In this manner, exclusive distribution may be offered to engender distributor support for a fledgling service to help it gain a foothold in the market. We believe that this recognized benefit from exclusivity is particularly relevant to our consideration of the public interest benefits from allowing a start-up regional venture, such as NECN, to grant exclusive distribution rights to its cable affiliates.

34. Where a programmer requires the ability to offer an added incentive to attract investment, carriage and support of the service, such that without the incentive the programming service could not be launched or become viable, exclusivity may be in the public interest. We believe that NECN has demonstrated that exclusive affiliations with cable operators for distribution of NECN within the affiliates' service areas are required to attract and secure capital investments for production, promotion, distribution and carriage of its regional news service.

35. We recognize and appreciate the current financial hardships experienced by NECN, and the difficulty it describes in persuading many cable operators to add NECN as a new service on their systems under the current regulatory environment. These difficulties affect all programming services. It is not uncommon for new programming services to sustain losses for long periods of time before their investors can begin to see any return on their investment. Similarly, NECN's contention that a service that cannot offer exclusivity to a cable operator is "significantly less attractive," also does not identify a unique obstacle facing NECN. While neither of these arguments can be determinative in our analysis, they are additional factors in support of an affirmative public interest determination, concluding that exclusivity may be important, if not critical, to NECN's survival.

36. Moreover, what makes NECN different from other programming services, and even differentiates it from other new programming services, is the regional nature of its programming and audience appeal. Because this service by definition appeals to a much smaller potential subscriber

base, it has a naturally limited distribution potential. The limited extent of the target market from which NECN can secure carriage reduces potential revenues from distribution as well as advertising. In addition, this limited revenue potential diminishes NECN's ability to generate an ultimate return on investment, making it less attractive to investors. Thus, the nature of NECN's programming inherently places it in a significantly more precarious financial condition than that of other competing programming services that enjoy broader audience appeal. Accordingly, we believe that the ability to offer cable operators exclusivity within NECN's limited target markets may be critical to the financial viability of a regional service like NECN, because it provides an incentive for cable operators, shown by the record to be the only significant existing means for multichannel video programming distribution in New England, to choose to carry NECN over other programming services.

37. Moreover, the Commission has already recognized that, in such situations, exclusivity may well pass the statutory public interest standard. In the *Program Access Order*, the Commission stated: [W]e recognize that there may well be circumstances in which exclusivity could be shown to meet the public interest test, especially when the launch of local origination programming is involved that may rely heavily on exclusivity to generate financial support due to its more limited appeal to a specific regional market.⁵⁷ Indeed, we expressly recognized that "it is possible that local or regional news channels could be economically unfeasible absent an exclusivity agreement."⁵⁸ Thus, we agree that NECN is the type of programming service we envisioned would be appropriate for adequately tailored exclusivity and thus, due to the regional nature and limited distribution potential of its programming, might need the ability to offer exclusivity in order to attract investment, promotion and carriage of NECN.

38. Further, we agree with NECN that, when evaluating requests for exclusivity, the Commission should not be "indifferent" to the competitive market conditions faced by the petitioner. We find it highly significant that all of the other regional news networks in the country provide exclusive distribution to their cable affiliates, which supports NECN's assertions regarding the importance of the ability to offer exclusivity to the viability of a regional service like NECN.⁵⁹ Thus, we find merit to NECN's argument that it would be placed at a competitive disadvantage if it were unable to offer exclusive distribution to its cable affiliates.

39. We conclude that NECN has demonstrated that the ability to offer exclusive distribution to its cable affiliates may be necessary to attract capital investment in the production and distribution of its regional programming. Moreover, we agree with NECN that a favorable ruling on its request may stimulate investment in and development of other new satellite cable programming services, and that these facts must weigh in favor of permitting NECN to offer reasonably tailored exclusivity to its cable system affiliates.

⁵⁶ See 47 U.S.C. § 548(c)(2)(C).

⁵⁷ 8 FCC Rcd at 3385.

⁵⁸ *Id.* (emphasis added).

⁵⁹ In addition, we recognize that NECN's New England broadcast competitors may benefit from the must carry rules which ensure their distribution.

2. Diversity in Programming

40. The statutory factors set forth in the 1992 Cable Act for the public interest analysis required to approve exclusive distribution by cable operators include consideration of the effect of exclusivity on diversity in the programming market.⁶⁰ We agree that exclusivity may promote diversity in the programming market when used to provide incentives for cable operators to promote and carry a new and untested programming service. Moreover, we agree with NECN that our regulatory policy should encourage and promote, to the extent consistent with the statute, new and innovative media partnerships and program services like those provided by NECN.

41. We have concluded the ability to offer reasonably tailored exclusive distribution rights to cable affiliates may be essential for NECN's financial survival. If NECN does not achieve financial viability through a significant increase in its distribution in the near term, the programming market will lose an award-winning, quality regional news service. Thus, it appears that promoting the financial survival of NECN by allowing it to offer appropriately limited exclusivity as an incentive for cable affiliates to distribute NECN's programming will foster the public interest in enhancing diversity of programming services.

42. NECN further contends that the content of its programming service is relevant to the public interest analysis. As a general matter, we do not believe that it is appropriate to evaluate the content of a programming service that is seeking approval of exclusive distribution by cable operators. We nonetheless observe that the Commission and Congress have indeed recognized the public interest value provided by news, public affairs, informational and children's programming. Here the increased diversity provided by additional news, public affairs, informational and children's programming weighs favorably in the public interest analysis required under the statute. Given our finding that exclusivity plays a vital role in the growth and financial viability of NECN, we believe that appropriately tailored exclusivity will foster the public interest in promoting diversity in programming in this situation.

43. Moreover, we agree with NECN that granting its petition will have a pro-competitive effect on the New England video marketplace because removal of regulatory barriers to its financial viability will enhance, rather than impair, competition in the market for news, sports, public affairs, information and children's programming. In addition, NECN's ability to offer exclusive distribution to its cable affiliates should not impede the development of competitive services by other programmers, nor dissuade new MVPDs from developing their own competing regional programming services. Thus, we believe that NECN has demonstrated that its proposed exclusivity will enhance diversity in the programming market, which weighs in favor of granting NECN's petition.

C. Duration of Exclusivity

44. The final statutory factor that must be evaluated is the duration of the proposed exclusivity.⁶¹ Where the duration of the exclusivity is tailored to the minimum period of

time reasonably necessary to develop and firmly establish the programming service through assured financing, promotion, marketing and carriage without unduly denying the availability of the service to competing distributors, such limited duration may weigh in favor of allowing exclusive distribution by cable operators.

45. NECN states that it has requested the ability to provide exclusivity to its affiliates for seven years because that is the duration of the affiliation agreement it seeks to obtain from distributors. NECN maintains that such long term affiliation agreements are crucial because it expects to incur millions of dollars of operating losses each year for the next 7-10 years. NECN contends that vigorous competition to cable from telephone companies, DBS, MMDS, and other multichannel distributors is "several years away," making seven years of exclusivity "even more important to a potential cable distributor" because the benefits of exclusivity will not accrue to the cable affiliate until competition from other distributors actually develops.⁶²

46. We note that the Commission previously sought comment on, and considered, the question of the appropriate duration of permitted exclusivity for new programming services when conducting its rule making proceeding to implement the program access provisions of the 1992 Cable Act. The record in the program access proceeding reflected a widespread disagreement on the appropriate duration of permitted exclusivity, with proposals ranging from two years to ten years or longer.⁶³ None of the commenters expressing a view, however, supported its proposal with any empirical evidence or other support to justify its conclusions, leaving the Commission to conclude that such matters would have to be resolved on a case-by-case basis.

47. In determining the appropriate duration for allowing a programming vendor to provide exclusive distribution agreements to its cable affiliates, the Commission must again balance the benefits of allowing exclusivity as an incentive for the investment in and distribution of new programming services that will enhance diversity against the overarching goal of the program access requirements, which is to foster the development of competition in the local and national distribution marketplace. Therefore, the duration of exclusivity must be tailored to achieve the public interest benefits in allowing the vertically integrated programming vendor to develop a viable service, while at the same time limiting the effects of such exclusivity, to the extent possible, on the growth of competitive MVPDs.

48. NECN began operations two years ago, but now reaches only one million cable subscribers. NECN projects significant losses for the next 7-10 years. For NECN to survive, it needs the opportunity to establish itself and gain popularity among consumers. NECN has shown that it must quickly and significantly increase its distribution in order to generate revenues from distribution and advertising sufficient to begin to offset NECN's significant financial losses. Obviously, it is in NECN's long term interest to be carried by as many multichannel video programming distributors as possible. At present, however, exclusivity may provide the necessary incentive to induce cable systems to carry NECN's service. As consumer demand for the service

⁶⁰ See 47 U.S.C. § 548(c)(4)(D).

⁶¹ See 47 U.S.C. § 548(c)(4)(E).

⁶² Letter at page 2.

⁶³ See *Program Access Order*, 8 FCC Rcd at 3385, n.84.

develops, cable operator reliance on exclusivity as an incentive to continue to carry NECN should change. Moreover, NECN's losses in the future can eventually be lessened by the revenue and increased advertising that can be generated from increased distribution through sales to competing distributors. Thus, it seems likely that NECN itself would seek to limit any promise of exclusive distribution by cable operators to that necessary to convince them to carry NECN now.

49. In our *Program Access Order*, we did not establish specific guidelines for assessing what would constitute an appropriate duration for exclusivity. In reviewing NECN's request, and considering all of the factors discussed herein, we conclude that NECN's requested duration is reasonable. As explained below, we are satisfied that NECN has met the requisite burden of demonstrating that the public interest benefits to the programming marketplace counterbalance the general rule disfavoring exclusivity for cable affiliates during the statutory transition period for the development of competition in the distribution marketplace. In order for NECN to provide these public interest benefits, however, it must gain sufficient distribution quickly to survive financially. In the absence of any opposition or evidence to the contrary, we determine that it is appropriate to allow NECN to provide exclusivity to its cable affiliates for the full seven year period proposed. We believe that we should, however, limit NECN's ability to offer exclusive distribution rights to its cable affiliates to a finite period of time, and establish a date certain by which all MVPDs must have access to NECN, in order to minimize the potential effects of such exclusivity on competing distributors that currently exist or may develop in the future.

50. The record shows that NECN must dramatically increase its distribution in the short term in order to sustain financial viability. We believe that the next eighteen months should provide a reasonable time period during which NECN may be permitted to offer exclusivity to cable affiliates in order to rapidly increase its distribution and subscriber base. We further believe that all exclusive distribution rights provided by NECN to its cable affiliates should terminate completely seven years from the effective date of this *Order*. We conclude that limiting the duration of exclusivity in this manner, by minimizing the amount of time during which NECN may grant exclusive distribution to cable affiliates to that reasonably necessary to achieve financial viability, and by establishing a date certain by which all competing distributors must have access to NECN, reasonably balances the public interest in promoting the development of competition in the distribution market against the public interest in promoting the financial viability of NECN.

51. Thus, we determine that it is in the public interest to allow NECN to enter into exclusive distribution agreements with cable affiliates in the six New England states during the next eighteen months, so long as all such exclusive distribution rights terminate seven years from the effective date of this *Order*. At the end of this eighteen month time period, NECN may no longer grant any exclusive distribution rights to cable affiliates without first petitioning the Commission for a finding that the continued ability to offer exclusivity for NECN to cable affiliates is in the public interest.

D. Conclusion

52. We believe that NECN has established that it is in the public interest to allow it to enter into appropriately tailored exclusive distribution agreements with cable affiliates. NECN has demonstrated that the ability to offer exclusivity to cable affiliates is necessary to attract investment and secure distribution essential to the financial viability of its regional news programming service. In addition, NECN has demonstrated that its ability to offer exclusive distribution rights to cable affiliates will foster diversity in the programming market. Moreover, NECN has shown that the public interest benefits that reasonably tailored exclusivity can provide offset the effect that such exclusivity may have on the development of facilities-based competition in the New England distribution market(s). Thus, we conclude that it is in the public interest to allow NECN to offer exclusive distribution to its cable affiliates in the six New England states, within their franchise areas, for the next eighteen months. All exclusive distribution rights provided by NECN to cable affiliates must terminate, however, seven years from the effective date of this *Order*.⁶⁴

V. ORDERING CLAUSE

53. Accordingly, IT IS ORDERED, that the petition for exclusivity filed by New England Cable News ("NECN") requesting a finding that its proposed exclusive distribution agreements with cable affiliates is in the public interest IS GRANTED as set forth herein, and NECN is hereby authorized to provide exclusive distribution rights to cable affiliates within their franchise areas in the six New England states for the next eighteen months, so long as all such exclusive distribution rights terminate seven years from the release of this *Order*.⁶⁵

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton,
Acting Secretary

⁶⁴ See 47 C.F.R. §1.103.

⁶⁵ *Id.*