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

MM Docket No. 92-259

In the Matter of

Implementation of the Cable Television Consumer Protection and Competition Act of 1992

Broadcast Signal Carriage Issues

MEMORANDUM OPINION AND ORDER

Adopted: September 28, 1994; Released: November 4, 1994

By the Commission:

Table of Contents

I. INTRODUCTION

1. This *Memorandum Opinion and Order* addresses issues raised in petitions for reconsideration[1] of our *Report and Order* [2] adopted March 11, 1993, which established rules to implement the mandatory television broadcast signal carriage ("must-carry") and retransmission consent provisions of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act").[3] In a *Clarification Order* adopted on May 28, 1993, we addressed specific concerns raised in these petitions relating to signal quality, copyright indemnification and translator ownership.[4] In an *Order* adopted on July 15, 1993, we addressed additional concerns relating to carriage rights, to the failure of broadcast stations to elect either must-carry or retransmission consent status, and to the channel position for such stations.[5] On October 5, 1993, we adopted a *Stay Order* which stayed two provisions of the retransmission consent rules, with respect to VHF/UHF antenna ownership and carriage in the entirety of broadcast signals, pending our resolution of those issues in this proceeding.[6] In this *Memorandum Opinion and Order* we will address all remaining issues raised in the petitions for reconsideration, as well as the outstanding issues from the *Stay Order*. We will also take this opportunity, on our own motion, to clarify certain other issues raised in the *Report and Order*.

2. We note that the constitutionality of the must-carry provisions of the 1992 Cable Act were challenged before the Supreme Court. In *Turner Broadcasting Systems, Inc. v. FCC*, a special three-judge panel of the District Court found the must-carry provisions constitutional.[7] On appeal,

[1] Parties which filed Petitions for Reconsideration, Oppositions, Replies and Comments are listed in Appendix A. Public Notice of Petitions for Reconsideration was given at 58 FR 29582 (May 21, 1993).

[2] *See* Report and Order in MM Docket No. 92-259 ("Report and Order"), 8 FCC Rcd 2965 (1993).

[3] Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("1992 Cable Act").

[4] *See Clarification Order* in MM Docket No. 92-259, 8 FCC Rcd 4142 (1993) ("Clarification Order"). Translator refers to a television broadcast repeater facility licensed on a secondary basis under Part 74 of the Commission's rules.

[5] *See Order* in MM Docket No. 92-259, 8 FCC Rcd 5083 (1993).

[6] *See Stay Order* in MM Docket 92-259, 9 FCC Rcd 2678 (1993).

[7] *Turner Broadcasting Systems, Inc. v. FCC*, 819 F. Supp. 32 (D.D.C. 1993).

the Supreme Court vacated the decision and remanded the case back to the three-judge panel for further proceedings.[8] While the case is pending, the must-carry provisions of the 1992 Cable Act remain in effect, as do the Commission's must-carry rules.

II. MUST-CARRY REGULATIONS

A. Carriage of Local Noncommercial Educational Television Stations.

1. Definition of a Qualified Noncommercial Station.

3. Section 615(l)(1) provides that a local noncommercial educational television ("NCE") station qualifies for must-carry rights if it is licensed by the Commission as an NCE station and if it is owned and operated by a public agency, nonprofit foundation, or corporation or association that is eligible to receive a community service grant from the Corporation for Public Broadcasting.[9] An NCE station is also considered qualified if it is owned and operated by a municipality and transmits predominantly noncommercial programs for educational purposes.[10] For purposes of must-carry rights, an NCE station is considered local if its community of license is within 50 miles of, or its signal places a Grade B contour over, the principal headend of the cable system.[11] This definition includes the translator of any NCE station with five watts or higher power serving the franchise area, a full-service station or translator licensed to a channel reserved for noncommercial educational use, and such stations and translators operating on channels not so reserved as the Commission determines are qualified NCE stations.[12]

4. The staff has received informal inquiries requesting clarification as to when a translator is "serving the franchise area" of the cable system. Because the service area of a translator differs from that of a full power broadcast station, we believe that guidance should be provided to assist interested parties in determining whether a translator serves the franchise area of the cable system. We believe it appropriate to adopt a standard based on coverage and contour, which has been used in the past and which should be easily identifiable.[13] Therefore, for purposes of a translator serving the cable system's franchise area, the coverage area of such translator shall be its predicted protected contour as specified in Section 74.707 of our rules.

2. Signal Carriage Obligations.

5. In the *Report and Order,* we indicated that Section 615(b) requires cable systems to carry any qualified local NCE television station requesting carriage.[14] Systems with 12 or fewer activated channels must carry the signal of one qualified local NCE station.[15] Systems with 13 to 36 activated channels must carry at least one qualified local NCE station, but need not carry more than three such stations.[16] Cable systems with more than 36 activated channels are generally required to carry all NCE stations requesting carriage.[17] If a system with fewer than 36 activated channels operates beyond the presence of a qualified local NCE station, it is required to import and carry a qualified NCE station.[18] In addition, cable systems must continue to provide carriage to all qualified local NCE television stations whose signals were carried on their systems as of March 29, 1990, regardless of the proximity of those stations to the system's principal headend.[19]

6. First, on our own motion, we clarify the carriage requirements of a system with more than 36 activated channels. The 1992 Cable Act states that systems with more than 36 channels must carry the signal of all NCE stations requesting carriage, with one exception: systems with more than 36 channels are not required to carry an additional local NCE station if the programming of such station substantially duplicates the programming of a qualified local NCE station already being carried.[20] It has come to our attention that Section 76.56(a)(1)(iii) of the Commission's rules as adopted in the *Report and Order* has been interpreted by some cable operators to require that only three stations need be carried. However, with respect to systems with more than 36 channels, we clarify that the reference to the number three is a minimum, not a maximum number. A system with more than 36 channels must carry all NCE stations requesting carriage, but is not required to carry more than three NCE stations if the additional station substantially duplicates the signal of NCE stations already carried by the system. Section 76.56(a)(1)(iii) is being revised accordingly.

7. Second, we emphasize that the requirement in Section 615(c) to continue carriage of stations carried as of March 29, 1990 applies only to qualified local NCE television stations and does not apply to a non-local NCE television station which was being imported as of that date.[21] A cable system which was carrying a non-local NCE station in excess of its mandatory carriagerequirements is permitted to drop that station, subject to giving appropriate notice.[22]

---

[8] *See Turner Broadcasting Systems, Inc. v. FCC,* 114 S. Ct. 2445 (1994). In remanding the case, the Court determined that issues of material fact must be resolved by the lower court. Specifically, the Court indicated that the government must show that the must-carry provisions are necessary to alleviate the alleged harms and that they do not burden substantially more speech than necessary to further such protection. *Id.* at 2451.

[9] All references to Section 614, Section 615 and Section 325 are references to those sections of the Communications Act of 1934, as amended by the 1992 Cable Act, Sections 4, 5 and 6. *See* 47 U.S.C. §§ 534, 535 and 325.

[10] *See* 47 C.F.R. §76.55(a). In defining a qualified noncommercial educational television station, Section 76.55(a)(2) incorrectly refers to Section 73.612 rather than Section 73.621. We are revising Section 76.55(a)(2) to refer to Section 73.621.

[11] *See* 47 C.F.R. §§76.55(b), 76.5(pp).

[12] 47 C.F.R. §76.55(a)(3).

[13] *See Reexamination of the Effective Competition Standard for the Regulation of Cable Television Basic Service Rates,* MM Docket 90-4 and Carriage of Television Broadcast Signals by Cable Television Systems, MM Docket 84-1296, 6 FCC Rcd 4545 (1991).

[14] *See* 8 FCC Rcd at 2966; *see also* 47 C.F.R. § 76.56.

[15] Section 615(b)(2)(B)(iii) states that a cable system with 12 or fewer usable activated channels shall not be required to remove any programming service provided to subscribers as of March 29, 1990 to satisfy these requirements, however the first available channel must be used to satisfy these requirements. *See* 47 C.F.R. § 76.56(a)(3).

[16] Section 615(b)(3)(i).

[17] Section 615(b)(1).

[18] *See* Section 615(b)(2)(B) and (b)(3)(B); 47 C.F.R. §76.56(a)(2)(i) and (ii).

[19] *See* Section 615(c); 47 C.F.R. § 76.56(a)(5).

[20] Section 615(e).

[21] *See* Section 615(c); 47 C.F.R. § 76.56(a)(5).

[22] *See* 47 C.F.R. § 76.58.

However, if a cable system which would be required to import a NCE signal pursuant to Section 615(b)(3)(B) or (b)(2)(B) was importing a non-local qualified NCE station on March 29, 1990, the system is required to continue carriage of such station. Prior carriage of the non-local NCE station generally indicates that a good quality signal is received at the cable system's headend. In addition, where the cable system voluntarily had been importing such signal prior to March 29, 1990, the continued carriage of such station will not result in additional copyright liability for the cable system. In the event a local NCE station subsequently becomes qualified, the cable operator may drop the distant signal (subject to notification requirements) and substitute the qualified local NCE station. Section 76.56(a)(5) is being revised accordingly.

8. Although the Act generally does not require copyright liability to be paid by a cable operator for the carriage of a local NCE station signal added after March 29, 1990, in the case of importation, the non-local NCE station has neither must-carry nor retransmission rights.[23] We do not believe it appropriate for a non-local NCE station which is being imported to be required to reimburse the cable operator for copyright costs. The 1992 Cable Act specifically provides that a cable system can recover such costs as part of the basic service tier rate, and we believe that this is the appropriate manner for dealing with such costs.[24]

B. Carriage of Local Commercial Television Stations

1. General Signal Carriage Requirements.

9. *Small System Exception.* Section 614(a) requires carriage of local commercial television stations and qualified low power television stations. Section 614(b) establishes the number of signals which must be carried by cable systems based on their channel capacity. In particular, it provides that a cable system with 12 or fewer usable activated channels must carry the signals of at least three local commercial television stations.[25] Such a system is exempt from any requirements of Section 614, however, if it serves 300 or fewer subscribers, as long as it does not delete from carriage the signal of any broadcast television station.[26] In the *Report and Order,* the Commission concluded that, under this exception, a system must not delete any station it carried on October 5, 1992.[27]

10. Although the language of the text accurately reflects this intention, the Community Antenna Television Association ("CATA") points out that the related rule is misleading because it implies that the system must have had 300 or fewer subscribers as of October 5, 1992.[28] We are revising Section 76.56(b)(1) of our rules to reflect that, at any time that a cable system with 12 or fewer activated channels serves 300 or fewer subscribers, it is exempt from the mandatory carriage requirements under Section 614, as long as it does not delete any signal of a broadcast television station which was carried on that system on October 5, 1992.

11. *Definition of Local Commercial Television Station.* Section 614(h)(1)(A) defines a local commercial television station for the purpose of the must-carry rules as "any full power television broadcast station, other than a qualified noncommercial television station within the meaning of Section 615(l)(1), licensed and operating on a channel regularly assigned to its community by the Commission that, with respect to a particular cable system, is within the same television market as the cable system. In the *Report and Order,* we inadvertently defined local commercial television station as "any full power *commercial* television station . . . ", which had the unintended effect of excluding non-qualified noncommercial stations from the definition.[29] A non-qualified NCE station is any NCE station which does not meet the qualification criteria established in Section 615(g). Such a station is not entitled to must-carry rights under that section. Colorado Christian University ("CCU") requests that the text of the rule be revised to conform with the language of the statute.[30] Otherwise, CCU complains, non-qualified NCE stations will not be able to assert must-carry rights in any situation.[31] San Jacinto Television Corporation, licensee of station KTFH(TV) ("San Jacinto"), and the Association of Independent Television Stations ("INTV") oppose this request, arguing that a non-qualified NCE station should not be granted carriage rights.[32] We believe that the definition of local commercial television station contained in the 1992 Cable Act clearly includes non-qualified NCE stations; the definition includes all stations other than "qualified NCE stations." Consistent with the language of the 1992 Cable Act, we determine that NCE stations which are not "qualified" NCE stations for must-carry purposes may assert must-carry rights under Section 614 within their local market, just like any other broadcast station.[33]

12. *Availability and Identification of Must-Carry Signals.* Section 614(b)(7) provides that all must-carry signals shall be provided to every subscriber of a cable system and shall be viewable via cable on all television receivers of a subscriber which are connected to a cable system by a cable operator or for which the cable operator provides a connection. In the *Report and Order* we declined to grant a request to provide a special exception for commercial subscribers (*e.g.,* hotels, hospitals) that receive specially designed channel line-ups.[34] We stated our belief that the 1992 Cable Act is clear in its application of Section 614(b)(7) to every subscriber of a cable system, that it grants no authority to exempt a specific class of cable subscribers from the carriage requirements, and that there is no reason to believe that such commercial subscribers are not interested in receiving local broadcast signals.[35]

---

[23] Section 325(b)(2)(A) specifically excludes noncommercial broadcast stations, and 47 C.F.R. Section 76.64(a) refers only to commercial broadcast stations.
[24] Section 623(b)(2)(C)(ii).
[25] Section 614(b)(1)(A).
[26] 8 FCC Rcd at 2973.
[27] *Id.*
[28] CATA Petition at 2.
[29] 8 FCC Rcd at 2973.
[30] CCU Petition at 2-3.
[31] *Id.*
[32] San Jacinto Opposition at 2-3; INTV Reply at 8.
[33] We interpret local commercial television station to include stations operating under a valid construction permit.
[34] 8 FCC Rcd at 2974.
[35] *Id.*

13. The National Cable Television Association ("NCTA") and Time Warner Entertainment Company, L.P. ("Time Warner") request that we reconsider the requirement to make all must-carry signals available to all subscribers including commercial subscribers (hotels/hospitals) which have contracted for a special channel 8line-up.[36] NCTA points to a footnote in the text of the *Report and Order* which stated that "commercial subscribers, of course, may exclude the must-carry signals in cases where converters or other equipment are needed to receive such signals, the subscriber elects not to obtain such equipment, and the cable operator does not provide the connections for all television receivers in the commercial establishment."[37] NCTA requests that we expand this caveat to state that the cable operator may provide all of the wiring to individual rooms and yet not requirex its customer to provide connections for all television sets in the commercial establishment.[38] These parties argue that "sophisticated buyers of video programming" should not be forced to buy what they do not want.[39]

14. In opposition, the National Association of Broadcasters ("NAB") argues that there is no basis for distinguishing between residential and commercial subscribers, and that Section 614(b)(7) provides no basis for allowing cable operators to delete must-carry signals from the commercial subscriber channel line-up.[40] NAB points out that the issue is not the level of sophistication of commercial entities requesting service, but rather the access to local stations by the viewers in these establishments.[41]

15. We agree with NAB that the must-carry provisions do not distinguish between commercial and residential viewers. Congress made clear its intent that all subscribers have access to local commercial broadcast signals. We do not believe that NCTA or Time Warner has presented sufficient cause to change our earlier interpretation of the 1992 Cable Act. Therefore, we affirm that all subscribers must have access to these signals on all television sets connected by the cable operator or for which the cable operator provides a connection.

16. It is our understanding that the on-channel carriage of some UHF signals has resulted in situations where a converter box supplied by a cable operator does not contain the necessary channel capacity to permit a subscriber to access a UHF must-carry signal through the converter. For example, a converter may supply channels 2-36 while the must-carry station is on channel 55. Where a cable operator chooses to provide subscribers with signals of must-carry stations through the use of converter boxes supplied by the cable operator, the converter boxes must be capable of passing through all of the signals entitled to carriage on the basic service tier of the cable system, not just some of them. In addition, any converter boxes provided for this purpose must be provided at rates in accordance with Section 623(b)(3). Therefore, in a situation where the subscriber's converter is supplied by the cable operator, and is incapable of receiving all signals as required by Section 614(b)(7), the cable operator must make provision for a converter which is capable of (providing these signals.)[42] If it is necessary to replace the converter, the subscriber must not be required to pay additional sums nor to pay for the installation.[43] As discussed below,[44] we have provided a mechanism for relief for cable systems which cannot meet the on-channel requests of must-carry stations. A decision not to seek such relief may not be used to contravene the directives of the 1992 Cable Act.

2. Definition of a Television Market

17. Use of ADI Markets and the Home County Exception. Under the 1992 Cable Act, a local commercial television station is entitled to must-carry status on all cable systems located in the same television market as the cable system.[45] The 1992 Cable Act states that the television market shall be determined pursuant to Section 73.3555(d)(3)(i) of our rules, which in turn defines a television market in terms of the Area of Dominant Influence ("ADI"), as defined by Arbitron.[46] In the *Report and Order,* the Commission noted that each county in the contiguous United States-is assigned by Arbitron exclusively to one ADI, and that each broadcast station licensed to a community located in an ADI is considered local throughout that ADI.[47] The Commission established one exception to that rule, determining that each broadcast station will also be considered a must-carry station in its home county, even if that station is assigned to a different ADI from that of its home county (the "home county exception").[48]

18. Cypress Broadcasting, Inc. ("Cypress"), the licensee of television station KCBA(TV), Salinas, California, filed a petition seeking reconsideration of the home county exception because it accords television station KNTV(TV), licensed to San Jose, California, and similarly situated stations, must-carry rights in an entire county outside their Arbitron designated ADI. Cypress argues that the Commission failed to give adequate notice that it might adopt this

---

[36] NCTA Petition at 15-16; Time Warner Reply at 2-3.

[37] NCTA Petition at 15-16 (citing 8 FCC Rcd at 2974 n.99).

[38] *Id.*

[39] *Id.;* Time Warner Reply at 3.

[40] NAB Opposition at 9-10.

[41] *Id.*

[42] *See Memorandum Opinion and Order* (CSR-3903-M) (Complaint of WLIG-TV, Inc. against Cablevision Systems Corporation), DA-93-1365 (released November 10, 1993), in which the Mass Media Bureau noted that converter boxes provided by the cable system must be capable of transmitting all the signals entitled to mandatory carriage on the basic tier, and required Cablevision, because it was in the midst of an upgrade of its system, to switch station WLIG to a channel receivable by all subscribers, without the necessity of an additional converter box, during the rebuilding of its system.

[43] We note that where the cable operator authorizes subscribers to install additional receiver connections, but does not provide the subscriber with such connections, or with the equipment and materials for such connections, the operator must notify such subscribers of all broadcast stations carried on the cable system which cannot be viewed via cable without a converter box and the operator must offer to sell or lease such a converter box to such subscribers at rates in accordance with section 623(b)(3). *See* Section 614(b)(7).

[44] *See infra* at para. 57.

[45] Section 614(h)(1)(A) and (C).

[46] *See* Section 614(h)(1)(C); *see also* 8 FCC Rcd at 2975 n.100. We note that Arbitron has cancelled its television ratings service. However, the decision will not have an impact on the use of Arbitron-designated ADIs until the next must-carry/retransmission consent election which must take place by October 1, 1996. *See* 47 C.F.R. § 76.55(e); 47 C.F.R. § 76.64(f)(2). We will address this issue sufficiently before that date.

[47] 8 FCC Rcd at 2975.

[48] *Id.*

exception to the must-carry rule.[49] According to Cypress, nowhere in the *Notice of Proposed Rule Making*[50] did the Commission suggest that it would allow the automatic addition of counties to the market of some stations.[51]

19. This petition is opposed by Granite Broadcasting Corporation ("Granite"), licensee of KNTV.[52] Granite maintains that the Commission gave adequate notice that it was considering adjustments or modifications of television markets, and sought comment on how to address requests for modification, including those not covered by the 1992 Cable Act.[53] Granite contends that the home county exception is a logical outgrowth of the Commission's rule making proposal that should have been anticipated by Cypress.[54]

20. Cypress disagrees that the home county exception is a logical outgrowth of the matters addressed in the *Notice*. It states that the Commission acknowledged in the *Notice* that, pursuant to Section 614(h)(1)(c), "it could only add 'communities' to a station's television market and that it would do so only after a written request in accordance with the procedures to be adopted in the *Notice*."[55] Thus, Cypress concludes that there was no basis for it to anticipate a home county exception, a rule it argues is inconsistent with the 1992 Cable Act.[56]

21. The *Administrative Procedure Act ("APA")*[57] requires an agency, when issuing a general notice of proposed rule making, to provide the public with "either the terms or the substance of a proposed rule or a description of the subject and issues involved."[58] The APA, however, "does not require an agency to publish in advance every precise proposal which it may ultimately adopt as a rule."[59]

22. The *Notice* set forth the 1992 Cable Act's direction that such markets would be determined primarily in the manner provided in Section 73.3555(d)(3)(i) of the Commission's rules, (which section uses Arbitron-defined ADIs), and specifically sought comment from the public concerning the Congressionally recognized need for adjustments to or modifications of television markets.[60] The Commission specifically stated that "it may determine that particular communities are part of more than one television market," and further explained that it would act upon written requests to add or delete communities to a station's market "to better reflect market realities and effectuate the purposes of this Act."[61] We believe that it was apparent that the Commission was likely to receive comments and suggestions regarding methods to assure that television stations' must-carry markets, both generally and in individual cases, best reflect market realities and the objective of localism underlying broadcast signal carriage obligations. While the *Notice* did not specifically seek comment on the home county exception, we believe that the home county exception is a "logical outgrowth" of the *Notice*.[62] Accordingly, we are not persuaded by Cypress' arguments that the *Notice* did not give adequate notice in compliance with the requirements of the APA.

23. Cypress also asserts that the Commission's adoption of the home county exception is in direct violation of the 1992 Cable Act in that it assigns must-carry rights outside of a station's ADI on a county-wide basis rather than by community as provided by Section 614(h)(1)(C)(i).[63] It argues that, under the clear language of that statutory provision, a station's must-carry market is defined by its Arbitron ADI, with no must-carry rights for the station beyond that ADI.[64] Cypress argues that the 1992 Cable Act establishes a specific procedure for affording a station must-carry rights in communities outside of its ADI, and spells out the precise matters the Commission must consider in ruling on individual written requests, referencing the provision of the 1992 Cable Act that provides:

> [F]ollowing a written request, the Commission may, *with respect to a particular broadcast station,* include *additional communities* within its television market to better effectuate the purposes of this section. In con-

---

[49] Cypress Reply at 6-9.

[50] *Notice of Proposed Rule Making* in MM Docket No. 92-259 ("Notice"), 7 FCC Rcd 8055 (1992).

[51] *Id.*

[52] KNTV(TV), Channel 11 (ABC), is licensed to San Jose, California. San Jose is part of the San Francisco-Oakland-San Jose Arbitron ADI. However, the city of San Jose is located within Santa Clara County, a county included by Arbitron in the Salinas-Monterey ADI. In comments filed in response to the *Notice* in this proceeding, Granite stated that although KNTV is listed by Arbitron in the Salinas-Monterey ADI, it and similarly situated stations should be deemed "local" for must-carry purposes in their home county when such county lies outside the ADI in which the station is assigned. Granite Opposition at 16-17. In adopting the home county exception, the Commission noted the case of KNTV. 8 FCC Rcd at 2975 n.108.

[53] Granite Opposition at 13-16.

[54] *Id.*

[55] Cypress Reply at 8.

[56] Cypress claims that it should not be deemed to have been put on notice that Granite made a home county exception proposal because Granite did not serve Cypress with a copy of its comments. Cypress Reply at 9. We reject Cypress' suggestion that either the Commission or Granite was obligated to serve it with a copy of Granite's comments submitted in response to the *Notice*. Neither the APA nor the Commission's rules of procedure require personal service to specific parties of general rule making comments. Sufficient notice to parties is presumed when the *Notice* is published in the Federal Register, and parties have an obligation to follow proceedings in which they may be interested. *See* 47 C.F.R. § 1.412. Moreover, the law does not require a new notice whenever an agency responsibly adopts the suggestions of interested parties. *See, e.g., Ethyl Corp. v. EPA,* 541 F.2d 1, 48 (DC Cir. 1976), *cert. denied,* 426 U.S. 941 (1976).

[57] 5 U.S.C. Section 551 *et seq.*

[58] *See* 5 U.S.C. § 553(b)(3).

[59] *California Citizens Band Association v. United States,* 375 F.2d 43, 48 (9th Cir. 1967); see also Spartan Radiocasting Co. v. FCC, 619 F.2d 314 (4th Cir. 1980). The notice is sufficient if the final rule is a "logical outgrowth" of the rule proposed. *United Steelworkers v. Marshall,* 647 F.2d 1189, 1221 (D.C. Cir. 1980).

[60] Section 614(h)(1)(C)(i) states that a broadcasting station's market shall be determined in the manner provided in section 73.3555(d)(3)(i) of the Commission's rules, except that the Commission may include or exclude additional communities to better effectuate the purposes of Section 614. 47 U.S.C. § 534(h)(1)(C)(i).

[61] *See* Section 614(h)(1)(C); *see also* 7 FCC Rcd at 8059.

[62] *See, e.g., United Steelworkers,* 647 F.2d at 1221; *Health Insurance Association of America, Inc. v. Shalala,* 23 F.3d 412, 421 (1994); *Northwest Tissue Center v. Shalala,* 1 F.3d 522, 528 (1993).

[63] Cypress Petition at 7-9; Cypress Reply at 2-4.

[64] *Id.*

> sidering such requests, the Commission may determine that particular *communities* are part of more than one television market.[65]

Cypress argues that the Commission received no written request from Granite which complied with the evidentiary requirements established by Section 614(h)(1)(C)(ii), and therefore had no record to support the statutorily required finding to afford this relief to KNTV.[66]

24. In opposition, Granite states that nothing in the 1992 Cable Act precludes adding a county to a station's market and notes that the Commission adopted the home county exception as a rule of general applicability for all stations whose home county lies outside its ADI.[67] It maintains that Section 614(h)(1)(C)(i) directs that market adjustments be limited to particular television stations, while the home county exception is entirely separate from a request to modify an individual television station's market.[68] It contends that the addition of Santa Clara County to KNTV's market was appropriate in the rulemaking proceeding, as opposed to an individual adjudicatory proceeding, "because every similarly situated station -- that is, every station whose home county lies outside its ADI -- should have its market defined to include its home county."[69] It asserts that in order to serve the 1992 Cable Act's goal of promoting localism, the home county of every station should be included in its must-carry market through the adoption of a general rule, rather than on an *ad hoc* basis.[70] Further, Granite maintains that the Commission is not precluded from exercising its own rulemaking authority to adopt such an exception.[71] Granite also notes that even under Cypress' reading, there is nothing in the 1992 Cable Act to prohibit the Commission from adding all the communities of a county to a must-carry market.[72] Thus, it argues, there is no basis to construe the 1992 Cable Act as preventing the addition of a county to a must-carry market.[73]

25. We disagree with Cypress that the home county exception violates either the spirit or letter of the 1992 Cable Act. Specifically, we disagree with the proposition that although a television station's must-carry rights are defined primarily by Arbitron ADIs, there can be no must-carry rights beyond the ADI to which a station is assigned by Arbitron. Section 614(h)(1)(C)(i) recognizes a potential, but easily corrected, deficiency in the use of Arbitron ADIs to define a station's must-carry market. We find no basis to presume that the Commission may not adjust ADIs generally to ensure that stations have must-carry rights in those areas where their service isappropriately "local." We agree with Granite that adoption of the home county exception is separate and apart from the procedure established to make individual station market adjustments based on particular situations.

26. *Modification of ADI Markets.* As noted in the *Report and Order*, the 1992 Cable Act permits the Commission to add or subtract communities from a television station's market to better reflect marketplace conditions or to promote the goal of localism underlying the signal carriage provisions.[74] In its petition, INTV requests that the Commission add or subtract a community for all stations in the market, not for an individual station. INTV suggests that upon the addition of a community to a market, every station in the community would attain must-carry rights in that market.[75]

27. The Commission has already addressed this subject in the *Report and Order* in response to parties' contentions that ADI modifications should be made on a community, rather than on a station, basis. Both the 1992 Cable Act and our rules require, for each broadcast station, an evidentiary showing from an interested party, with opportunity for comment. INTV's request would not meet this requirement and therefore must be rejected. We reiterate our statement in the *Report and Order* that we will accept joint filings by a group of stations or a single request from a cable operator for changes for more than one station licensed to the same community, so long as the submitted information demonstrates that each station is entitled to have its market modified.[76] The special relief procedures will ensure that the 1992 Cable Act's objectives of promoting localism and reflecting market realities are achieved.[77]

28. As noted above, Section 614(h)(1)(C) directs the Commission, when considering ADI modification requests, to promote localism by taking into account the four factors

---

[65] Section 614(h)(1)(C)(i); 47 U.S.C. § 534(h)(1)(C)(i) (emphasis added by Cypress).

[66] Section 614(h)(1)(C)(ii) directs that in considering requests to add or exclude certain communities within a television station's market pursuant to this section, the Commission shall afford particular attention to the value of localism by taking into account such factors as: the historical cable carriage of the station on cable systems in the subject community; whether the station provides coverage or local service to the community; whether other must-carry stations in the community provide news coverage of issues of concern to such community, or provide carriage or coverage of sporting or other events of interest to the community; and evidence of viewing patterns in cable and noncable households within the areas served by the cable system in the community. In the *Report and Order*, the Commission determined to use the special relief procedures to modify television markets, pursuant to a modified Section 76.7 of our rules. Moreover, the Commission determined not to restrict the types of evidence that parties may submit to demonstrate the propriety of changing a station's must-carry market, or to prejudge the importance of any of the factors set forth in the statute because each case will be unique. *See* 8 FCC Rcd at 2977.

[67] Granite Opposition at 6-7 n.9.

[68] Granite notes that in the *Report and Order*, the Commission addressed the home county exception in the context of the general definition of local television market, whereas the addition or deletion of specific communities in a market is addressed as a form of relief intended by the 1992 Cable Act to address the "individual situation" of a particular television station. *Id.* at n.8.

[69] *Id.* at 8. Granite further states that Cypress' contention that the statutory requirements of Section 614(h)(1)(C)(ii) of the 1992 Cable Act have not been met with respect to KNTV is "entirely misplaced," because adoption of the home county exception is not a modification of one must-carry market granted pursuant to a written request under that section. *Id.* at 7.

[70] *Id.* at 8.

[71] *Id.*

[72] *Id.* at 11-12.

[73] *Id.*

[74] 8 FCC Rcd at 2976.

[75] INTV Petition at 7.

[76] 8 FCC Rcd at 2977 n.139.

[77] *Id.* The same logic applies to a single station requesting the addition of multiple communities.

listed in that section.[78] Press Broadcasting Company, Inc. ("Press"), the licensee of WKCF(TV), Clermont, Florida, seeks clarification or partial reconsideration of the types of evidence the Commission has indicated that it will consider in assessing proposed changes in a station's must-carry market.[79] Specifically, Press states that, among other things, the Commission observed in the *Report and Order* that to show that a station provides coverage or other local service to the cable community, "parties may demonstrate that the station places at least a Grade B coverage contour over the cable community or is located close to the community in terms of mileage."[80] Press maintains, however, that mere geographic proximity is not, in and of itself, meaningful evidence of coverage or service. It asserts that the Commission is not sufficiently clear whether such proximity refers to the distance between the cable community, and, for example, a station's city of license, transmitter or some other aspect of a station's operation. In any event, it suggests that before a station's must-carry status is altered, the Commission should be satisfied that the station's signal is available throughout all or most of the subject cable market.[81] Further, Press suggests that the Commission should consider whether the station can demonstrate that it has chosen to include itself in the market by, for example, voluntarily agreeing to pay programming costs based on market-wide prices.[82]

29. We clarify that the two factors mentioned in the *Report and Order* are merely examples of the types of evidence that might be considered in a request to modify an ADI. The Commission purposely did not restrict the types of evidence that may be used to demonstrate that a station's must-carry market should be modified.[83] The Commission declined to prejudge the importance of any of the factors set forth in the statute, noting that each case will be unique.[84] Accordingly, we note that the factors suggested by Press may be employed by parties to show the appropriateness of altering a station's must-carry market, although the importance of such factors may differ from one situation to the next.[85]

30. *Section 76.51 Top 100 Market List.* Section 614(f) of the 1992 Cable Act directs the Commission to issue regulations that include revisions needed to update the list of top 100 television markets and their designated communities contained in Section 76.51.[86] Although the *Notice* sought guidance on how to fulfill this requirement,[87] the comments were general in nature and did not offer a mechanism for revising the top 100 market list, including criteria for determining when a city of license should become a designated community in a television market.[88] Accordingly, the Commission concluded in the *Report and Order* that a wholesale revision of Section 76.51 was unnecessary and stated that it would only update the existing list by adding those designated communities requested by parties providing specific evidence that a particular market change is warranted.[89] The Commission made three specific market modifications, and stated that further revisions to this list would be made on a case-by-case basis.[90] The Commission stated that requests for modification should demonstrate "commonality" between the proposed community to be added to a market designation and the market as a whole, and that such requests would be made in accordance with the factors in Section 614(h)(1)(C) and the related rules.[91]

31. A number of broadcast television licensees in Columbus, Ohio filed petitions for reconsideration respecting the addition of Chillicothe to the Columbus, Ohio television market.[92] These petitioners allege that the Commission's action was taken without sufficient notice to interested parties and was therefore based on an inadequate factual record. They maintain that the *Notice* in this proceeding generally requested comment on suitable\criteria for revising Section 76.51 of the rules pursuant to Section 614(f), and indicated that, during the pendency of the rulemaking, market revisions would be made on an *ad hoc* basis through individual rulemaking notices. These petitioners contend that, despite the language of the *Notice*, only the modification of the Atlanta, Georgia television market was the subject of a prior notice of proposed rulemaking, and even in modifying that market, the Commission declined another request to include Athens, Georgia in the market because that proposal was not included in the prior notice.[93] By contrast, they assert, the addition of Chillicothe

---

[78] Section 614(h)(1)(C)(ii); Section 614(h)(1)(C)(ii) (II).

[79] Press Petition at 2-4.

[80] *Id.* at 2 (citing 8 FCC Rcd at 2977).

[81] *Id.* at 2-4.

[82] *Id.* at 4-5.

[83] *Id.* This is consistent with the legislative history of this section of the 1992 Cable Act which states that the particular factors set forth in the statute "are not intended to be exclusive." House Committee on Energy and Commerce, H.R. Rep. No. 628 ("House Report"), 102d Cong., 2nd Sess. (1992) at 97.

[84] 8 FCC Rcd at 2977.

[85] We note that, in stating that a station may demonstrate that it is located close to the community in terms of mileage, a station may present evidence, as suggested by Press, regarding the distance between the cable community and the station's community of license, transmitter, or other aspect of the station's operation.

[86] 47 C.F.R. § 76.51.

[87] 7 FCC Rcd at 8060.

[88] 8 FCC Rcd at 2977.

[89] *Id.* at 2978.

[90] The Commission made the following market modifications: (1) added Chillicothe to the Columbus, Ohio market; (2) added New London to the Hartford-New Haven-New Britain-Waterbury, Connecticut market; and (3) added Rome to the Atlanta, Georgia market. *Id.*

[91] *Id.; see also* Section 614(h)(1)(C); 47 C.F.R. § 534(h)(1)(C). The Commission also stated that the same procedures would be applicable to requests to delete named communities from specific hyphenated markets.

[92] Petitions were filed by: Anchor Media, Ltd. (WSYX(TV)), WBNS TV Inc. (WBNS-TV), Outlet Broadcasting, Inc. (WCMH-TV), and WTTE, Channel 28 Licensee, Inc. (WTTE(TV)).

[93] In its petition, Outlet Broadcasting, Inc. notes that Triplett and Associates, Debtor-in-Possession ("Triplett"), licensee of WWAT(TV), Chillicothe, and proponent of the subject rule amendment, filed comments in this proceeding merely incorporating by reference two earlier requests for modification of the market. Outlet maintains that the Commission never issued a public notice concerning the earlier proposals. Moreover, it claims that the Commission only reported the filing of Triplett's submission in this proceeding in a notice of comments received in this docket, listing Triplett as one of many filers and giving no indication of the nature of those comments. As a result, Outlet states, "the Commission understandably received no oppositions or comments on the idea." Outlet Petition at 6-7.

was made without any published notice or an independent notice of proposed rule making consistent with the procedures announced in the *Report and Order,* or any other indication from the Commission that it was contemplating the change, and without interested parties receiving service of the proposal.

32. As noted above, the APA requires an agency, when issuing a general notice of proposed rule making, to provide the public with "either the terms or the substance of a proposed rule or a description of the subject and issues involved," but "does not require an agency to publish in advance every precise proposal which it may ultimately adopt as a rule."[94] In the *Notice,* the Commission specifically requested that interested parties "comment on what modifications to the television markets specified in Section 76.51 of our rules is needed to ensure that it reflects current market realities."[95] In so doing, the Commission observed that this proceeding necessarily overlaps with an ongoing proceeding involving, *inter alia,* the makeup of the Section 76.51 market list in relation to the Commission's program exclusivity rules.[96] Therefore, the Commissionp explicitly stated that Docket 87-24 would be reopened for further comment in the context of this rulemaking in order to facilitate coordination of the overlapping aspects of the two proceedings.[97]

33. In light of the nature of this proceeding, the statutory instruction to amend, as necessary, Section 76.51, and the incorporation by reference of the issues in Docket 87-24, we conclude that the *Notice* amply alerted the public that potential amendments to that rule section could be made in the context of this specific proceeding.[98] The Commission explicitly soughtbpublic comment on what modifications to Section 76.51 would be necessary to fulfill the directive of Section 614(f), and we believe that specific market change proposals are a natural and logical outgrowth of the range of issues presented in the *Notice* and discussed in the comments filed in this proceeding. Accordingly, we are not persuaded by the petitioners that the *Notice* did not provide adequate notice to interested parties that specific amendments to Section 76.51 were likely to be considered in this proceeding.

34. We disagree with the petitioners' contentions that amendment of the Columbus market first required the issuance of an independent notice of proposed rulemaking. The fact that we said in the *Notice* that we may consider further revisions to Section 76.51 on an *ad hoc* basis did not preclude the Commission's taking specific action on particular modifications consistent with the guidance provided by the 1992 Cable Act where the record indicated that such changes were warranted.[99]

3. Selection of Signals.

35. *Definition of Substantial Duplication.* Section 614 (b)(5) provides that a cable operator is not required to carry the signal of any local commercial television station that substantially duplicates the signal of another local commercial television station which is carried on its cable system, or to carry the signals of more than one local commercial television station affiliated with a particular broadcast net-

---

[94] *See* discussion *supra* paras. 21-22.

[95] 7 FCC Rcd at 8060.

[96] *See Further Notice of Proposed Rule Making* in Gen. Docket No. 87-24, 3 FCC Rcd 6171 (1988). Further, the pendency of Triplett's request to modify the Columbus, Ohio television market is referenced in Docket No. 87-24, 3 FCC 2d at 6176 n.15, which was incorporated into the instant proceeding.

[97] *See* 3 FCC 2d at 6171 (1988). In response to the *Notice* in this proceeding, the proponents of three previously-filed market change petitions for rulemaking filed comments which incorporated by reference their rulemaking petitions and urged the adoption of their Section 76.51 market amendment proposals. One of these proponents, Star Cable Associates ("Star"), operator of a cable television system serving the community of Brazoria, Texas, and portions of Brazoria County, Texas, filed a petition for reconsideration based on the concept that although the Commission granted other requests to modify existing television markets, the Commission did not act on Star's request to amend Section 76.51 to add the community of Alvin to the Houston, Texas market. Star states that it has had such a request pending before the Commission since January 1991. Star's comments to the *Notice* in this proceeding were incorporated into and filed with Adelphia, *et al.* and included numerous other cable operators. These parties were arguing that the Commission need not revise the Section 76.51 market list, stating that "[n]o revision to this list is needed to implement the must-carry rules since the current ADI markets are to be used for determining must-carry rights." Adelphia comments to *Notice* at 11-12. It was suggested in those comments that the Commission "might wish to update the list . . . to add new communities to existing markets for stations which have gone on the air since the list was last revised" and, in that context noted the copyright consequences explained in the pending petition regarding the Houston market. *Id.* However, neither Adelphia nor Star specifically requested action in the must-carry context on Star's pending petition for rulemaking. Under these circumstances, we do not believe that it was erroneous to defer action on the Star petition.

[98] Neither the APA nor the Commission's rules specifically required that the petitioners receive personal service of the particular market change proposals tendered in comments filed in this proceeding. *See supra* note 55. Moreover, we observe that at least one petitioner, Outlet, notes that the filing of Triplett's submission was referenced in a public notice of comments received in this docket. *See* FCC Filings, Mimeo No. 31317, released January 15, 1993. However, we do not agree that the Commission was somehow obligated to indicate the nature of Triplett's comments, and the petitioners offer no support for that particular proposition. To the extent that Triplett incorporated by reference its previous request regarding Chillicothe, which was also noted in Docket 87-24, we do not believe that obviated the responsibility of interested parties to assess the nature of comments received in response to the general rulemaking issues specifically raised in the *Notice.*

[99] *See Edison Electric Institute v. OSHA,* 849 F.2d 611 (D.C. Cir. 1989). We do not agree that the action taken with respect to a proposal to include Athens in the Atlanta market indicates that the Commission could only act in independent and separate rulemaking proceedings. The Georgia Public Television Commission ("GPTC"), licensee of noncommercial educational television station WGTV(TV), Athens, Georgia, sought to include Athens as a designated community in the Atlanta market essentially to increase the station's visibility and fund raising in the market. GPTC's proposal was not submitted in the instant proceeding directly or incorporated by reference, but rather in comments supporting the requested action in MM Docket 92-295, which specifically addressed the Rome proposal. Parties commenting in MM Docket 92-295 had no opportunity to comment upon the Athens proposal in the context of that proceeding. Moreover, GPTC's proposal differs significantly from the competition and carriage issues vis-a-vis commercial stations raised in either the instant proceeding or in MM Docket 92-295 (relating specifically to Rome). In light of the action taken in the *Report and Order,* the Commission appropriately terminated MM Docket 92-295, and invited GPTC to refile its proposal for consideration in an independent proceeding.

work.[100] In the *Report and Order,* based on the legislative history of this section of the 1992 Cable Act, we decided that two stations "substantially duplicate" each other "if they simultaneously broadcast identical programming for more than 50 percent of the broadcast week."[101] For purposes of this definition, identical programming means the identical episode of the same program series.[102]

36. NCTA requests that this definition be modified to conform to the definition of duplication in the syndicated exclusivity and network nonduplication rules.[103] It states that the Commission is not compelled to follow the legislative history because Congress left the definition of substantial duplication to the Commission's discretion, rather than including it in the 1992 Cable Act. NCTA asserts that Congress intended to relieve cable operators of the need to devote channel capacity to duplicative programming at the expense of programming that provides diversity to viewers.[104] It further contends that the Commission's definition will only be met in situations where one station is a satellite of the other.[105] In addition, NCTA argues thatPrequiring carriage of a station that can be blacked out pursuant to the exclusivity rules for a substantial portion of the broadcast day deprives the cable operator of discretion not to carry substantially duplicative stations and cannot be what Congress intended.[106]

37. In opposition, NAB notes that under NCTA's proposal, the existence of two stations in separate markets that have exclusivity rights to one program would be sufficient to relieve the operator of carriage obligations, contrary to Congressional intent.[107] It also states that there is no relation between carriage rights and the protection afforded to local stations under the program exclusivity rules, which were designed to level the competitive playing field and permit stations to enforce contractual rights.[108] NAB asserts that Congress did not equate substantial duplication in the must-carry context with the duplication policies under the exclusivity rules. It further claims that Congress did not intend for exclusivity rights to affect either the carriage of stations asserting such rights or the carriage of stations against which these rights are asserted, yet NCTA's proposal appears to permit cable operators to decline carriage of any station against which exclusivity rights are applied.[109] In response to NCTA's contention that cable operators will have to carry duplicative stations and then delete the duplicating programming, NAB points out that cable operators can combine a station's programming not subject to deletion with substitute nonduplicative programming to provide diverse programming consistent with the intent of the 1992 Cable Act.[110]

38. We continue to believe that our definition of substantial duplication is appropriate for determining signal carriage obligations. We note that it is consistent with the legislative history that indicates that this term refers to the "simultaneous transmission of identical programming on two stations" and which "constitutes a majority of the programming on each station."[111] While we agree with NCTA that Congress gave the Commission discretion to define substantial duplication, we continue to believe that the most appropriate approach here is to act consistently with the legislative history. Congress did not intend for a single duplicative program, whether subject to blackout or not, to be the determining factor. Finally, we observe that our rules often use different definitions for similar terms based on the purpose of the policy involved.[112] The Commission's exclusivity rules are intended to protect the rights that a broadcaster has bargained for with the supplier of a particular program. The must-carry rules, however, are intended to ensure that local stations are available to cable subscribers. Thus, we reject the proposed modification to our definition of substantial duplication.

4. Low Power Television Stations.

39. *Qualified Low Power Television Station.* Section 614(h)(2) contains the statutory requirements a low power television station (LPTV) must meet before it will be considered "qualified" for must-carry purposes.[113] As we stated in the *Report and Order,* a low power television station must meet all of the statutory requirements to be "qualified" for must-carry status.[114] Cable systems are required to carry a qualified LPTV station only if there are not suffi-

---

[100] 47 U.S.C. § 534(b)(5); 47 C.F.R. § 76.56(b)(5). Western Broadcasting Corporation of Puerto Rico, licensee of Station WOLE, Aguadilla, requests that the Commission reconsider its rules with respect to their application to WOLE, "given the unique situation in Puerto Rico." Western Broadcasting Petition at 1-3. We note that such a request is more appropriately made as a petition for special relief rather than as part of a general rulemaking proceeding.

[101] 8 FCC Rcd at 2980-2981 (citing House Report at 94).

[102] We also consider programming to be duplicative where the stations involved are located in contiguous time zones and the hour of broadcast differs by one hour. *Id.* at 2980 n.186.

[103] NCTA Petition at 12-15. NCTA states that a syndicated program may be duplicative if it is part of a series for which the station has exclusive rights, even if the episodes differ, and that a program may also be considered duplicative regardless of whether it is shown simultaneously or whether the program is not shown at all.

[104] *Id.* at 12 (citing House Report at 94).

[105] *Id.* at 13.

[106] *Id.* at 15.

[107] NAB Opposition at 4-6.

[108] *Id.* at 5.

[109] *Id.* at 5.

[110] *Id.* at 6 (citing 47 C.F.R. §§ 76.62, 76.67).

[111] House Report at 94.

[112] *Compare, e.g.,* 47 C.F.R. § 73.658(v) *with* 47 C.F.R. § 76.55(f) (definition of network).

[113] Section 614(h)(2) provides that a LPTV station must broadcast for at least the minimum number of hours the Commission requires of commercial broadcast stations. The station must adhere to certain Commission requirements regarding non-entertainment programming and employment. The station must address local news and informational needs that full power stations are not adequately serving because the full power stations are distant from the LPTV station's community of license. The station must comply with the Commission's LPTV interference regulations. The station must be within 35 miles of the cable headend and deliver a good quality over-the-air signal to the headend. The station's community of license and the cable system's franchise area both must have been located outside of the largest 160 Metropolitan Statistical Areas (MSA's) on June 30, 1990, and the population of the LPTV station's community of license must not have exceeded 35,000 on that date. Lastly, there cannot be any full power television station licensed to any community within the county or other political subdivision served by the cable system. 47 U.S.C. § 534(h)(2)(A)-(F).

[114] 8 FCC Rcd at 2981.

cient full power local commercial television stations to fulfill the cable operator's must-carry obligations under Section 614(b).[115]

40. Moran Communications ("Moran") and the Community Broadcasters Association ("CBA") request a revision to the requirement inSection 614(h)(2)(F) that, in order for a LPTV station to be qualified, there cannot be any full power station licensed to any community within the county or political subdivision served by the cable system.[116] Under this exception, Moran and CBA explain, a LPTV station would qualify for must-carry rights if it meets all the requirements of subsections 614(h)(2), except for subsection F, and if none of the full power stations in the county or political subdivision served by the cable system offers local news or informational programming. They contend that when a satellite station is repeating another station's signal and not broadcasting any local news or informational programming to meet the needs of the local community, the satellite station should not be considered a full power station for the purposes of Section 614(h)(2)(F).[117] CBA also argues that a satellite station is a "passive repeater," and because Section 614(h)(1)(b)(i) specifically excludes passive repeaters from the definition of a local commercial television station, it follows that Congress intentionally gave less to repeaters than to originating stations in terms of must-carry rights.[118] Therefore, argues CBA, "[t]he Congressional recognition of the lesser value of repeaters must be incorporated into the must-carry rule. . . ."[119] In opposition, NCTA argues that the Commission cannot rewrite the statute, which defines qualified LPTV stations and governs the must-carry rights of LPTV stations.[120]

41. We agree with NCTA that the provisions of the 1992 Cable Act may not be amended by the Commission through the rule making process. Further, contrary to CBA's interpretation of Section 614(h), satellite stations meet the definition of a local commercial television station, are full power stations pursuant to Section 614(h)(2)(F), and are generally not simply passive repeaters.[121] We disagree with CBA's contention that Congress intended satellite stations to be treated differently from other full power stations when reviewing the statutory requirements a LPTV station must meet to gain must-carry status.[122]

C. Manner of Carriage Provisions Applicable to Commercial and Noncommercial Stations

1. Content to be Carried

42. Section 614(b)(3)(A) and Section 615(g)(1) require cable operators to carry the primary video, accompanying audio, and line 21 closed caption transmission, in its entirety, of both qualified local commercial and NCE stations when fulfilling their must-carry obligations. With respect to qualified local commercial stations, cable operators also are required, to the extent technically feasible, to retransmit program-related material carried in the vertical blanking interval (VBI) or on subcarriers.[123] Retransmission of other material in the VBI or other non-program-related material (including teletext and other subscription and advertiser-supported information services) is at the discretion of the operator.[124] With respect to local qualified NCE stations, cable operators are required to transmit, to the extent technically feasible, program-related material carried in the VBI, or on subcarriers, that may be necessary for receipt of programming by handicapped persons or for educational or language purposes. Retransmission of other material in the VBI or on subcarriers is at the discretion of the operator.[125] Cable operators may, where technically feasible and appropriate, remove ghost-cancelling information carried in a station's VBI if the cable operator applies an adequate alternative methodology at the headend.[126]

43. In the *Report and Order*, we decided that the factors enumerated in *WGN Continental Broadcasting, Co. vs. United Video Inc.* ("WGN"),[127] provide useful guidance for what constitutesprogram-related material.[128] We declined to further define "program-related," noting that carriage of information in the VBI is rapidly evolving. As a result of our reliance on the approach followed in *WGN* for guidance, we rejected a proposal by A.C. Nielsen Company ("Nielsen") to require program identification codes to be carried by a cable system.[129]

44. The *WGN* case addressed the extent to which the copyright on a television program also included program material in the VBI of the signal. The *WGN* court set out three factors for making a copyright determination. First, the broadcaster must intend for the information in the VBI to be seen by the same viewers who are watching the video signal. Second, the VBI information must be available during the same interval of time as the video signal.[130] Third, the VBI information must be an integral part of the program. The court accepted WGN's future programming schedules as an "integral part of the program." The court in *WGN* held that if the information in the VBI is in-

---

115 *See* 47 U.S.C. § 534(c)(1); *see also* 47 C.F.R. § 76.56(b)(3).

116 Moran Petition at 4; CBA Comments at 1.

117 Moran Petition at 4; CBA Comments at 1.

118 Moran Petition at 4; CBA Comments at 1.

119 CBA Comments at 3.

120 NCTA Opposition at 7-8.

121 *See* 8 FCC Rcd at 2973, 2982; s *ee also* 47 C.F.R. § 73.606.

122 Moran and CBA request that we codify the exception in footnote 217 to the qualification requirements of a LPTV station. Moran Petition at 4; CBA Comments at 1 (citing 8 FCC Rcd at 2983 n.217). While the *Report and Order* had suggested the possibility of additional circumstances in which LPTV carriage might be warranted, it now appears that this is an area where the specific statutory provisions and the balancing incorporated therein must necessarily guide our enforcement of the mandatory carriage provisions for LPTV stations.

123 47 U.S.C. § 534(b)(3)(A).

124 *Id.*

125 47 U.S.C. § 535(g)(1).

126 47 U.S.C. § 534(b)(3)(A).

127 693 F.2d 622 (7th Cir. 1982).

128 In the *Report and Order,* we used a cite of 685 F.2d 218 (7th Cir. 1982), which was the original citation for the case, prior to rehearing. *See* 8 FCC Rcd at 2985 n.235. Upon rehearing, the court affirmed the factors on which we are relying.

129 8 FCC Rcd at 2986.

130 The court stated that this could be available on a different channel than the video. 693 F.2d at 626.

tended to be seen by the viewers who are watching the video signal, during the same interval of time as the video signal, and as an integral part of the program on the video signal, then the VBI and the video signal are one copyrighted expression and must both be carried if one is to be carried.[131] While the court did not define an "integral part of the program," the WGN VBI information not only included local news, but also contained future programming schedules for WGN, and the court upheld the VBI as one copyrightable expression with the video signal.[132]

45. Nielsen and INTV request reconsideration of the use of the *WGN* factors when defining "program-related," in so far as their application excludes the carriage of Source Identification Codes ("SID codes") which are used by Nielsen in the preparation of ratings.[133] Nielsen argues that because the SID codes are an integral part of ratings, which support the advertiser-based broadcast industry, a decision to exclude such codes adversely affects the programming and broadcast industries as a whole.[134] Nielsen states that our decision in this context is completely contrary to other decisions in which we have found such material to be program-related.[135] Nielsen also states that the exclusion of SID codes is expressly contrary to Congress' stated intent in adopting the 1992 Cable Act, and ignores specific Congressional directions for the Commission not to transplant arbitrarily Copyright Act concepts to the Communications Act arena.[136] Nielsen refers to guidance provided in the legislative history with respect to program-relatedness.[137] Nielsen argues that if we continue to use the *WGN* analysis, we should at least require that SID codes, which are unique to, and transmitted with, main-channel programming, be carried by cable systems carrying such main-channel programming.[138] INTV further argues that the exclusion of such codes strikes at broadcasters' ability to compete with cable television.[139]

46. NAB also petitions for reconsideration of the use of the copyright test of *WGN*. NAB argues that program-related material on subcarriers or in the VBI need not always be owned by the same copyright holder as the main program because whether or not the same copyright is held by both the main program and the material carried in the VBI has no bearing on whether that material is related to the main program, and therefore, the *WGN* test is inappropriate.[140] NAB argues that there are program-related services that would not meet this test, for example, previews of upcoming programs or a program schedule which may not be related to the main program being aired at that time, but are related to the broadcaster's program service and must therefore be retransmitted.[141] NAB asserts that material which supplements the main program service of the broadcaster should be required to be carried by the cable operator and that "[o]nly if the material is part of a service separately provided to subscribers or consumers, the contents of which do [sic] are not established by reference to the main program service, should cable systems be allowed to choose not to carry it as part of a retransmitted broadcast signal."[142]

47. In its late-filed comments, StarSight Telecast, Inc. ("StarSight") supports the Commission's reliance on the factors enumerated in the *WGN* test, but urges the Commission to defer to the broadcaster to decide what material meets the test.[143] StarSight asserts that if the primary video and the VBI material can be copyrighted together, then the VBI material is program-related and the cable operator must carry the material.[144] StarSight argues that, according to the *WGN* holding, if the broadcaster intends any portion of the information in the VBI to be seen as part of the broadcaster's expression, then it is program-related and cable operators must transmit the VBI with the primary video.[145]

48. Time Warner and NCTA support the use of *WGN* to determine program-relatedness, and to exclude Nielsen source codes. Time Warner argues that NAB does not offer any reason why this test should not be used. Time Warner contends that the Commission correctly determined that Nielsen program codes are not program-related, rather they are intended to measure viewership levels and are not intended to be seen by the viewer of the program.[146] NCTA argues that the inclusion of information in the VBI is left to the discretion of the cable operator and should not be selected by the broadcaster.[147] NCTA states that program-related material is integral matter such as subtitles or trans-

---

[131] *Id.*

[132] Id. at 627.

[133] Nielsen Petition at 17-21; INTV Petition at 9.

[134] Nielsen Petition at 19.

[135] Nielsen Petition at 11-14. Nielsen states that the Commission has long recognized the value of the information provided by SID codes. Nielsen notes that the Commission has authorized the transmission of SID codes for over 20 years in a variety of cases which expound upon the virtue of such codes. *See* Permitting Transmission of Program-Related Signals in the VBI, 43 FR 49331 (October 23, 1978); Program Identification Patterns, 43 FCC 2d 927 (1973); TV Visual Transmission for Program ID, 22 FCC 2d 779 (1970); TV Visual Transmission for Program ID, 22 FCC 2d 536 (1970); Radio Broadcast Services Order, 46 FR 40024 (August 6, 1981). In addition, Nielsen points to its Authorization, which states with respect to its Automated Measurement of Line-up ("AMOL") system's SID codes, "we believe Nielsen's AMOL systems qualifies as a special signal' and should be considered as an integral part of the associated programming within which it is transmitted and is not intended for the use of the viewing public." In *Audiocom Corp.*, 96 FCC 2d 898 (1984), the Commission stated that "SIDS, while not intended for reception by the public, is clearly related to the program material within which it is transmitted and to the normal operation of broadcast service . . . . It is . . . clear that the very nature and purpose of the information to be encoded requires that it be recorded and transmitted as an integral part of its associated program material." *Id.* at 899.

[136] Nielsen Petition at 17-20.

[137] *Id.* at 9 n.7 (citing House Report at 101) ("[p]rogram-related . . . is not meant to include tangentially related matter such as a reading list shown during a documentary or the scores of games other than the one being telecast or other information about the sport or particular players.").

[138] Nielsen Petition at 22.

[139] INTV Petition at 9.

[140] NAB Petition at 3.

[141] *Id.* at 4.

[142] *Id.* at 4-5.

[143] StarSight Comments at 9.

[144] Id . at 9-10.

[145] *Id.* In an *ex parte* presentation, StarSight requested that the Commission determine that its product, which is transmitted in the VBI, meets the *WGN* test. *See* Comments of StarSight at 2-4; Notification of *ex parte* presentation (May 5, 1994). We believe that such a request should not be resolved in the context of a rulemaking proceeding, but rather should be dealt with separately through the special relief process.

[146] Time Warner Opposition at 2-3.

[147] NCTA Opposition at 6 (citing House Report at 93).

lations, not tangentially related matter such as a reading list or sports scores. NCTA contends the test proposed by NAB is too broad and could include anything.[148]

49. In response to NCTA and Time Warner, Nielsen claims that the use of the *WGN* test could actually preclude the carriage of subtitles for the hearing impaired while including program schedules and news stories not related to the programming.[149] Nielsen asserts that not only are SID codes program-related, but also items such as Cues, which tell a broadcaster or cable system where to insert advertisements. Nielsen contends that these codes are integrally related to the identification of the programming for advertiser-supported broadcast television and are integrally related to the main-channel programming.[150]

50. We continue to believe that the factors articulated in *WGN* provide the best guidance for determining whether material in the VBI is program-related and, therefore, must be carried by the cable system.[151] Accordingly, material that is intended to be seen by the viewers of the main program, during the same time interval as the main program, and which is an integral part of the main program will be entitled to carriage along with the main signal of the must-carry station. However, on reconsideration, we clarify that the factors set forth in *WGN* do not necessarily form the exclusive basis for determining program-relatedness. WeXbelieve there will be instances where material which does not fit squarely within the factors listed in *WGN* will be program-related under the statute. For example, on reconsideration, although SID codes may not precisely meet each factor in *WGN*, we find that they are program-related under the statute because they constitute information intrinsically related to the particular program received by the viewer. Further, SID codes provide important information that is useful to both broadcasters and cable operators. We note that the 1992 Cable Act recognized the importance of the national ratings period and prohibited cable operators from repositioning or deleting stations during that time.[152] This interpretation is consistent with previous Commission decisions in which SID codes were found to be program related in other contexts.[153] Finally, we reiterate that, in order to be program-related, it is not necessary that the copyright holder in the main program and in the material in the VBI be the same.

2. Channel Positioning

51. The 1992 Cable Act provides both commercial and NCE television stations which elect must-carry status the additional right to select the channel position on which they will be carried by the cable system, within certain specified options.[154] Alternatively, the broadcast station and cable operator may agree on a mutually acceptable alternative channel position. We note that, with respect to channel position, a qualified LPTV station enjoys the channel positioning rights of a commercial television station. Section 76.57 is being revised accordingly.

52. Based on comments received in response to the *Notice*, we declined in the *Report and Order* to adopt a formal priority structure for resolving conflicting channel positioning claims.[155] We stated that we expected compliance with the channel positioning requests of broadcasters "absent a compelling technical reason for not being able to accommodate such requests," and that "inconvenience, marketing problems, the need to reconfigure the basic tier or the need to employ additional traps or make technical changes" would not be sufficient reasons to deny a channel positioning request.[156] In addition, we determined that "only where placement of a signal on a chosen channel results in interference or degraded signal quality to the must-carry station or an adjacent channel, or causes a substantial technical or signal security problem, will we permit cable operators to carry a broadcast signal on a channel not chosen by the station."[157] We noted that most systems would be able to configure their service to meet this statutory requirement and that a cable system claiming that it cannot meet a channel positioning request for technical reasons will have to provide evidence that clearly demonstrates that inability.

53. In the *Order* adopted July 15, 1993, we addressed certain issues relating to continued carriage of retransmission consent stations and the channel position for "default" must-carry stations.[158] In that *Order*, we stated that cable systems which are required to carry the signal of a default station "shall place that signal on one of the statutorily defined positions, at the system's discretion."[159] Although the footnote to that sentence correctly stated that the station licensee makes the election, the text incorrectly stated "at the system's discretion."[160] We clarify that, as required by the 1992 Cable Act, the choice of statutorily defined channel position is made by the station, not the cable system.[161] The *Order* also determined that, in the event of a conflict, the station making an affirmative election has priority over the default station.[162] Finally, we stated that, where the station making an affirmative election has selected the only statutory channel position available to the default station, the cable system may place the default station on a channel of the cable system's choice, so

---

148 *Id.* at 6-7.
149 Nielsen Petition at 2-3.
150 *Id.* at 4.
151 NAB's proposal for making a determination with respect to program-relatedness is broader than either the statute or the legislative history support.
152 *See* Section 614(b)(9); 47 U.S.C. § 534(b)(9).
153 *See* note 135.
154 Section 614(b)(6) provides that the signals of a local commercial television station carried pursuant to the must-carry rules must be carried on either (1) the same channel on which the station is broadcast over-the-air, (2) the cable channel on which it was carried on July 19, 1985, or (3) the cable channel on which it was carried on January 1, 1992. The election, in the absence of conflicts, is left up to the station involved. *See* 47 U.S.C. § 534(b)(6). Similarly, Section 615(g)(5) requires that NCE signals carried pursuant to must-carry requirements must appear on the cable system channel number on which the qualified local NCE station is broadcast over-the-air, or on the channel on which it was carried on July 19, 1985, at the election of the station. In either case, another channel number that is mutually agreed upon by the station and the cable operator may be selected. *See* 47 U.S.C. § 535(g)(5).
155 8 FCC Rcd at 2988.
156 *Id.*
157 *Id.*
158 8 FCC Rcd 5083 (1993).
159 *Id.* at 5084.
160 *Id.* at 5084 and n.14.
161 Section 614(b)(6); 47 U.S.C. §534(b)(6).
162 *Id.* at 5084.

long as that channel is included on the basic tier.[163] Section 76.57 of our rules was amended to reflect the channel positioning options discussed and adopted in the *Order*.[164]

54. NCTA requests a revision to our rules relating to on-channel carriage of UHF stations.[165] NCTA argues that UHF stations should not have on-channel carriage rights where the channel request is outside an operator's basic service tier. NCTA states that the Commission erroneously made the assumption that most cable systems could comply with the on-channel carriage requests of UHF stations by reconfiguring their basic service tier.[166] NCTA claims that this assumption ignores that, for many systems, reconfiguring can only be accomplished through significant expenditures of time and money, and that such reconfiguring conflicts with the ability of subscribers to "buy through" services offered on a per-program or per-channel basis.[167]

55. NCTA claims that providing on-channel carriage to a station outside the system's basic tier line-up entails significant operational and technical problems.[168] NCTA asserts that in order to isolate the UHF station, the cable operator must use filtering devices such as traps, and that, as the number of traps increase, systems experience technical signal quality problems which in turn make the system unable to comply with technical standards. Moreover, NCTA states, the costs of installing traps can be prohibitive, due to, for example, the need to replace all filters on each cable-connected television set in each home.[169] NCTA also claims that the on-channel requirements can cause problems on addressable systems. For instance, NCTA asserts, while a system could scramble all channels surrounding the UHF channel in order to enable basic-only subscribers access to all must-carry stations, it would be required to force expanded basic subscribers to obtain descrambling converter boxes in order to view tiered services that previously were protected by a filter trap.[170]

56. NAB and INTV object to NCTA's request to deny on-channel carriage to UHF stations.[171] NAB states that NCTA's alleged technical problems may, in some instances, make compliance difficult, but that NCTA's solution would preclude a UHF station from ever having on-channel carriage.[172] NAB asserts that the 1992 Cable Act creates an absolute right to channel position, making no distinction between UHF and VHF signals, and providing no technical difficulty exception.[173] NAB and INTV point out that UHF stations have historically had the worst channel position, and that few UHF stations will insist on a high on-channel carriage position far removed from other broadcast station channel positions.[174] In addition, NAB contends, where a cable system does have a severe technical problem, the Commission has already stated that it would grant a waiver. NAB asserts that while NCTA complains that the standard for obtaining a waiver is too high, it fails to explain why or to propose any alternative standard.[175]

57. The 1992 Cable Act provides that the channel position of a station which has elected must-carry rights is a decision to be made by the broadcaster from among the listed statutory alternatives.[176] The Act does not distinguish between VHF and UHF stations. We emphasize that our statements in the *Report and Order* regarding channel positioning apply to UHF, in addition to VHF, stations. As noted there, cable operators must comply with the channel positioning requirements absent a compelling technical reason.[177] Further, in response to a broadcaster scomplaint regarding denial of a channel positioning request, a cable system will be required to provide evidence to the Commission clearly demonstrating that the operator cannot meet the request for technical reasons.[178] As part of such a showing, a cable operator may present evidence as to the costs involved in remedying the technical problem.

3. Signal Quality

58. In the *Report and Order*[179] and the *Clarification Order*[180] we addressed issues relating to the signal quality of a broadcast station asserting must-carry rights. We noted that Section 614(h) established specific minimum signal levels for a good quality signal of a commercial television station (*i.e.*, -45 dBm for UHF signals and -49 dBm for VHF signals). Neither the 1992 Cable Act nor the Commission's *Orders* specifically stated what would be considered a "good quality signal" for must-carry purposes with respect to noncommercial stations, educational translator stations, and low power television stations.[181] We do so now, on our own motion.

59. We note that in a *Memorandum Opinion and Order*,[182] the Mass Media Bureau decided to utilize the standards for commercial television stations as *prima facie* tests to initially determine, absent other evidence, whether noncommercial stations place adequate signal levels over a

---

[163] *Id.* at n.16.
[164] *See* 47 C.F.R. § 76.57(e).
[165] NCTA Petition at 8-12.
[166] *Id.* at 9.
[167] *Id.* at 9, 11. NCTA is referring to the requirement in Section 3 of the 1992 Cable Act which provides that subscribers to the basic tier should be permitted to purchase pay-per-view or per-channel services without being required to purchase intermediate tiers of service. *See* 47 U.S.C. § 543(b)(8); Report and Order , 8 FCC Rcd 2274 (1993) ("Tier Buy-Through Order").
[168] NCTA Petition at 9-10.
[169] *Id.* at 10.
[170] *Id.* at 10-11. *But see supra* para. 16, relating to the cost to subscribers for converter boxes provided for the sole purpose of obtaining must-carry signals.
[171] NAB Opposition at 1-3; INTV Opposition at 5.
[172] NAB Opposition at 2.
[173] *Id.*
[174] *Id.* at 3; INTV Opposition at 5.
[175] NAB Opposition at 3; INTV Opposition at 5.
[176] Section 614(b)(6); 47 U.S.C. § 534(b)(6).
[177] 8 FCC Rcd at 2988. As noted above, inconvenience, marketing problems, the need to reconfigure the basic tier or to employ additional traps or make technical changes are not sufficient reasons for denying the channel positioning request of a must-carry signal. Only where placement of a signal on a chosen channel results in interference or degraded signal quality to the must-carry station or an adjacent channel, or causes a substantial technical or signal security problem will we permit cable operators to carry a broadcast station on a channel not chosen by the station. *Id.*
[178] *Id.*
[179] *Id.* at 2988-91.
[180] 8 FCC Rcd at 4144.
[181] Section 615(g)(4) states that the Commission may define a "signal of good quality" for noncommercial stations.
[182] *See Memorandum Opinion and Order* (Independence Public Media of Philadelphia, Inc. against Suburban Cable TV Co., Inc.) (CSR-3806-M), 8 FCC Rcd 6319 (1993).

cable system's principal headend.[183] The Mass Media Bureau has relied on this test in processing must-carry complaint cases and we believe that is appropriate. With respect to low power and NCE translator stations, we are adopting the same signal quality standard of -49 dBm for VHF and -45 dBm for UHF signals.

60. With respect to the manner of testing for a good quality signal, we find that the Mass Media Bureau has adopted an appropriate method for measuring signal strength in the *Memorandum Opinion and Order*.[184] Generally, if a test measuring signal strength results in an initial reading of less than -51 dBm for a UHF station, at least four readings must be taken over a two-hour period. If the initial readings are between -51 dBm and -45 dBm, inclusive, readings must be taken over a 24-hour period with measurements not more than four hours apart to establish reliable test results. For a VHF station, if the initial readings are less than -55 dBm, we believe that at least four readings must be taken over a two-hour period. Where the initial readings are between -55 dBm and -49 dBm, inclusive, readings should be taken over a 24-hour period, with measurements no more than four hours apart to establish reliable test results.[185]

61. Cable operators are further expected to employ sound engineering measurement practices. Therefore, signal strength surveys should, at a minimum, include the following: (1) specific make and model numbers of the equipment used, as well as its age and most recent date(s) of calibration; (2) description(s) of the characteristics of the equipment used, such as antenna ranges and radiation patterns; (3) height of the antenna above ground level and whether the antenna was properly oriented; and (4) weather conditions and time of day when the tests were done. We believe that adherence to these procedures and requirements will result in fewer disputes over the signal quality of broadcasting stations.[186]

D. Procedural Requirements

1. Compensation for Carriage

62. *Copyright Liability*.[187] Under the 1992 Cable Act, a cable operator is generally not required to carry a station that would otherwise qualify for must-carry status if the station would be considered distant for copyright purposes,[188] unless the station indemnifies the cable operator for its copyright liability.[189] The Commission required cable operators to notify local commercial and noncommercial stations by May 3, 1993 that they may not be entitled to must-carry status because their carriage may cause an increased copyright liability.[190] In the *Report and Order*, the Commission stated that it expected cable operators and broadcasters to cooperate with each other to ensure that operators are compensated for the cost of carriage of "distant" must-carry signals and that broadcast licensees pay only their fair share.[191] The Commission stated that each licensee should be responsible for the increased copyright costs specifically associated with carriage of its station as a must-carry signal and that stations should be counted in the order they satisfy all the necessary conditions for attaining must-carry status. The Commission also determined that it would be reasonable for a cable operator to receive a written commitment for such payments from a broadcaster in return for an estimate of the broadcaster's expected copyright liability, based on previous payments and financial information.

63. On May 28, 1993, the Commission adopted a *Clarification Order* ("Clarification") that, among other things, addressed certain copyright issues.[192] We stated that we would require a cable operator to provide a broadcast station with a good faith estimate of the potential copyright liability for carriage of the station during the next copyright accounting period, as well as a copy of the most recent form filed with the Copyright Office for existing distant signal carriage that details the payments made for carriage of distant signals. The cable operator, however, is not required to make legal judgments pertaining to the amount of indemnity involved. In addition, a cable operator is required to provide such information within three business days of receipt of a written request from a broadcaster.[193] Any cable operator not providing sufficient in-

---

[183] *Id.* 6

[184] *See id.* We note that these standards have been followed by the Cable Services Bureau.

[185] *Id.*

[186] *Id.* at 6319-20.

[187] We note that the Satellite Home Viewer Act of 1994, P.L. 103-369, 108 Stat. 3477, which was signed into law on October 18, 1994, includes a provision to amend Section 111(f) of title 17, United States Code, specifically with reference to the definition of "local service area of a primary transmitter" by inserting after "April 15, 1976," the following: "or such station's television market as defined in section 76.55(e) of title 47, Code of Federal Regulations (as in effect on September 18, 1993), or any modifications to such television market made, on or after September 18, 1993, pursuant to section 76.55(e) or 76.59 of title 47 of the Code of Federal Regulations,". We acknowledge that there may be some effect on pending petitions and on our current rules. We will revisit, to the extent necessary, those rules and policies which may be affected.

[188] *See* Copyright Act, 17 U.S.C. § 111.

[189] Sections 614(b)(10) and 615(i)(2). However, a qualified local noncommercial station that has been carried continuously since March 29, 1990 is not required to reimburse a cable operator for its copyright liability to retain its must-carry status. *See* 47 C.F.R. §§ 76.55(c)(2) and 76.60(b). In addition, a distant noncommercial station that has been imported prior to March 29, 1992, and which continues to be imported to meet the statutory requirements of Section 615, shall not be required to reimburse for copyright liability. *See* supra para. 7, regarding the importation requirements; *see also* 47 C.F.R. §§ 76.55(b)(3), 76.55(c)(2), and 76.60.

[190] *See* 47 C.F.R. § 76.58(d).

[191] 8 FCC Rcd 2993. We clarify that, in situations where copyright liability is incurred for carriage in some of the communities served by a single cable system, the broadcaster must indemnify the operator for that copyright liability for carriage in any community served by the system, unless the operator is able to provide different channel line-ups to the different communities.

[192] 8 FCC Rcd 4142 (1993).

[193] 8 FCC Rcd at 4144. In its opposition, Time Warner argues that cable operators should be given at least seven days, not three, to respond to any requests for information regarding copyright liability. Time Warner Opposition at 7. We reject

formation to a broadcast station regarding potential copyright liability in the required timely fashion may be subject to Commission sanctions.

64. In their reconsideration petitions, NAB and INTV state that we should not require that agreements for copyright reimbursement be open ended, rather parties should be permitted to limit such agreements to one or more semi-annual accounting periods.[194] Petitioners argue that any requirement that agreements to indemnify for copyright cover the entire three-year election period may force broadcasters to pay costs that they do not wish to, especially if the copyright liability changes for some unforeseen reason.[195] NAB specifically proposes that broadcasters be required to make a minimum one-year commitment, with a notice of at least 60 days prior to the next semi-annual accounting period before indemnification can be terminated.[196] Cable interests reject the proposal to allow agreements for less than the entire three-year election period.[197] They contend that the broadcasters' approach is contrary to the statutory scheme that is based on a three-year election period. Furthermore, NCTA asserts that to allow shorter agreements essentially allows a station to change its election to retransmission consent.[198] In its reply, NAB counters that its recommendations regarding the commitment for indemnification is consistent with the decision in the *Clarification* that the three-year election period has no bearing on when a station is able to take steps necessary to secure its must-carry rights.[199]

65. We concur with INTV and NAB that stations should be able to commit to copyright indemnification for periods shorter than the three years specified in the 1992 Cable Act. In light of the numerous factors that affect the liability payments, we believe that commitments can be for periods as short as one year (two six-month accounting periods). Otherwise, a station may be required to make a commitment that cannot be fulfilled, thereby leading to protracted litigation. However, in fairness to cable operators, we support NAB's proposal that broadcasters notify cable operators 60 days prior to termination of any agreements to indemnify them for copyright liability. In particular, this will provide sufficient time for cable operators to notify subscribers regarding the deletion of the station.[200] Further, we disagree with NCTA that to permit agreements for periods of less than three years essentially allows stations to revert to retransmission consent. A station electing must-carry status remains a must-carry station for the entire three-year period, but, in situations where the station is considered distant for copyright purposes, a cable operator is not obligated to honor that election unless it receives a commitment for copyright reimbursement. Further, we note that where a station does not initially meet the criteria for must-carry status, it subsequently may assert its rights once it satisfies the conditions for must-carry status.[201]

66. In a related matter, NAB requests that cable operators provide broadcasters with advance notice of any actions, such as retiering, that may affect the copyright liability before the broadcaster is required to enter into an indemnification agreement.[202] Time Warner states that the requirement that cable operators inform stations of plans that might affect copyright liability has no basis in law and that the requirement of an estimate of liability should be sufficient.[203] United Video opposes such a requirement because many of the changes that affect copyright liability are not predictable.[204]

67. NAB further asks for a clarification that a station need not agree to indemnify a cable system unless and until copyright liability actually is incurred. NAB claims that some cable operators are requesting commitments for indemnification should such liability be incurred at any time during the three-year election period, even though there is no copyright liability for carriage of the station at this time.[205]

68. We find it appropriate to require cable operators to notify a broadcaster of any change in service that will have an unexpected change on the amount of copyright reimbursement that will be required to maintain its must-carry status.[206] We believe it is reasonable to expect a cable operator to inform a must-carry station when the estimated cost of continued carriage may change. We also agree with NAB that it is inappropriate for broadcasters whose stations do not cause a copyright liability for the cable system to be required to commit to indemnification before such liability is actually incurred. In both cases, a change in a station's potential copyright liability may affect its decision whether to retain its must-carry status by indemnifying the cable operator or to cede its must-carry rights. Accordingly, we will require cable operators to notify broadcast stations at least 60 days prior to any unexpected change on their copyright status. This will allow sufficient time for the station to determine whether it wishes to continue carriage and, if not, it will give the cable operator enough time to send out the required notice of deletion of a signal. However, the broadcast station must indemnify the cable operator for costs incurred during that copyright accounting period, but not for additional costs once the broadcaster has notified the cable operator that it will discontinue must-carry status in light of changes proposed, but not yet effectuated, by the cable operator.

69. *Calculation of station liability.* INTV and NAB request clarification regarding the method for determining the incremental copyright liability attributable to a particular

---

Time Warner's proposal and note that in the *Clarification* we observed that the information that must be provided to broadcasters should be readily available to the cable operator. 8 FCC Rcd at 4144.

194 NAB Petition at 10; INTV Petition at 5.

195 INTV Petition at 2-3; NAB Petition at 10.

196 NAB Petition at 10.

197 NCTA Opposition at 2; Time Warner Opposition at 7-8; United Video Opposition at 5.

198 NCTA Opposition at 2.

199 NAB Reply at 2-3.

200 *See* 47 C.F.R. § 76.58. We note that this rule also requires notification of the affected broadcast station, although in such instances the deletion will be at the request of the broadcaster.

201 *See* 8 FCC Rcd 4142.

202 NAB Petition at 9-10.

203 Time Warner Opposition at 9.

204 United Video Opposition at 4.

205 NAB Reply at 4.

206 For example, as petitioners point out, there are some circumstances where a permitted signal subject to a .563% royalty rate may become a penalty station and require a payment of 3.75% of the system's gross revenues. *See* NAB Reply at 3.2

station.[207] NAB proposes a method for averaging rates over affected stations as a way to prevent cable operators from manipulating the copyright liability associated with a particular station.[208] Under NAB's approach, if more than one local station is carried pursuant to a reimbursement agreement, and none is carried at the 3.75% penalty rate, the lowest marginal royalty rates paid for the total number and types of non-3.75% stations should be added and then divided among those stations in proportion to their distant signal equivalent values.[209] Thus, each station will reimburse the system for the average rate paid for the entire group of permissible (non-3.75%) distant stations, and the system will be reimbursed for the entire amount of royalties paid for carriage of these stations. NCTA and Time Warner oppose NAB's proposed formula.[210] In particular, NCTA states that each distant station's share is a function of a statutorily established formula, and therefore an operator cannot manipulate the process. NCTA is also concerned that cable operators will not be fully reimbursed if this methodology is used. To avoid protracted disputes, NCTA argues that the cable operator must be able to designate which distant signal accounts for which incremental cost. United Video supports the decision in the *Report and Order* to calculate the incremental copyright fees on the basis of the royalty fee associated with the last added distant signal.[211] It and Time Warner explain that most stations that are added will be subject to the 3.75% penalty rate since cable operators are already carrying the maximum number of distant signals permitted at the lower rate.[212]

70. We indicated in the *Report and Order* that increased copyright liability should be specifically associated with the carriage of each station and further that "stations should be counted in the order they satisfy all the necessary conditions for attaining must-carry status."[213] However, this statement does not accurately reflect the reality of copyright liability, nor does it adequately address the concern that cable operators may have the ability to manipulate the liability of stations which have been historically carried on the system, or which are added pursuant to must-carry.[214] We note that NAB is correct in stating that the copyright liability is determined according to the sequence by which the signal is added to the system.[215] Section 111(d) of Title 17 provides the method for calculating copyright royalties to be paid by a cable system. In addition, the copyright rules provide specific information regarding statements of account and methods of computation for the payment of copyright royalties.[216] We agree with NCTA that the copyright rules determine the manner in which the cable operator will have to pay royalties for each station carried.

71. In an effort to eliminate confusion in making the determination of increased liability associated with each station, we believe that stations which were carried prior to the implementation of must-carry should continue to be accounted in the same manner with respect to the sequence of signal carriage. Stations which were or are added by the system should have their copyright liability based on the sequence by which the signal was or is added to the system. In the event multiple signals are added on the same day, the sequence of incremental increase in liability should be based on the order in which the stations met all necessary conditions for attaining must-carry status. We anticipate that providing the station with the statement of account filed with the Copyright Office will ensure the station the opportunity to review how this process is achieved. Therefore, we decline to adopt an alternative system for determining the copyright liability of individual stations' carriage on a cable system.

72. The Commission's must-carry requirements became effective on June 2, 1993, during a Copyright Office accounting period.[217] INTV argues that stations should be required to pay no more than a *pro rata* share of the first accounting period for carriage between June 2 and June 30.[218] NCTA and Time Warner oppose this approach and state that the Copyright Office does not allow prorations of such payments and therefore stations should bear the full cost of carriage for the entire six-month period.[219] Specifically, Time Warner observes that for a must-carry station that was added on June 2, the copyright liability is calculated as though the station were carried for the entire period.[220] INTV, in its reply, contends that NCTA and Time Warner misinterpret its *pro rata* approach. It states that it was referring only to situations where the cable operator carried the signal prior to June 2 without regard to reimbursement. In such cases, INTV argues that the cable operator should not be entitled to a windfall from the station.[221]

73. Prior to the implementation of the must-carry rules, carriage of any station was at the discretion of the cable operator. In such cases, the cable operator carried such a signal even though it incurred a copyright liability for the period ending June 30, 1993. That liability did not increase due to a change in our regulations for stations which had previously been carried, and therefore the liability had already been assumed. We do not believe it appropriate to require the broadcast station to reimburse for that liability, even if carriage became mandatory on June 2, 1993. However, with respect to a broadcast station which was not previously carried by the cable system and which immediately asserted its must-carry rights on June 2, 1993, we believe that such station should reimburse the cable operator for any increased copyright liability incurred as a

---

[207] INTV Petition at 7; NAB Petition at 11-12.
[208] NAB Petition at 11-12; NAB Reply at 5-7.
[209] NAB notes that its proposal does not deal with signals which are currently being carried for which a 3.75% royalty rate is incurred. NAB Petition at 12.
[210] NCTA Opposition at 3-4; Time Warner Opposition at 9-10.
[211] United Video Opposition at 1.
[212] *Id.* at 3; Time Warner Opposition at 10.Z
[213] 8 FCC Rcd at 2993.
[214] NAB Petition at 11; United Video Petition at 1-3.
[215] NAB Petition at 11.
[216] *See* Statements of Account Covering Compulsory Licenses for Secondary Transmission by Cable Systems, 37 C.F.R. § 201.17.
[217] 47 C.F.R. § 76.56(b). The Copyright Office divides the year into two accounting periods -- January 1 to June 30 and July 1 to December 31.
[218] INTV Petition at 5.
[219] NCTA Opposition at 2; Time Warner Opposition at 10-11.
[220] Time Warner Opposition at 10.
[221] INTV Reply at 1-2.

result of adding that signal between June 2, 1993 and June 30, 1993. Therefore, in the case of a station that agreed to be added on June 2 and committed to indemnification, the station is responsible for the whole semi-annual fee. In particular, the station had the opportunity to postpone satisfying the conditions of must-carry status until the first day of the next Copyright Office accounting period.

74. INTV seeks to establish a rebuttable presumption that all stations are significantly viewed throughout their ADIs. It argues that this option would not alter the 1976 signal carriage rules, but would eliminate the copyright liability for carriage of such stations.[222] Time Warner and NCTA oppose this proposal because it would defeat the intent of the 1992 Cable Act to exclude from must-carry those stations that are considered distant for copyright purposes. In addition, petitioners assert that this proposal improperly shifts the burden to cable operators to rebut the presumption.[223] In its reply, INTV claims that NCTA and Time Warner offer no valid reason for rejecting its proposal to presume a station is significantly viewed throughout its ADI. It also argues that, since parties would only come to the Commission to rebut the significantly viewed status of a station, the argument regarding the potential administrative burden is speculative.[224]

75. We recognize that there may be some merit in considering alternative procedures for addressing significant viewing showings and that there may be both policy and efficiency reasons for attempting to parallel ADI and significant viewing service area decisions. The INTV proposal, however, is in our view sufficiently novel that it is not appropriately considered in the context of this proceeding. This is particularly the case since the significant viewing process has ramifications in terms of other rules, such as the network nonduplication rules, that are not the subject of this proceeding.[225]

2. Remedies

76. Section 615(d)(1) and Section 615(j) provide for the resolution of carriage and channel positioning disputes between a broadcast station and a cable operator. With respect to commercial stations, the 1992 Cable Act requires a local commercial station to notify the cable operator of an alleged violation, and requires the cable operator to respond to such a notice, prior to the station's filing a complaint with the Commission. However, with respect to NCE stations, the 1992 Cable Act permits a NCE station to file a complaint with the Commission prior to notifying the cable operator. In the *Report and Order* we discussed these provisions and adopted rules for their implementation.[226] Upon review of those rules, we find it necessary to make some adjustments on our own motion, as they relate to the filing of a complaint by a NCE station.

77. As indicated above, a NCE station is not required to notify a cable operator prior to filing a complaint with the Commission. In the *Report and Order*, we stated that "it is anticipated, though not required, that if there is any question relating to the carriage obligations of the cable system, the NCE station will make inquiries of the cable system prior to filing a complaint."[227] We also stated that if a NCE station wanted to follow the procedures outlined for complaints filed by a commercial broadcasting station, it could do so as long as it notified the cable system of such intent. In establishing the - time frames by which any broadcaster (commercial, noncommercial or LPTV) should file a complaint, we stated that such complaint should be filed within 60 days of an "affirmative action" by a cable operator which directly affects the carriage rights of a broadcast station.[228] We then proceeded to define "affirmative action" as the denial by a cable operator of a request for either carriage or channel position, or the failure of a cable system to respond to such a demand within the required 30-day time frame.[229] It appears that by establishing such a 60-day requirement based upon an "affirmative action," we have made the complaint procedure for NCE stations more rigorous than was intended, either by our rule or the intent of the 1992 Cable Act. Therefore, for the purposes of a NCE station complaint, we are revising Section 76.7 to allow a NCE station to file a complaint at any time it determines that its carriage rights have been violated. We believe this better reflects the language of the 1992 Cable Act and will eliminate the possibility that a NCE complaint would be dismissed based solely on a failure to meet the 60-day time frame, prior to having the merits of the complaint considered.

III. RETRANSMISSION CONSENT

A. Definition Issues

1. Multichannel Video Programming Distributors.

78. Section 325(b)(1) provides that "no cable system or other multichannel video programming distributor shall retransmit the signal of a broadcasting station, or any part thereof, . . . " except with express authorization of the station or if carried pursuant to must-carry.[230] Section 602(12) of the Communications Act defines a multichannel video programming distributor as "a person such as, but not limited to, a cable operator, a multichannel multipoint distribution service (MMDS), a direct broadcast satellite service, or a television receive-only satellite program distributor, who makes available for purchase, by subscribers or customers, multiple channels of video programming."[231]

79. In the *Report and Order* we found that "local broadcast signals provided by MATV facilities or VHF/UHF antennas on individual dwellings situated within the station's broadcast service area are not subject to retransmission consent, provided that these signals are available without charge at the resident's option."[232] We further stated that this exemption applies to MATV-

---

222 INTV Petition at 6.
223 NCTA Opposition at 2-3; Time Warner Opposition at 13.
224 INTV Reply at 5.
225 *See also* discussion at n.187, *supra,* with respect to the amendment to Section 111(f) of title 17 of the United States Code.
226 *See* 47 C.F.R. § 76.7, relating to the filing of petitions for special relief.
227 8 FCC Rcd at 2994.
228 *Id.* at 2995.
229 *Id.*
230 Section 325(b)(1); 47 U.S.C. § 325(b)(1).
231 Section 602(12); 47 U.S.C. § 522(12).
232 8 FCC Rcd at 2997.

SMATV, MMDS-SMATV and MMDS-individual antenna combinations, so long as there is no charge. The analogy used was that of an individual purchasing and installing a roof top antenna to receive broadcast signals.[233] This exception to retransmission consent was added to the Commission's rules as Section 76.64(e).[234] The determining factor used in the rule relates to antenna ownership, not the provision of the service free-of-charge.

80. The Wireless Cable Association ("WCA") contends that the Commission should eliminate the requirement that the wireless cable operator must divest itself of ownership and control of the VHF/UHF antenna in order to avoid retransmission consent obligations.[235] WCA claims that wireless cable operators provide service to individual homes and multiple dwelling units through a combination of a standard VHF/UHF antenna on the same mast as a microwave antenna and that wireless operators generally offer the VHF/UHF antenna as an amenity to ensure that all of the signals received by the subscriber are of the highest quality. Further, explains WCA, such operators generally do not charge for the provision of this service to the extent that, in multiple dwelling units, all residents (including non-subscribers) receive the local broadcast signals over the VHF/UHF antenna supplied by the wireless cable operator. With respect to single family homes, WCA states that the wireless operator does not charge for the antenna and the operator retains ownership so that if the subscriber terminates service, both the VHF/UHF antenna and the microwave antenna are recoverable and may be reused.[236]

81. WCA argues that the ownership or control of the antenna should not be the determining factor as to whether retransmission consent must be obtained. WCA proposes instead that as long as the broadcast signals are provided free-of-charge over a VHF/UHF antenna, then the ownership of the antenna should not matter.[237] WCA, in its motion for a stay, pointed to the unintended effects of the existing rule. WCA claims that where a wireless operator has obtained retransmission consent from all but one local broadcaster, that broadcaster's refusal will effectively negate the consent of all other broadcasters.[238] The wireless operator would immediately be forced to disable or retrieve all of the VHF/UHF antennas in the field. Without the ability to provide common VHF/UHF antenna service to homeowners, even without a charge, to improve reception of local broadcast signals, the wireless cable operator will be unable to effectively compete in the marketplace. Alternatively, if the operator must immediately transfer the ownership and control of the antennas to each individual subscriber, at a significant financial loss to the operator, such operator will be unable to reuse such equipment. If the subscriber is asked to pay the operator for the antenna, WCA claims that most subscribers will discontinue service.

82. Cable operators oppose WCA's request, claiming that such a revision to the rule would create a loophole for wireless cable operators to avoid the retransmission consent provisions entirely. NCTA states that a wireless operator could simply structure its billing in such a way as to indicate that no charge was made to the subscriber for the receipt of broadcast signals, and the operator would be exempt from the provisions.[239] Time Warner argues that the legislative history clearly shows that all multichannel distributors are required to obtain consent, and there is no indication that MMDS operators should be given any special treatment. Time Warner states that Congress intended that a viewer who owns his own antenna is very different from the viewer who receives the signal through an antenna owned by the MMDS operator.[240] In the latter case, the MMDS operator is acting in the same capacity as a traditional cable service. NCTA argues that we should not allow "MMDS operators to gain a competitive advantage over cable systems and take themselves outside the constraints of retransmission consent," and that such action can not be "squared with the [1992 Cable] Act and should not be adopted."[241]

83. We agree with NCTA and Time Warner that a wireless operator meets the definition of a multichannel video programming distributor ("MVPD") and generally would be responsible for obtaining retransmission consent for all broadcast signals retransmitted over their system. We are cognizant of Congress' desire not to affect a viewer who receives these broadcast signals over an antenna not owned by a MVPD.[242] The application of the retransmission consent requirement to MMDS and SMATV facilities was an effort to create regulatory parity between these types of operations and cable systems. In the *Report and Order,* the Commission expressed its belief that to the extent the signal reception involved was under the control of the individual subscriber and the signals involved were not being "sold" by the MMDS and SMATV operators, the consent requirement should not apply. In addition, and in recognition of the concerns raised by WCA, we find that retransmission consent is not required if the broadcast signal reception service is received without a separate subscription charge and the antenna is either (1) owned by the subscriber; or (2) under the control of the subscriber and available for purchase by the subscriber upon termination of service. We believe that this interpretation upholds Congressional intent without causing undue disruption to subscribers. We will amend Section 76.64(e) of our rules to reflect this change.

---

[233] *Id.*

[234] 47 C.F.R. § 76.64(e) states that "[p]rovision of local broadcast signals by master antenna television (MATV) facilities or by VHF/UHF antennas on individual dwellings is not subject to retransmission consent, provided that these signals are available without charge at the residents' option. That is, the antenna facilities must be owned by the individual subscriber or building owner and not under the control of the multichannel video programming distributor." On October 5, 1993, at the request of the Wireless Cable Association ("WCA") and the National Private Cable Association ("NPCA"), we adopted a *Stay Order* with respect to Section 76.64(e), pending our resolution of this issue. *Stay Order,* 9 FCC Rcd 2678.

[235] WCA Petition at 3.

[236] *Id.* at 5-7.

[237] *Id.* at 8-9.

[238] *Id.* at 3 n.5.

[239] NCTA Opposition at 9.

[240] Time Warner Opposition at 15-16 (citing Senate Committee on Commerce, Science and Transportation, S. Rep. No. 92 ("Senate Report"), 102d Cong., 1st Sess. (1991) at 34).

[241] NCTA Petition at 8-9.

[242] *See* Senate Report at 36.

B. The Scope of Retransmission Consent

1. Radio

84. In the *Report and Order* we concluded that Congress intended to provide retransmission consent to all broadcast signals, including those retransmitted by radio.[243] Petitions for reconsideration argue that the retransmission consent provisions of Section 325 and the must-carry provisions of Sections 614 and 615 were intended to work in concert and, therefore, because the must-carry provisions apply only to broadcast television signals, Congress intended retransmission consent to apply only to broadcast television signals.[244] Cable operators argue that most cable systems carry radio stations as an all-band offering, meaning that as with any standard radio receiver, all stations which deliver a signal to the antenna are carried on the system. They contend that the refusal of one radio station to grant consent would preclude all other radio stations from being carried in the all-band method. Several commenters assert that cable operators are more likely to drop the all-band radio offering, rather than attempt to bargain for retransmission consent from all stations carried.[245]

85. We continue to believe that Section 325, as amended by the 1992 Cable Act, applies to radio signals as well as television signals. The statutory language and the legislative history support this conclusion and we have not been presented with a credible argument for reading the statute otherwise.[246] Section 325(b)(2) expressly exempts certain broadcast stations from the consent provision, and radio stations are not included in these exceptions.[247] However, with respect to the difficulty of obtaining consent for all stations carried in an all-band method, we believe that cable systems have a legitimate concern. In order to make possible the offering of an "all-band" FM radio service, cable operators need only seek the consent of stations within the usual reception area of a high power FM station. Therefore, cable systems must obtain consent from all stations which are located within 92 km (57 miles) of the cable system's receiving antenna(s).[248] Other stations, in the absence of specific notice to the contrary, will be presumed to be insufficiently present to be considered carried in the all-band reception mode. This should eliminate concern over obtaining consent from signals which fade in and out of an all-band offering due to atmospheric conditions.[249] Alternatively, a cable system may choose to use a filtering device to eliminate those radio stations from an all-band offering for which the cable operator is unable or unwilling to obtain consent. This change will be reflected in Section 76.64 of our rules, under a new subpart (n).

2. Low Power Television Stations

86. In concluding in the *Report and Order* that low power television stations are entitled to retransmission consent, we stated that low power television stations are "television broadcast stations."[250] We incorrectly stated, however, that a low power station meets the definition of television broadcast station in Section 76.5 of our rules. Section 76.5(b) defines television broadcast station as "any television broadcast station operating on a channel regularly assigned to its community by § 73.606 of this chapter . . . ." A low power television station, defined in Section 74.701(f), however, is authorized under subpart G of Part 74 of our rules. However, we continue to believe that the statute was clear that low power television stations are entitled to assert retransmission consent over their signals.

3. Exceptions to the Retransmission Consent Requirement

87. Section 325, as amended by the 1992 Cable Act, provides four exceptions to retransmission consent. Section 325(b)(2) states that retransmission consent shall not apply to the retransmission of NCE stations, retransmission directly to a home satellite antenna, the retransmission of the broadcast signal of a network directly to a home satellite antenna of an unserved household, or the retransmission of the signal of a superstation if such signal was obtained from a satellite carrier and the originating station was a superstation on May 1, 1991.[251] Petitions for reconsideration have been filed regarding the interpretation of the fourth exception.

88. On May 26, 1993, the Commission adopted an *Order* denying a Request for Stay submitted by Yankee Microwave, Inc. ("Yankee").[252] In subsequent pleadings Yankee requested reconsideration of that *Order,* or alternatively, the immediate grant of its petition for reconsideration. Yankee sought relief, on behalf of its cable system customers, from the provision of Section 76.64(b)(2) regarding the superstation exception. Alternatively, Yankee requested revision of that section of our rules so it would apply to microwave carriers of a superstation signal, as well as to satellite carriers of such a signal. By *Order* of the Chief, Mass Media Bureau, a temporary waiver was granted to Yankee upon a finding by the Bureau that Yankee would suffer irreparable harm if the provisions of the rule were enforced prior to our decision on the pending petitions for reconsideration.[253] On October 5, 1993, the Mass Media Bureau adopted an *Order* which denied a similar request filed by EMI, Inc. ("EMI") primarily based on that party's lack of a showing of imminent harm.[254] We now address the requests and oppositions raised by parties to this proceeding.

---

[243] 8 FCC Rcd at 2998.

[244] CATA Petition at 7-8; Newhouse Broadcasting Petition at 8-10; United Video Opposition at 5-6. Time Warner supports these requests.

[245] CATA Petition at 7-8; United Video Opposition at 5-6.

[246] *See* Senate Report at 34-36.

[247] Section 325(b)(2); 47 U.S.C. § 325(b)(2).

[248] The distance of 92 km was selected as a result of the Commission's allotment policies relating to FM radio stations. Because the predicted service contour of a Class C FM radio station is 92 kilometers, the use of such a distance will ensure that retransmission consent is obtained from FM radio stations received by the cable system's receiving antenna(s). *See* 47 C.F.R. § 73.211.

[249] We note that although the cable operator is not required to obtain retransmission consent from stations outside the 92 km zone, any such station that is received and retransmitted by the cable system may affirmatively refuse to grant, or negotiate for compensation in return for granting, retransmission consent to the cable operator.

[250] 8 FCC Rcd at 2998.

[251] *See* Section 325(b)(2); 47 U.S.C. § 325(b)(2); 47 C.F.R. § 76.64(b)(2).

[252] 8 FCC Rcd 3938 (1993).

[253] *Order,* 8 FCC Rcd. 6248 (1993).

[254] Order, 8 FCC Rcd 7583 (1993).

89. In the *Report and Order* we rejected arguments that the retransmission consent requirement should not apply to superstation signals delivered via terrestrial means such as microwave.[255] Petitions for reconsideration argue that the effect of the rule is to unfairly discriminate in favor of satellite carriers to the detriment of alternative delivery methods such as microwave. Newhouse argues that the Commission has "elevated form over substance" in its interpretation of the superstation exception.[256] These petitions for reconsideration refer to the inclusion of the words "or common carrier" in the Senate version of the statute, claiming that although there is no indication why these words were dropped from the final version of the bill, the failure to include them does not evidence an intent by Congress to discriminate against microwave carriers in the manner that has resulted.[257] Yankee submits that Congress left room for interpretation of the statute, in a manner consistent with the intent and purpose of the 1992 Cable Act, where failure to do so would have effects contrary to the stated purpose of the Act.[258] Specifically, the parties point to Section 623(b)(7)(A)(iii) of the 1992 Cable Act which excepts from carriage on the basic tier those broadcast signals "secondarily transmitted by a satellite carrier beyond the local service area of such station."[259] According to Newhouse, in order to make these provisions consistent with one another, it is the emphasis on secondary transmission by satellite which should control, not the manner of delivery of such a satellite signal. NCTA states that there is no public interest justification for exempting superstations delivered by satellite but not those delivered by microwave.[260]

90. No party has objected to this request or filed comments, other than WSBK, Boston, which stated that it did not object to the transmission via microwave of its signal outside the local market of its station.[261] We are persuaded by commenters that the unintended effect of the rule is to unfairly discriminate against alternative methods of delivery of a superstation signal. We believe, consistent with the stated purpose and intent of the 1992 Cable Act, that it is the delivery of satellite signals, not the manner of delivery which should be excepted from the retransmission consent requirement. In other words, if a superstation meets the definition of "superstation" contained in the Copyright Act, then the manner of delivery of such a signal shall not control. However, as discussed more fully below, the exception will only apply to delivery of such a superstation signal outside the local market of the station.

91. *Rights of superstations within the local market.* Section 614 defines a local commercial broadcast station as any full power commercial television broadcast station licensed by the Commission that is located in the same television market as the cable system. As long as the local commercial broadcast station delivers a good quality signal and agrees to indemnify the cable system for any additional copyright liability, the station is entitled to must-carry rights within the local market. Otherwise, that station has the right, pursuant to Section 325(b)(4)-(5), to elect retransmission consent. Section 325 states that the term "superstation" shall be defined according to Section 119(d) of Title 17 of the United States Code. Section 119(d) of Title 17 defines a superstation as "a television broadcast station other than a network station, licensed by the Federal Communications Commission that is secondarily transmitted by a satellite carrier."[262] Tribune Broadcasting Company, INTV, Chris-Craft, WSBK License, Inc. and Turner Broadcasting System, Inc. request that the Commission affirm that for purposes of electing between must-carry or retransmission consent, a superstation is a local commercial station for any cable system located in the same market, and that as such, these stations may elect either must-carry or retransmission consent status within the local market.[263] Consequently, these parties argue that such a signal should not be retransmitted within the local market without consent (unless carried pursuant to must-carry), whether the retransmission occurs over-the-air or via satellite. The parties agree that outside the local market, the superstation may not assert retransmission consent for the receipt of its signal via satellite or other common carrier (such as microwave delivery). Alternatively, Time Warner asserts that no superstation has any rights in or out of its local market, as long as the signal is received via satellite. Time Warner would deny must-carry and retransmission consent to these stations as long as they meet the definition of a superstation.[264]

92. We believe that Congress intended for all local commercial broadcast stations to have the option to assert either must-carry or retransmission consent within their individual market. These local commercial broadcast stations do not become superstations until such time as they are retransmitted via satellite outside their market, an activity unrelated to their status as local commercial broadcast stations within their market. Therefore, such local commercial stations retain the right to elect between must-carry and retransmission consent within their market.

C. Must-Carry/Retransmission Consent Election and Implementation

93. Section 325(b)(3)(B) provides that television stations must make an election between must-carry and retransmission consent "within one year after the date of enactment" and every three years thereafter. In the *Report and Order* we established the implementation of these provisions indicating that the initial election for must-carry or retransmission consent must be made by June 17, 1993.[265] We also provided that subsequent elections must be made by October 1, 1996, October 1, 1999, etc., and would become effective on January 1, 1997, January 1, 2000, etc.[266] We determined that broadcasters were to send copies of their election to the cable operator and were to retain copies of such elections in their public files.[267] We failed,

---

255 8 FCC Rcd at 2999.
256 Newhouse Petition at 2.
257 Senate Report at 37. The House Report does not discuss retransmission consent because the provision was not included in the House-passed bill.
258 Yankee Petition at 5-6.
259 *See* Section 623(b)(7)(A)(iii); 47 U.S.C. § 543(b)(7)(A)(iii).
260 NCTA Petition at 24.
261 WSBK Comments at 2.
262 17 U.S.C. § 119(d).
263 Tribune Petition at 2-3; INTV Petition at 10; Chris-Craft Comments at 1, 2-4; WSBK Comments at 3-4; Turner Petition.
264 Time Warner Opposition at 15.
265 8 FCC Rcd 3001-3002.
266 *Id.* at 3002; 47 C.F.R § 76.64(f)(1).
267 *Id.* at 3003; 47 C.F.R. § 76.64(h).

however, to instruct television broadcast stations on the term of retention. Consistent with the requirements of the 1992 Cable Act and other record keeping provisions of Sections 73.3526 and 73.3527 of our rules, we will require television broadcast stations to retain election statements in their public files for the term of the three year-election period applicable to such election statements.[268]

94. In the *Report and Order* we noted that no party had commented on our proposal to require a new television station to make an initial must-carry/retransmission consent election within 30 days from the date that it commences regular broadcasts. We adopted that proposal, as well as an effective date of ninety (90) days following the election. In considering this provision further, we believe that such an election schedule could have a detrimental effect on a new television station which is entering the market. The Commission's rules provide that a television station which has completed construction may commence program tests prior to filing for a license with the Commission. These stations generally know in advance the date they plan to commence broadcasting. On our own motion, we therefore alter the initial election and effective date with respect to new television broadcast stations. A new television station shall elect between must-carry and retransmission consent sixty (60) days prior to commencing program tests, and shall notify the cable operator of that election. In the event that must-carry status is elected, the new station shall also include its channel position in the election statement to the cable operator. The election statement should be sent to the cable operator by certified mail, return receipt requested. The initial election of the broadcast station shall take effect ninety (90) days after it is made. This will provide the cable operator with sufficient time to notify subscribers of any change which may be required in the channel line-up of the system. The result will be that a new television broadcast station will have the opportunity to be carried on a cable system 30 days after it commences broadcasts over-the-air. We believe that such a result serves the public interest and provides new broadcast stations with appropriate access to enable them to effectively enter a market. Section 76.64(f)(4) of our rules is being revised to reflect this change.

95. In the *Report and Order* we failed to provide for the introduction of a new cable system in a market. Consistent with the purpose of the 1992 Cable Act, a new cable system will be required to notify all local commercial and noncommercial broadcast stations of its intent to commence service. The cable operator must send such notification, by certified mail, at least 60 days prior to commencing cable service. Commercial broadcast stations must notify the cable system within 30 days of the receipt of such notice of their election of either must-carry or retransmission consent with respect to such new cable system. If the commercial broadcast station elects must-carry, it must also indicate its channel position in its election statement to the cable system. Such election shall remain valid for the remainder of any three-year election interval, as established in section 76.64(f)(2). Noncommercial educational broadcast stations should notify the cable operator of their request for carriage and their channel position. The cable system must determine, in advance of commencing service on the system, whether a station is delivering a good quality signal and/or if a station will be required to indemnify for copyright purposes. The cable system must notify the broadcaster of any signal quality problems or copyright liability and must receive the station's response to such information prior to commencing carriage of the station's signal. These provisions are being added to our rules as Section 776.64(l).

D. Retransmission Consent and Section 614

96. In the *Report and Order* we rejected the tentative conclusion of the *Notice* that cable operators could negotiate with broadcasters to carry less than the entire program schedule of a retransmission consent station. We interpreted Section 614(b)(3)(B) and the legislative history as not permitting negotiation for carriage of partial broadcast signals. On October 5, 1993, at the request of various parties to this proceeding, we stayed the rule requiring carriage in the entirety for retransmission consent signals.[269] We stated in the *Stay Order* that we would resolve this issue in this *Memorandum Opinion and Order*.[270]

97. NCTA, Newhouse, Columbia International ("Columbia") and Continental Cablevision of Western New England ("CCWNE") request reconsideration of the requirement for carriage in the entirety with respect to retransmission consent signals.[271] NCTA argues that the plain language of the 1992 Cable Act states that the provisions of Section 614, including the carriage in the entirety provision, do not apply to stations which elect retransmission consent pursuant to Section 325.[272] Newhouse specifically urges that we reconsider the carriage in the entirety requirement to permit the grant of consent for those programs for which a broadcaster possesses the requisite authority.[273] Newhouse notes that the Commission tentatively concluded in the *Notice* that cable operators can

[268] We will amend Sections 73.3526 and 73.3527 to indicate not only the need to include such information in the station's public file, but also the three-year retention period for such election statement.

[269] 8 FCC Rcd at 3003-04.

[270] 9 FCC Rcd 2681. Section 76.62(a) of the rules requires the carriage of the entire program schedule of any television station carried by a cable system. The rule applies to stations carried pursuant to Sections 614, 615 or 325. The only exception to this "carriage in its entirety" requirement is specific programming that is prohibited under Section 76.67 (sports blackout rule) or subpart F of Part 76 of our rules (network nonduplication and syndicated exclusivity). In the *Stay Order* we granted a stay, with respect to stations carried pursuant to Section 325 (retransmission consent stations), of the new Section 76.62(a). The stay was issued in response to a request by Media-Com, the licensee of a low power television station located in Akron, Ohio. Media-Com requested a waiver of the provision to permit it to continue part-time carriage on a Warner Cable system under a private agreement. We granted the stay in an effort to avoid an interim loss to the public of its present cable access while we considered petitions for reconsideration with respect to the carriage in the entirety issue.

[271] NCTA Petition at 16-20; Newhouse Petition at 4-8; Columbia Petition at 1-3; CCWNE Reply at 1-3. Media-Com filed comments in support of this request. Media-Com Comments at 1.

[272] NCTA Petition at 18; *see also* Section 325(b)(4); 47 U.S.C. § 325(b)(4).

[273] Newhouse Petition at 7 n.4. We note that Cox Cable Communications and Post-Newsweek Cable, Inc. support partial carriage based on existing partial carriage arrangements which have benefitted their systems. *See* Cox Cable Supplemental Comments; Post-Newsweek Cable Supplemental Comments.

contract with broadcasters to carry less than the entirety of the program schedule of retransmission consent stations.[274] Newhouse contends that Section 325(b) gives an entirely new right to broadcasters which has nothing to do with must-carry and that there is no apparent public policy which mandates carriage in the entirety for retransmission consent signals. Newhouse asserts that retransmission consent is supposed to be the result of a voluntary bargain between the cable operator and the broadcaster and that "[t]o put constraints on retransmission consent without any clear statutory guidance is an arbitrary decision which does not serve the public policy which retransmission consent itself was designed to implement."[275] Newhouse agrees with the Commission's conclusion in the *Report and Order* that Congress made a clear distinction between television stations' rights in their signal and copyright holders' rights in the programming carried on that signal, and notes that the Commission stated that it intended to maintain that distinction.[276] Newhouse maintains that the Commission "engaged in an unfathomable leap of logic that the bargaining over retransmission consent rights must be for the entire signal since a station cannot bargain over the retransmission rights to individual programs."[277]

98. Columbia and CCWNE request, in the alternative, that the prohibition on partial carriage agreements not be enforced retroactively to existing agreements (*i.e.*, that they be grandfathered), or that the Commission entertain petitions for special relief or waivers to preserve the public interest benefits which agreements such as these provide.[278]

99. NCTA points out that Section 614 addresses only the carriage of local broadcast signals and therefore, even if applied to signals carried pursuant to Section 325, the requirement would not extend to distant, non-local, broadcast signals. NCTA explains that, under the current regulatory scheme, a cable system is unable to fill the void left by a network affiliate which has not cleared network programming in the local market, because the cable system is now prohibited from purchasing the programming from a distant affiliate. Both NCTA and Newhouse point to the prior provisions of our rules and 17 U.S.C. Section 111(f) of the copyright laws which specifically provide that a cable operator may purchase from a distant station a network program which has not been cleared by the local affiliate.[279] The copyright laws provide that the system need not pay additional royalties for distant programming which represents programming not cleared by a local affiliate.[280]

100. NAB and INTV oppose the request for a change in the carriage in the entirety rule.[281] NAB argues that this issue was correctly decided in the first instance and that all television broadcast signals must be carried in their entirety, regardless of whether the carriage is pursuant to Section 614, 615 or 325. In response to the concern expressed by NCTA and Newhouse regarding the inability to obtain network programming from distant affiliates, NAB states that Section 73.658 of our rules already provides a partial solution in that it allows another local (and presumably must-carry station) to carry that programming.[282] INTV indicates that full-time carriage provides broadcasters with necessary bargaining power against cable systems whose bargaining power in retransmission consent negotiations is much stronger.[283] Neither NAB nor INTV address the issues raised by Columbia and CCWNE with respect to the public interest benefits garnered by private agreements to provide local news and information through pre-existing partial carriage agreements.

101. First, we continue to believe that, with respect to stations which have elected must-carry status, Section 614(b)(3) requires cable operators to "carry the entirety of the program schedule of any television station carried on the cable system . . . ." As discussed in the *Report and Order,* the legislative history indicates that carriage in the entirety was intended for those local commercial broadcast signals entitled to must-carry status under Section 614. Indeed, the legislative history is replete with discussions relating to the must-carry provisions, the need for adequate carriage of local broadcast stations on cable systems and the controlling market power of cable systems. Congress was concerned that such market power not overwhelm the ability of local broadcast stations to obtain carriage, and that the terms of carriage not be unreasonable.[284] Congress

---

[274] Newhouse Petition at 5.

[275] Newhouse Petition at 6.

[276] Newhouse Petition at 5 (citing 8 FCC Rcd at 3004-3005).

[277] Newhouse Petition at 6.

[278] Columbia Petition at 4-6; CCWNE Petition at 4. Columbia and CCWNE have situations similar to that of Media-Com. Columbia operates a cable system which serves portions of Clark County, Washington, including the cities of Vancouver, Washington, and Portland, Oregon. Through a private agreement with stations located in Seattle and Tacoma, Washington, Columbia provides Washington residents with local news and programming, which is unavailable through other sources. The Washington residents served by Columbia's system are separated from the rest of the state by the Cascade Mountain Range, and hence, do not receive over-that-air signals from either Seattle or Tacoma. However, through the combined programming of both stations on one channel, Columbia is able to provide Washington residents with news and information of specific concern to those subscribers. Columbia states that it does not have the channel capacity to carry the full signal of both stations, and would be prohibited from doing so under the network non-duplication and syndicated exclusivity rights which those stations possess. Similarly, CCWNE, through private agreement with two Boston, Massachusetts stations, provides news from the state capital to its subscribers. CCWNE states that it carries only locally-produced programming from these two stations on its own "community" programming channel. CCWNE states that it cannot carry the signals in their entirety because the copyright royalty fees would be prohibitive, and even if affordable, it would still be prohibited from doing so under the network non-duplication and program exclusivity rules.

[279] NCTA Petition at 19-20; Newhouse Petition at 6-7.

[280] 17 U.S.C. § 111(f).

[281] NAB Opposition at 8; INTV Opposition at 6.

[282] NAB Opposition at 8-9. Section 73.658 prohibits anticompetitive behavior by network affiliates and provides that a non-affiliate station should be permitted to purchase network programming which the local affiliate has rejected. *See* 46 C.F.R. § 76.658.

[283] INTV Opposition at 6.

[284] The Conference Report states that "the must-carry and channel positioning provisions in the bill are the only means to protect the federal system of television allocations, and to promote competition in local markets . . . . Given the current economic condition of free, local over-the-air broadcasting, an affirmative must-carry requirement is the only effective mechanism to promote the overall public interest." H.R. Conf. Rep. No. 862, 102d Cong., 2d Sess. ("Conference Report") at 75. *See also* Senate Report at 41-46; House Report at 47-58.

indicated its strong belief that absent the must-carry provisions, local broadcast stations would not be readily available to cable subscribers. In the Senate Report, Congress stated that "it is for this reason that the legislation incorporates a special provision focusing just on the carriage of local broadcast signals. Moreover, this provision addresses both the primary concern of carriage and the secondary concerns of the terms of carriage.[285] Based on these concerns, we believe that all qualified local commercial broadcast stations should have the minimal protection afforded by Section 614. Further, we also continue to believe that any broadcast station that is eligible for must-carry status, although it may be carried pursuant to a retransmission consent agreement must, therefore, be carried in the entirety, unless carriage of specific programming is prohibited, pursuant to our rules relating to network nonduplication, syndicated exclusivity, sports programming or similar regulations."

102. The *Report and Order* concluded that Section 614(b)(3) requires carriage in the entirety of any broadcast station carried on the cable system. However, upon reconsideration, we believe that the ability of a broadcaster and cable system to negotiate and agree to carriage of less than the entire signal is permitted only where Section 614 is inapplicable. Specifically, as pointed out by NCTA, Section 614 applies only to qualified local commercial television signals (including qualified LPTV stations), and does not apply to either non-local or non-qualified local commercial broadcast signals. Therefore, where the broadcaster's signal is not eligible for must-carry rights, either by failure to meet the requisite definitions or because the broadcast station is outside the local market (ADI), and where, therefore Section 614 is inapplicable, the broadcaster's rights to freely negotiate for the carriage of that signal pursuant to retransmission consent includes the right to negotiate for partial carriage of the signal.

103. Section 325 states that no cable system or other multichannel video programming distributor shall without consent retransmit "the signal of a broadcasting station, *or any part thereof*, . . ."[286] In contrast, Section 614(b)(3)(B), the must-carry provision, states that the cable operator shall carry "the entirety of the program schedule . . . ." Further, Section 325(b)(4) states that if a station elects retransmission consent, "the provisions of section 614 shall not apply to the carriage of the signal of such station by such cable system." While, at first blush, the statutory language appears to permit broadcasters to negotiate with cable operators for retransmission consent for any part of their signal (*i.e.*, any programs), we now believe that a more correct and harmonious reading of Section 614 and 325 together leads to an interpretation that Congress intended cable systems to carry all the programming of must-carry eligible stations regardless of whether the broadcast station opts for must-carry status or not. While it is clear under Section 325 that some negotiated partial carriage is permitted, Section 325 does not mandate the availability of partial carriage in all negotiations. Given this fact, and the congressional emphasis on full carriage for must-carry qualified stations (discussed above), we believe the statutory provisions read in concert suggest that qualified must-carry stations should, as a matter of policy, be carried in their entirety even if they are carried pursuant to retransmission consent.

104. This interpretation is bolstered by Congress' direction to the Commission in Section 325(b)(3)(A) to fashion "regulations to govern the exercise by television broadcast stations of the right to grant retransmission consent under this subsection and of the right to signal carriage under section 614." By including this provision in Section 325, we believe that Congress recognized the interplay between the two sections and gave the Commission authority to fill in regulatory gaps.[287] Thus, at the very least, the Commission has the flexibility to require carriage in the entirety for qualified must carry stations carried pursuant to retransmission consent to ensure that the basic underlying objectives of the 1992 Cable Act relating to local broadcast service would be fulfilled. Otherwise, the statutory goals at the heart of Sections 614 and 325 -- to place local broadcasters on a more even competitive level and thus help preserve local broadcast service to the public -- could easily be undermined.

105. The Senate Report confirms this interpretation by stating that the "rights granted to stations under section 325 and under sections 614 and 615 can be exercised harmoniously, and it anticipates that the FCC will undertake to promulgate regulations which will permit the fullest applications of whichever rights each television station elects to exercise."[288] We believe that our rules should provide the widest possible range of opportunity for both broadcast stations and cable operators, where the must-carry provisions are not applicable. Thus, any station which is eligible for must-carry status must be carried, if at all, in its entirety regardless of whether the station elects must-carry or retransmission consent. Similarly, any station which is not eligible for must-carry status under Section 614, because it is not a local commercial broadcast station, or does not qualify under the definitions of Section 614, may negotiate for partial carriage. Thus, we conclude, based upon a reading of both Sections 614 and 325, that broadcast stations whose signals are entitled to must-carry but are instead carried pursuant to retransmission consent are not permitted to negotiate for carriage of less than their entire signal.[289]

106. The 1992 Cable Act was specific in stating that "[c]able systems carrying the signals of broadcast stations, whether pursuant to an agreement with the station or pursuant to the provisions of [must-carry], will continue to have the authority to retransmit the programs carried on those signals under the section 111 compulsory license."[290] The Committee emphasized that nothing in the 1992 Cable Act was "intended to abrogate or alter existing program licensing agreements between broadcaster and program suppliers, or to limit the terms of existing or future licensing agreements."[291]

---

[285] Senate Report at 45.A

[286] 47 U.S.C. § 325(b)(1) (emphasis added).

[287] *Cf. Chisholm v. FCC*, 538 F.2d 349, 357 (D.C. Cir. 1976).

[288] Senate Report at 38.

[289] We note that this interpretation of the statute is supported by the legislative history which notes that the retransmission consent provision was drafted in such a way as to promote the "established relationships between broadcasters andh) cable systems," and to "minimize unnecessary disruption to broadcasters and cable operators." Senate Report at 36.

[290] 47 U.S.C. § 325(b)(6).

[291] Senate Report at 36.

107. We continue to interpret retransmission consent as a new right given to the broadcaster under the terms of the 1992 Cable Act and as a right separate from the right of the underlying copyright holder[292] and do not believe that our reconsideration decision in any way undermines the separate nature of these rights or creates a conflict between communications and copyright based policies. Congress indicated that it intended "to establish a marketplace for the disposition of the rights to retransmit broadcast signals."[293] As stated in the *Report and Order*, the right involved is one which may be freely bargained away in future programming contracts.[294] Although NAB and INTV argue that carriage in the entirety is required to ensure the continued validity of both the retransmission consent right and the current compulsory copyright, we do not see how providing broadcasters and cable operators with additional flexibility to negotiate retransmission agreements for signals not eligible for must-carry status alters the nature of the rights granted under Sections 325 and 614 in any way. Indeed, according this additional flexibility is consistent with interpreting the right in question as a new right subject to the control of the station licensee. To the extent these rights have been bargained away, the remaining rights that have not been disposed of still remain under the control of the station involved. As noted in paragraph 99, a contrary interpretation would not only deprive broadcasters and cable operators of the ability to negotiate mutually advantageous arrangements for the carriage of portions of distant signals but would negate the functioning of various portions of Section 111 of the Copyright Act and of the Commission's rules which specifically contemplate the possibility that portions of distant signals may be carried.[295] Accordingly, we interpret Section 325 to provide that broadcasters may bargain with cable operators for the right to carriage of any part of the broadcast signal provided that such station is not eligible under the provisions of Section 614, either because it is not a local commercial broadcast signal or it does not qualify for mandatory carriage. "Carriage in the entirety" remains a requirement with respect to signals eligible for mandatory carriage under the provisions of Section 614. Sections 76.62(a) and 76.64(k) are being revised to reflect this change.

E. Retransmission Consent Contracts

108. In the *Report and Order* we specifically prohibited exclusive retransmission consent agreements between television broadcast stations and cable operators.[296] This provision forbids a television station from making an agreement with one MVPD for carriage, exclusive of other MVPDs. After reviewing the comments filed in response to the *Notice*,[297] we concluded that this prohibition is necessary in light of the concerns that led Congress to regulate program access and cable signal carriage agreements.[298] We then stated that we would revisit the issue in three years.

109. NCTA argues in its petition for reconsideration that prohibiting exclusive retransmission consent agreements is not warranted and is not supported by the 1992 Cable Act. NCTA claims that such a provision is "contrary to the Commission's belief that broadcasters should be entitled to obtain and enforce exclusivity, in the form of network non-duplication and syndex, *against* cable operators -- even if they have opted for retransmission consent."[299] NCTA also states that the prohibition is not necessary under the program access provisions of the 1992 Cable Act and that such agreements may be justified based on a public interest showing. In addition, NCTA claims that exclusive contracts between operators and program suppliers, such as any of the networks, are not within the scope of the Section 19 prohibitions. Therefore, NCTA argues that we should not uphold the ban on exclusive retransmission consent agreements.

110. WCA, Bell Atlantic and U.S. Telephone Association ("USTA") oppose the request filed by NCTA to reconsider this issue and request that we continue to prohibit such agreements. WCA notes that we did not suggest that the 1992 Cable Act requires the prohibition of such contracts, but simply that such a prohibition would further the purposes of the statute. WCA points out that Congress expressly provided that the Commission ensure that provisions adopted do not conflict with our obligation to ensure that rates are reasonable. Moreover, WCA points to the legislative history and the stated purpose to promote competition in the multichannel video marketplace.[300] Bell Atlantic states that such a prohibition is within our authority to establish regulations to govern the exercise of retransmission consent, and that such a provision will promote competition and further congressional intent.[301] We do not believe that NCTA has raised a credible argument for revisiting this issue at this time. We are adding a new subsection (m) to Section 76.64 of our rules to reflect this decision. As we indicated in the *Report and Order,* we will consider the need for such a prohibition against exclusive retransmission consent agreements in three years.

F. Other Matters

111. *Retransmission Consent and Network Nonduplication Protection.* In the *Report and Order,* we concluded that local television stations electing retransmission consent should continue to be entitled to invoke network nonduplication or syndicated exclusivity protection, whether or not they are carried by the cable system.[302] Commenters had sought to eliminate exclusivity rights for stations choosing retransmission consent.[303] We found,

---

[292] 8 FCC Rcd at 3004.

[293] Senate Report at 36.

[294] *Id.*

[295] *See e.g.,* 17 U.S.C. Section 111(f)(providing for the carriage of network programs uncleared in the cable operator's market); 47 C.F.R. § 76. 161 (providing for programs to be carried in place of programs deleted under the syndicated exclusivity rules).

[296] 8 FCC Rcd at 3006.

[297] *See* WCA Comments at pages 19-24; National Private Cable Association at pages 6-13; U.S. Telephone Association at 2-6; Bell Atlantic at 1-2; and InterMedia Partners at 13-14. In particular, WCA points to the comments of InterMedia, one of the nation's larger cable systems, which joined its competitors in urging the prohibition of exclusive retransmission consent contracts of this nature.

[298] *See 1st Report and Order* , MM Docket 92-265, 8 FCC Rcd 3359 (1993) (Program Access).

[299] NCTA Petition at 22-23.

[300] WCA Opposition at 6 (citing Senate Report at 18).

[301] Bell Atlantic Opposition at 2.

[302] 8 FCC Rcd at 3006.

[303] *See* Petition for Rulemaking of the National Cable Television Association, Inc., filed January 19, 1993; *see also* Opposi-

however, that the legislative history addressed this matter and that Congress intended for exclusivity protection to apply under its regulatory framework.[304]

112. Cable interests contend that stations electing retransmission consent should not be entitled to network nonduplication protection.[305] NCTA and Cablevision claim that the application of network nonduplication rights in conjunction with retransmission consent could result in the loss of network programming for cable subscribers. They observe that where a station and a cable operator cannot reach a retransmission consent agreement, the station can still assert its exclusivity rights against another network affiliate that agrees to carriage. The result, according to petitioners, will be that subscribers will be precluded from receiving any network programming. Petitioners also argue that the 1992 Cable Act does not require the Commission to retain this rule and, indeed, the result is contrary to the intent of the Act, which sought to provide consumers with access to the widest diversity of programming, including network programming.[306] Moreover, cable interests argue that retaining network nonduplication rights for stations electing retransmission consent provides broadcasters with an advantage over cable operators in their consent negotiations. They assert that they will have to accede to broadcasters' demands since the local station will be able to prevent them from providing network programming to their subscribers from distant stations.

113. Broadcasting interests support the Commission's decision to continue to permit stations choosing retransmission consent to enforce their nonduplication rights.[307] They assert that petitioners are simply rearguing issues rejected by the Commission in the *Report and Order*. NAB and NASA contend that the elimination of network nonduplication protection for stations choosing retransmission consent would undermine localism and the ability of networks to distribute their programming. In particular, NASA states that Congress determined that the long term survival of the over-the-air local broadcast system could be assured by providing broadcasters with the right to control the distribution of their signals and the concomitant right to be compensated for the retransmission of those signals. Cap Cities argues that cable operators have an unfair advantage in the negotiating process since they face virtually no competition. It also argues that, without exclusivity protection, broadcasters would be forced to choose the must-carry option since the cable operator would be able to import a distant station rather than negotiate with a station licensed to serve its local area. Finally, Cap Cities states that it is unreasonable to eliminate this regulatory structure which promotes local broadcasting and the network/affiliate distribution system based on predictions regarding negotiations that had not yet taken place.[308]

114. We affirm our decision to allow stations electing retransmission consent to assert network nonduplication or syndicated exclusivity protection as provided in the rules.[309] We observe that this issue was considered earlier in this proceeding in response to a petition from NCTA, which we denied in the *Report and Order*. Parties have provided no new arguments nor additional evidence to convince us that our decision conflicts with the intent of Congress. We also do not find that there is a conflict between retransmission consent rights and exclusivity rights. Network nonduplication and syndicated exclusivity rights protect the exclusivity that broadcasters have acquired from their program suppliers, including their network partners, while retransmission consent allows broadcasters to control the redistribution of their signals. Both policies promote the continued availability of the over-the-air television system, a substantial government interest in Congress' view.[310]

115. We also note that cable operators believe that broadcasters have an advantage in the negotiations for retransmission agreements due to their ability to assert their exclusivity rights, while broadcasters believe the reverse. Local broadcast stations are an important part of the service that cable operators offer and broadcasters rely on cable as a means to distribute their signals. Thus, we believe that there are incentives for both parties to come to mutually-beneficial arrangements. Moreover, the allegations that local stations electing retransmission consent would not be carried due to their inability to successfully negotiate agreements with cable operators and then assert their exclusivity rights and deprive subscribers of programming was speculative at the time the reconsideration petitions were filed. Now that the retransmission consent provisions are in effect, there is no evidence that subscribers are being deprived of network programming. We note that there are only limited situations where local stations are not carried.[311] Therefore, the dire consequences predicted do not exist and we continue to believe that stations should receive the exclusivity protection to which they are entitled.

IV. ADMINISTRATIVE MATTERS

Regulatory Flexibility Analysis

116. Pursuant to the Regulatory Flexibility Act of 1980, the Commission included a final analysis in the *Report and Order* detailing (i) the need for and purpose of the rules, (ii) the summary of issues raised by public comment in

tion to Petition for Rulemaking of the National Cable Television Association, Inc. to Revise the Network Non-duplication Rules, filed February 8, 1993.

[304] Senate Report at 38.

[305] NCTA Petition at 20-22; Cablevision Systems Corporation Petition at 1-9; Time Warner Reply at 3-4.

[306] 1992 Cable Act, Sections 2(b)(1) and (3).

[307] NAB Opposition at 6-8; Cap Cities Opposition at 1-7; NASA Opposition at 1-5.

[308] Cap Cities Opposition at 2-3.

[309] We note that we also considered whether to modify the geographic zone applicable to exclusivity protection to make it consistent with the definition of a local television market as the ADI, as specified in the 1992 Cable Act. We declined to make such a change. *See* 8 FCC Rcd at 2978-2979.

[310] 1992 Cable Act, Section 2(a)(12).

[311] A joint survey conducted by NAB and the Television Bureau of Advertising on October 6, 1993, the effective date of the retransmission consent provisions, indicates that 92% of all television stations reach virtually all cable households in their ADIs and 97% of all stations reach at least 90% of such homes. *See* TVB News , Television Bureau of Advertising, Inc., October 7, 1993.

response to the initial regulatory flexibility analysis, Commission assessment, and changes made as a result, and (iii) significant alternatives considered and rejected. No substantive changes have occurred pertaining to the final analysis as a result of the petitions for reconsideration.

Paperwork Reduction Act

117. The proposal contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980 and found to impose a new or modified information collection requirement on the public. Implementation of any new or modified requirement will be subject to approval by the Office of Management and Budget as prescribed by the Act.

ORDERING CLAUSES

118. Accordingly, IT IS ORDERED that pursuant to the authority contained in Section 4(i) and (j), and 303 of the Communications Act of 1934, as amended, and the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, Parts 73 and 76 of the Commission Rules, 47 C.F.R. Part 73 and 76, are AMENDED as set forth in Appendix B.

119. IT IS FURTHER ORDERED that rule provisions of Part 76 of the rules set forth in Appendix B shall be effective 30 days after publication in the Federal Register. Rule provisions of Part 73 of the rules set forth in Appendix B shall be effective upon approval from OMB.

120. IT IS FURTHER ORDERED that Sections 76.62 and 76.64 of the Commission's rules which were stayed by *Order* of the Commission on October 5, 1994 are revised as indicated in Appendix B and the *Stay Order* is lifted as of the effective date of these rules.

121. IT IS FURTHER ORDERED that the petitions for reconsideration filed by the parties listed in Appendix A are GRANTED IN PART and DENIED IN PART only to the extent indicated in this *Memorandum Opinion and Order,* except that the Petition for Reconsideration filed by Western Broadcasting of Puerto Rico is DISMISSED without prejudice.

Additional Information

122. For further information on this proceeding, contact Elizabeth Beaty or Meryl S. Icove, Cable Services Bureau, (202) 416-0856.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

APPENDIX A

Petitions for Reconsideration

1. A.C. Nielsen Company
2. Anchor Media
3. Association of Independent Television Stations
4. Cablevision Systems Corporation
5. Colorado Christian University
6. Columbia International
7. Community Antenna Television Association
8. Cypress Broadcasting, Inc.
9. Moran Communications
10. National Association of Broadcasters
11. National Cable Television Association
12. Newhouse Broadcasting
13. Outlet Broadcasting Company
14. Press Broadcasting Company
15. Star Cable Associates
16. Tribune Broadcasting Company
17. WBNS-TV, Columbus, Ohio
18. Western Broadcasting Corporation of Puerto Rico
19. Wireless Cable Association International
20. WTTE, Columbus, Ohio
21. Yankee Microwave

Comments in Support of Petitions for Reconsideration

1. Chris-Craft Industries, Inc.
2. Community Broadcasts Association
3. Cox Cable Communications, Inc.*
4. Media-Com Television, Inc.
5. Midwest KAAL Corp.
6. Post-Newsweek Cable, Inc.*
7. StarSight, Inc.*
8. Turner Broadcasting System, Inc.
9. WSBK License, Inc.

Oppositions to Petitions for Reconsideration

1. Bell Atlantic Telephone Companies
2. Capital Cities/ABC, Inc.
3. Granite Broadcasting Corporation
4. National Association of Broadcasters
5. National Cable Television Association
6. Network Affiliated Stations Alliance
7. San Jacinto Television Corporation (KTFH-TV)
8. Time Warner Entertainment Company, LP
9. United States Telephone Association
10. United Video, Inc.
11. Wireless Cable Association International

* Indicates late filed.

Replies to Oppositions for Reconsideration

1. A.C. Nielsen Company
2. Association of Independent Television Stations
3. Colorado Christian University
4. Continental Cablevision of Western New England
5. Cypress Broadcasting, Inc.
6. National Association of Broadcasters
7. Time Warner Entertainment Company, LP
8. Tribune Broadcasting Company

APPENDIX B

Rules

Part 73 of Chapter I of Title 47 of the Code of Federal Regulation is amended as follows:

Part 73 BROADCAST RADIO SERVICES

1. The Authority Citation for Part 73 is revised to read as follows:

AUTHORITY: Secs. 303, 48 Stat., as amended, 1082; 47 U.S.C. § 154, as amended.

2. Section 73.3526 is amended by adding paragraph (g) to read as follows:

73.3526 Local public inspection file of commercial stations.

*****

(g) Statements of a commercial television station's election with respect to either must-carry or retransmission consent as defined in section 76.64 of this chapter shall be retained in the public file of the television station for the duration of the three year election period to which the statement applies.

3. Section 73.3527 is amended by adding paragraph (g) to read as follows:

73.3527 Local public inspection file of noncommercial educational stations.

*****

(g) Noncommercial television stations requesting mandatory carriage on any cable system pursuant to Section 76.56 of this chapter shall place a copy of such request in its public file and shall retain both the request and relevant correspondence for the duration of any period to which the statement applies.

Part 76 of Chapter I of Title 47 of the Code of Federal Regulations is amended as follows:

PART 76 -- CABLE TELEVISION SERVICE

1. The Authority Citation for Part 76 is revised to read as follows:

AUTHORITY: Secs. 2, 3, 4, 301, 303, 307, 308, 309, 48 Stat., as amended, 1064, 1065, 1066, 1081, 1082, 1083, 1084, 1085, 1101; 47 U.S.C. §§ 152, 153, 154, 301, 303, 307, 308, 309; Secs. 612, 614-615, 623, 632 as amended, 106 Stat. 1460, 47 U.S.C. §532; Sec. 623, as amended, 106 Stat. 1460; 47 U.S.C. §§532, 533, 535, 543, 552.

2. Section 76.7(c)((4)(i),(ii), and (iii) are revised and a new paragraph (c)(4)(iv) is added to read as follows:

§ 76.7 Special relief and must-carry complaint procedures.

*****

(c)***

(4)(i) Must-carry complaints filed pursuant to Sec. 76.61(a) (Complaints regarding carriage of local commercial television stations) shall be accompanied by the notice from the complainant to the cable television system operator (Sec. 76.61(a)(1)), and the cable television system operator's response (Sec. 76.61(a)(2)), if any. If no timely response was received, the complaint should so state.

(ii) Must-carry complaints filed pursuant to Sec. 76.61(b) (Complaints regarding carriage of qualified local NCE television stations) should be accompanied by any relevant correspondence between the complainant and the cable television system operator.

(iii) No must-carry complaint filed pursuant to Sec. 76.61(a)(complaints regarding local commercial television stations) will be accepted by the Commission if filed more than sixty (60) days after the date of the specific event described in this paragraph. Must-carry complaints filed pursuant to Sec. 876.61(a) should affirmatively state the specific event upon which the complaint is based, and shall establish that the complaint is being filed within sixty (60) days of such specific event. With respect to such must-carry complaints, the specific event shall be

(A) The denial by a cable television system operator of a request for carriage or channel position contained in the notice required by Sec. 76.61(a)(1), or

(B) The failure to respond to such notice within the time period allowed by Sec. 76.61(a)(2).

(iv) With respect to must-carry complaints filed pursuant to Sec. 76.61(b), such complaints may be filed at any time the complainant believes that the cable television system operator has failed to comply with the applicable provisions of subpart D of this part.

*****

3. Section 76.55(a)(2) is revised to read as follows:

§ 76.55 Definitions applicable to the must-carry rules.

*****

(a)***

(2) Is owned and operated by a municipality and transmits noncommercial programs for educational purposes, as defined in Section 73.621 of this chapter, for at least 50 percent of its broadcast week.

*****

4. Section 76.55 is amended by adding a note after paragraph (a)(3)(iii) to read as follows:

76.55 Definitions applicable to the must-carry rules.

*****

Note to paragraph (a): For the purposes of Section 76.55(a), "serving the franchise area" will be based on the predicted protected contour of the NCE translator.

*****

5. Section 76.55(b) is amended by adding paragraph (b)(3) to read as follows:

Section 76.55 Definitions applicable to the must-carry rules.

*****

(b)***

(3) Notwithstanding the provisions of this section, a cable operator shall not be required to add the signal of a qualified local noncommercial educational television station not already carried under the provision of subsection 76.56(a)(5), where such signal would be considered a distant signal for copyright purposes unless such station agrees to indemnify the cable operator for any increased copyright liability resulting from carriage of such signal on the cable system.

*****

6. Section 76.55(d) is amended by adding a note after paragraph (d)(6) to read as follows

Section 76.55 Definitions applicable to the must-carry rules.

*****

(d)***

(6)***

Note: For the purposes of this section, a good quality signal shall mean a signal level of either -45 dBm for UHF signals or -49 dBm for VHF signals at the input terminals of the signal processing equipment, or a baseband video signal.

*****

7. Section 76.55 is amended by revising the note following paragraph (e)(3) to read as follows:

Section 76.55 Definitions applicable to the must-carry rules.

*****

(e)***

(3)***

Note: For the 1993 must-carry/retransmission consent election, the ADI assignments specified in the 1991-1992 *Television Market Guide* will apply.

*****

8. Section 76.56 is amended by revising paragraphs (a)(1)(iii), (a)(5) and (b)(1) to read as follows:

§ 76.56 Signal carriage obligations.

(a)***

(1)***

(iii) Systems with more than 36 usable activated channels shall be required to carry the signals of all qualified local NCE television stations requesting carriage, but in any event at least three such signals; however a cable system with more than 36 channels shall not be required to carry an additional qualified local NCE station whose programming substantially duplicates the programming of another qualified local NCE station being carried on the system.

*****

(5) Notwithstanding the requirements of paragraph (a)(1) of this section, all cable operators shall continue to provide carriage to all qualified local NCE television stations whose signals were carried on their systems as of March 29, 1990. In the case of a cable system that is required to import a distance qualified NCE signal, and such system imported the signal of a qualified NCE station as of March 29, 1990, such cable system shall continue to import such signal until such time as a qualified local NCE signal is available to the cable system. This requirement may be waived with respect to a particular cable operator and a particular NCE station, upon the written consent of the cable operator and the station.

(b)***

(1) A cable system with 12 or fewer usable activated channels, as defined in Section 76.5(oo), shall carry the signals of at least three qualified local commercial television stations, except that if such system serves 300 or fewer subscribers it shall not be subject to these requirements as long as it does not delete from carriage the signal of a broadcast television station which was carried on that system on October 5, 1992.

*****

9. Section 76.57(a) is revised to read as follows:

Section 76.57 Channel positioning.

(a) At the election of the licensee of a local commercial broadcast television station, and for the purposes of this rule, a qualified low power television station, carried in fulfillment of the must-carry obligations, a cable operator shall carry such signal on the cable system channel number on which the local commercial television station is broadcast over the air, or on the channel on which it was carried on July 19, 1985, or on the channel on which it was carried on January 1, 1992.

*****

10. Section 76.60 is amended by adding a new paragraph (c) to read as follows:

§ 76.60 Compensation for carriage.

*****

(c) A cable operator may accept payments from stations pursuant to a retransmission consent agreement, even if such station will be counted towards the must-carry complement, as long as all other applicable rules are adhered to.

*****

11. Section 76.62(a) is revised to read as follows:

§ 76.62 Manner of carriage.

(a) Cable operators shall carry the entirety of the program schedule of any television station (including low power television stations) carried by the system unless carriage of specific programming is prohibited, and other programming authorized to be substituted, under section 76.67 or Subpart F of Part 76, or unless carriage is pursuant to a valid retransmission consent agreement for the entire signal or any portion thereof as provided in Section 76.64.

*****

12. Section 76.64 is amended by revising paragraphs (b)(2), (e), (f)(4) and (k) and by adding paragraphs (l), (m) and (n) to read as follows:

§76.64 Retransmission consent.

*****

(b)***

(2) The multichannel video programming distributor obtains the signal of a superstation that is distributed by a satellite carrier and the originating station was a superstation on May 1, 1991, and the distribution is made only to areas outside the local market of the originating station; or

(e) The retransmission consent requirements of this section are not applicable to broadcast signals received by master antenna television facilities or by direct over-the-air reception in conjunction with the provision of service by a multichannel video program distributor provided that the multichannel video program distributor makes reception of such signals available without charge and at the subscribers option and provided further that the antenna facility used for the reception of such signals is under the control of the subscriber and is owned by or is available for purchase by the subscriber upon termination of service.

(f)***

(4) New television stations shall make their initial election any time between 60 days prior to commencing broadcast and 30 days after commencing broadcast; such initial election shall take effect 90 days after they are made.

*****

(k) Retransmission consent agreements between a broadcast station and a multichannel video programming distributor shall be in writing and shall specify the extent of the consent being granted, whether for the entire signal or any portion of the signal.

(l) A cable system commencing new operation is required to notify all local commercial and noncommercial broadcast stations of its intent to commence service. The cable operator must send such notification, by certified mail, at least 60 days prior to commencing cable service. Commercial broadcast stations must notify the cable system within 30 days of the receipt of such notice of their election for either must-carry or retransmission consent with respect to such new cable system. If the commercial broadcast station elects must-carry, it must also indicate its channel position in its election statement to the cable system. Such election shall remain valid for the remainder of any three-year election interval, as established in section 76.64(f)(2). Noncommercial educational broadcast stations should notify the cable operator of their request for carriage and their channel position. The new cable system must notify each station if its signal quality does not meet the standards for carriage and if any copyright liability would be incurred for the carriage of such signal. Pursuant to Section 76.57(e), a commercial broadcast station which fails to respond to such a notice shall be deemed to be a must-carry station for the remainder of the current three-year election period.

(m) Exclusive retransmission consent agreements are prohibited. No television broadcast station shall make an agreement with one multichannel distributor for carriage, to the exclusion of other multichannel distributors.

(n) A multichannel video programming distributor providing an all-band FM radio broadcast service (a service that does not involve the individual processing of specific broadcast signals) shall obtain retransmission consents from all FM radio broadcast stations that are included on the service that have transmitters located within 92 kilometers (57 miles) of the receiving antenna for such service. Stations outside of this 92 kilometer (57 miles) radius shall be presumed not to be carried in an all-band reception mode but may affirmatively assert retransmission consent rights by providing 30 days advance notice to the distributor.