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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Cable Television Consumer Protection and Competition Act of 1992	)	MM Docket No. 92-259
	)	
Broadcast Signal Carriage Issues	)	

COMMENTS OF CONSUMER FEDERATION OF AMERICA[1]
AND MEDIA ACCESS PROJECT[2]

1. Introduction and Summary

The Cable Television Consumer Protection and Competition Act of 1992[3] recognizes the changing landscape of the multi-channel video marketplace. Reasonable must carry guidelines are necessary promote maximum diversity and assure the continued vibrancy of the broadcast television market. These guidelines must reflect viewership realities and prevent misuse of must carry status by cable operators or broadcasters. By granting must carry status, Congress recognizes its responsibility for protecting the public interest by assuring a healthy over-the-air broadcast industry.[4]

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[1]Consumer Federation of America is a coalition of 240 pro-consumer groups from around the country with a combined membership of 50 million. Since 1968, CFA's primary goal has been to represent the interests of consumers before Congress and federal regulatory agencies.

[2]Media Access Project is a non-profit, public interest telecommunications law firm. MAP is not a membership group, and typically represents other organizations before the FCC and the courts. On occasion, however, MAP addresses general policy matters in its own name based on its longstanding knowledge of the needs and views of the public.

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

[4]Id. at 1461.

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The guidelines must also provide means for public participation in the process.

Approximately 40 percent of the households in the U.S. do not subscribe to cable television service. This 40 percent of American households who cannot receive or who choose not to subscribe to cable services, rely almost exclusively on local broadcasting for their video entertainment and information in their homes.[5] At the same time, broadcast programming remains the most popular programming offered on cable systems.[6] In the 1992 Cable Act, Congress recognized its duty to assure the continued viability of broadcast television.

Cable operators have built in incentives to refuse to include local broadcast stations on their systems. Cable operators compete with broadcasters for advertising revenues.[7] Cable networks, often owned by cable operators, compete with both commercial and non-commercial broadcasters for programming and audiences. Without reasonable must carry requirements, the economic viability of local broadcast television and locally originated programming is in danger.

In an effort to protect the public's interest in locally

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[5]While there are a small fraction of consumers who have access to alternative video services such as "wireless cable" or C-Band satellite services, their local news and entertainment come almost exclusively from relay of their local broadcaster's signal. While VCR's can be a source of video entertainment in conjunction with video movie rentals, they do not provide locally generated entertainment, information or news programming.

[6]1992 Cable Act, 106 stat. at 1462.

[7]Id.

originated video programming and in recognition of broadcasters' public interest mandate in exchange for their license, Congress has taken steps in the 1992 Cable Act to assure that the free flow of information from diverse sources continues. It has done so in the form of the Must Carry[8] and Retransmission Consent[9] provisions in the 1992 Cable Act. The Consumer Federation of America and Media Access Project (CFA/MAP) believes consumers are best served by a system that assures continued access to broadcast signal both over the air and through a cable system.

The Commission can assure the continued vibrancy of both commercial and non-commercial local broadcasting, which are the only entities in the video-marketplace whose license requires them to serve the public interest, through reasonable guidelines defining "substantial duplication" for purposes of the 1992 Cable Act. These guidelines will ultimately benefit the cable companies as well as consumers by assuring a greater variety of local and national programming being offered on cable systems throughout the country, making cable more attractive to consumers.

2. Must Carry Regulations for Non-Commercial Educational Television Stations:

The Commission has a special responsibility to assure that Non-Commercial Educational Television Stations (NCE) continue to thrive in the video marketplace. Congress has found that "it is in the public interest to encourage the growth and development of

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[8] Id. at 1471.

[9] Id. at 1482.

public...television broadcasting, including the use of such media for instructional, educational and cultural purposes..."[10] Taxpayer money, in part, is used to support NCE stations and their programming.

These stations are also charged with special responsibilities that other stations do not have, most notably to serve traditionally under-served segments of the population such as minorities and children. Congress has also found that "it is necessary and appropriate for the Federal Government to complement, assist, and support a national policy that will most effectively make public telecommunications services available to all citizens of the United States..."[11] For the benefit of taxpayers as well as all consumers, inclusion of NCE stations on cable systems is critical.

To make certain that the intent of the must carry provisions is not compromised, CFA/MAP believes the Commission should consider the actual viewing patterns of consumers and the ease of application of the definition when the Commission determines which NCE stations qualify for must carry status. For purposes of the 1992 Cable Act, the definition of what constitutes "transmits predominately non-commercial programs for educational purposes" is of critical importance.

A. Municipal NCE Stations:

In paragraph 8 of its Notice of Proposed Rulemaking (NPRM),

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[10]Communications Act of 1934, Subpart C, § 396(a)(1).

[11]Id. at § 396(a)(6).

the Commission seeks comment on what criteria should be used to determine if municipal NCE stations are transmitting predominately noncommercial programs for educational purposes. The Commission offers a scheme by which these municipal NCE stations would be eligible for must carry if they transmit this type of programming only half the time. In the alternative, the Commission suggests a specification of a minimum number of hours per week devoted to this type of programming.

CFA/MAP believes that these definitions will not adequately ensure that the intent of the must carry provisions for NCE stations is met. This scenario would permit stations which have either commercial or non-commercial licenses to qualify for non-commercial must carry status even if they spend the half of each day with the least television viewership transmitting "non-commercial" programming. This could ultimately lead to the exclusion of a station licensed as a non-commercial broadcaster from taking advantage of the must carry provisions of the 1992 Cable Act if a cable operator chooses to include broadcasters who happen to fit the NCE definition of non-commercial broadcasters but sell up to 50 percent of their broadcast week for commercial programming.[12]

CFA/MAP recommends that the Commission review audience ratings

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[12]Channel 13 in New York at one time sought to lease all of its nighttime hours. The request was subsequently withdrawn. It is clear that unless the definition for NCE stations reflect viewership realities, a broadcast station with must carry status is in a position to exploit its license for financial gain rather than the public's interest.

and demographic data with respect to municipal NCE stations to establish the primary hours of viewing, as well as those periods when the most children, minorities and other viewers with special informational needs are watching. Based on those time periods the Commission should mandate that 50 percent of that time period per day be devoted to non-commercial educational programs for a municipal NCE station to qualify for non-commercial must carry status.

B. Discretion in Carriage of NCE Stations for Medium and Small Cable Systems:

The NPRM seeks comment at paragraph 12 on the implementation of statutory provisions which limit the number of NCE stations that medium and small cable systems must carry. The Commission suggests that when one of these smaller-sized systems receives multiple carriage requests from NCE stations, that the cable system be free to select from among these carriage requests.

CFA/MAP supports this approach with one important caveat. Guaranteed carriage on a cable system is a great benefit to an NCE station. Taxpayer money is used in part to fund NCE stations that operate with a non-commercial broadcasting license. In recognition of these facts, CFA/MAP would ask the Commission to require medium or small cable operators that receive multiple carriage requests to first select from among those requests made by NCE stations licensed as non-commercial broadcasters to meet their NCE must carry requirements. If there are none, or there are not enough to fill the carriage requirements for the system, then the cable

company could freely choose from among the other requests.

C. Substantial Duplication:

The NPRM also seeks comment on what constitutes "substantially duplicated" with respect to the medium sized system's exception regarding state networks and the large sized system exception. The Commission proposes several options, including whether 50 percent of the weekly prime-time programming is duplicated, using the same all day approach applied to municipal NCE stations or a percentage other than 50 percent of the station's programming week.

Here too, CFA/MAP urges the Commission to look to viewership realities with respect to NCE stations. A relatively small number of large television markets will be affected by this provision of the 1992 Cable Act. The overall burden on the cable industry will be small. These few large, populous markets cover almost 30% of all U.S. television households.[13]

In general, CFA/MAP believes prime-time programming offers a reasonable gauge for determining substantial duplication. However, there are benefits to consumers of having the same program or series offered on two stations at different times, even on the same night.[14] CFA/MAP also seeks to make this determination as simple

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[13]There are 11 markets out of the top 50 in the nation according to Arbitron's Area's of Dominant Influence (ADI) where more than three NCE signals exist. 1991 *Broadcasting Yearbook*. Not every cable system in an ADI with more than three NCE signals will be required to carry more than three. It will depend upon the number, placement and transmitting power of the stations to determine market size with respect to must carry obligations.

[14]Consumers who do not own or cannot operate video cassette recorders (VCR's) for time-shifting of programming will benefit from this scenario.

as possible for the Commission, the cable companies and the NCE broadcasters.

To that end, CFA/MAP recommends a definition which finds substantial duplication when more than 50 percent of a station's weekly prime time programming is aired simultaneously on another station for more than four successive weeks[15]. This definition will be extremely easy to apply for the Commission, cable operators and NCE broadcasters. It is also appropriate, for simplicity sake, to apply the same definition to medium and large cable systems. Furthermore, it will ensure that the intent of NCE station must carry is not frustrated in any way. This definition will assure maximum consumer choice and flexibility for viewing NCE programming. This will also help to strengthen a national resource, NCE stations, by making more stations viable through sealing the loopholes that could develop if the Commission's definition were employed.

In addition to being easy to administer, this definition offered by CFA/MAP uses language and a standard that has previously been applied to cable television.[16] Although the Commission indicates that it supports a standard for substantial duplication based on 50 percent of prime-time programming because of its prior use, it incorrectly states that standard in the NPRM. That standard, like the one suggested by CFA/MAP, is based on

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[15]The reason for using successive weeks is to allow for carriage of extraordinary events that might warrant airing of the same programming on many different stations.

[16]See, 47 C.F.R. 76.33(a)(2)(i).

simultaneous duplication.[17] Marketplace realities indicate that this definition will not affect many NCE broadcasters at all. Only in the largest broadcast markets are there more than three authorized NCE signals.[18] This definition strikes a fair and reasonable balance between the consumer interest and cable operator's interests where they might differ.

Consumers whose tax dollars help to support NCE stations, benefit from keeping these stations vibrant and on the air. The proposed standard will maximize the number of NCE's carried on cable systems.[19] This definition also promotes diversity in the video marketplace and thereby the public interest objectives of the Communications Act as well as the intent of Congress in the 1992 Cable Act.[20] This definition will not unduly burden the NCE stations, cable operators or the Commission which will have to enforce it. Finally, it will not affect the vast majority of cable

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[17]47 C.F.R. 76.33(a)(2). "For purposes of this section, '[un]duplicated broadcast television signal' is defined as one which does not simultaneously duplicate more than 50 percent of another signal's weekly prime-time schedule..." (emphasis added).

[18]See; 1991 *Broadcasting Yearbook*. There are more than three authorized public television signals available in 6 of the ten largest Arbitron Areas of Dominant Influence (ADI's); New York, Los Angeles, Philadelphia, San Francisco, Boston and Washington, D.C. There are only 2 in the next ten; Miami and Pittsburgh; 3 in the third ten largest markets; Orlando, Indianapolis and Cincinnati; None in the 31st to 50th markets. Also, the number of authorized public television stations is greater than the number of actual stations that are constructed or will ever go on the air.

[19]It is unlikely that an NCE station not carried by a cable system would survive in today's marketplace since it would essentially be closed off from 60 percent of its potential market.

[20]1992 Cable Act, 106 Stat. at 1463.

systems while still allowing affected cable operators reasonable flexibility in choosing what stations to include on their systems.

D. Placement of NCE Stations on Un-used PEG Channels:

The commission seeks comment at paragraph 14 of the NPRM on rules regarding placement of qualified NCE must carry stations on un-used PEG channels. Specifically, the Commission seeks comment on what procedure should be followed when a qualified PEG user appears after a cable system has put a qualified NCE station on the PEG channel. Also, comments are solicited regarding what a cable operator must do when a request is made for identification of channels carried pursuant to must carry requirements.

In principle, CFA/MAP would prefer that PEG channels not be used for programming other than PEG programming. PEG channels are a valuable public resource and should not be done away with lightly. They contribute to diversity by presenting public service programming. Furthermore, these channels and their programming are generally not controlled by the cable operator. However, these valuable resources are often at risk as a result of the absence of a national system for equipping and funding them. Local arrangements vary widely and often include no funding for equipping or operating PEG channels.

There is authority to use PEG channels for other purposes in the 1992 Cable Act, provided that a cable operator wishing to take advantage of this provision in the law first obtain permission from the franchising authority. CFA/MAP believes that the involvement of the franchising authority is pivotal. As the Commission rightly

points out, it is the franchising authority that initially determines how much of a cable operator's channel capacity must be devoted to PEG channels.[21]

It is reasonable and appropriate for the same party that is required to create the initial channel-use requirements to ratify any proposed changes in channel usage. The franchising authority is the local entity with the responsibility of protecting the public interest with respect to cable television service. It should also be the party that decides whether using designated PEG channels for NCE must carry stations is in the public interest.

Requiring the cable operator to seek permission from the franchising authority will prevent PEG channels from being eliminated without public knowledge. To that end, CFA/MAP recommends that the Commission provide for public notice and require a vote at an open meeting before this authority can be granted by the authority that has the power to approve revisions in the franchise agreement.

In the event a franchising authority authorizes use of PEG channels for non-PEG programming, CFA/MAP believes the Commission must create a system to protect subsequent PEG programmers that may seek carriage in the future. After a franchisee is notified of a PEG user who seeks channel capacity, the franchisee shall make channels available which subsequently come available because of additional channel capacity on the system or when programming is no longer available. This approach would prevent PEG users from being

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[21] 47 U.S.C. § 531.

permanently excluded from using their originally allocated PEG channels if a cable system uses the channel for other programming. This promotes diversity while permitting flexibility by the cable operator to make the most efficient use of its channel capacity possible.

CFA/MAP advocates making information regarding channels being carried pursuant to must carry requirements publicly available. A cable operator should be required to respond to a written request for must carry information within 30 days with a list of those channels being carried pursuant to must carry requirements. This is a reasonable length of time in which to respond to any inquiry of this nature. A list of these channels should also be kept in all cable operator's public files. These requirements would put little if any burden on cable operators. The information should be brief, readily available and there is no reason that it should not be made public. Consumers benefit from public information about their cable operator. This information enables consumers to make more informed decisions about both personal and community needs and the performance of their cable franchise.

3. Must Carry for Local Commercial Television Stations:

CFA/MAP's comments regarding must carry requirements for NCE stations apply to carriage of local commercial stations and low power television (LPTV) stations as well. Based on the consumer interest in maximum diversity of video programming[22] and regulatory simplicity, CFA/MAP advocates application of parallel requirements

[22]1992 Cable Act, 106 Stat. at 1463.

as those to NCE stations to local commercial and LPTV stations. With respect to LPTV, CFA/MAP urges the Commission to require that these broadcasters meet community needs just as other local commercial broadcasters must before they are eligible for must carry status. Qualifying for must carry status provides a significant benefit to broadcasters. Along with the benefits, in the name of fairness, LPTV stations must also have the responsibilities that other broadcasters have before they can earn must carry status.

In paragraph 19 of its NPRM, the Commission requests comment on what type of notice should be afforded when a request is made to add or subtract a community from a television market. CFA/MAP urges the Commission to provide for written notice to all subscribers before any decision is made. Consumers in the affected communities should have an opportunity to become involved in the proceeding before decisions affecting their television service are made.

When defining a "network" for purposes of the must carry provisions, CFA/MAP believes the 50 percent simultaneous weekly prime time programming standard urged for NCE stations would be appropriate for the reasons stated above.

A. Sales Presentations and Program Length Commercials:

The Commission seeks comment on a definition of "predominantly utilized for the transmission of sales presentations or program length commercials" for purposes of the 1992 Cable Act at paragraph 31 of its NPRM. An interim definition of "predominantly used" is

offered that would classify a channel where more than 50 percent of its programming week consists of sales presentations or program length commercials.

CFA/MAP believes this definition does not adequately reflect viewership realities. In particular, it permits TV licensees to reserve all prime-time and periods of high viewership from commercial presentations. It would be realistic to utilize a 50 percent per day cap on operating hours to qualify for must carry. in addition, the Commission should make plain that the 50 percent cap includes all commercial matter carried at any time during the stations daily (or weekly) operation. In other words, spot commercials carried during "ordinary programming" count toward the 50 percent daily (or weekly) cap.[23]

4. Provisions Applicable to Commercial and Noncommercial Stations:

A. Channel Positioning:

The NPRM at paragraph 33 seeks comment on a procedure for resolving disputes when more than one must carry station has a claim to the same channel position under the 1992 Cable Act. CFA/MAP believes that when there is more than one station with a valid claim to a channel position, non-commercial educational stations should be given priority.

B. Notification Regarding Deletion or Repositioning of

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[23]The Commission could also reserve the right to exercise its authority to define "predominately utilized" based on audience share as well as experience after implementation of these rules. This would give the Commission the ability to take on a more expansive definition if necessary in the future if problems arise.

Channels:

The Commission seeks comment at paragraph 37 of its NPRM about whether subscribers must be informed by cable operators of the deletion or repositioning of a commercial must carry signal. CFA/MAP urges the Commission to mandate application of the same rules regarding informing subscribers about deletions and repositioning of qualified must carry commercial stations as applied to NCE stations be applied to commercial stations. This would require at least 30 days notice of deleting a must carry signal or moving such a station to another channel.

5. Conclusion:

The Commission can assure the greatest level of diversity and the continued vibrancy of both commercial and non-commercial local broadcasting, which are the only entities in the video-marketplace mandated to serve the public interest, through reasonable must carry guidelines. These guidelines and the definition of "substantial duplication" should reflect viewership realities and prevent loopholes which could lead to abuse of the must carry privilege. Any rules must make certain that consumers are adequately informed about the stations on their system that qualify for must carry and any subsequent changes in status.

Respectfully submitted,

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January 4, 1993