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

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

ORIGINAL  
FILE

In the Matter of )  
 )  
Implementation of the Cable )  
Television Consumer Protection )  
and Competition Act of 1992 )  
 )  
Broadcast Signal Carriage Issues )

MM Docket No. 92-259

To: The Commission

COMMENTS  
OF  
NATIONAL BROADCASTING COMPANY, INC.

Richard Cotton  
Ellen Shaw Agress  
National Broadcasting  
Company, Inc.  
30 Rockefeller Plaza  
New York, NY 10112

James H. Rowe  
Howard Monderer  
National Broadcasting  
Company, Inc.  
Suite 930 North  
1331 Pennsylvania Ave., N.W.  
Washington, D.C. 20004

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## **SUMMARY**

In interpreting and executing a law as complex and detailed as the 1992 Cable Act, many different potential problems and conflicts can be envisioned. NBC urges the Commission not to become enmeshed and entrapped into attempting to deal in its current rulemaking proceedings with all the questions and inconsistencies with other laws and rules. This will bog these proceedings down and inevitably delay the adoption of a broad regulatory framework that will guide the cable and broadcast industries, local governments and the Commission in the immediate task of complying with a far-reaching new statutory scheme. The Commission can address these detailed and marginal issues later in real-world situations, by whatever procedure may be appropriate to each particular issue.

Concerning five broadly applicable issues raised in this proceeding, NBC urges the Commission to conclude:

- that a station's right to grant retransmission consent is a statutory right and is not dependent on acquiescence by the station's program suppliers;

■ that cable systems must carry the complete schedules of stations electing retransmission consent;

■ that the Commission should adopt minimum technical standards applicable to cable systems' carriage of programs pursuant to retransmission consent election, at least as stringent as those Congress imposes, or authorizes the Commission to impose, on must-carry channels;

■ that the Commission is the primary forum for enforcing retransmission consent elections and agreements made pursuant to them; and

■ that for the rules adopted in this proceeding, the Commission should use the definition of "substantial duplication" in Section 76.5(j) of its former must-carry rules.

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**COMMENTS  
OF  
NATIONAL BROADCASTING COMPANY, INC.**

National Broadcasting Company, Inc. ("NBC"), by its attorneys, hereby files its comments on the Notice of Proposed Rule Making in this proceeding.

NBC is a corporation that operates a national commercial broadcast television network that provides a full daily schedule of programming to over 200 affiliated television stations nationwide. NBC also owns six VHF television stations across the country. NBC Cable, NBC's cable division, owns or has investments in a number of national and regional cable programming services.

## INTRODUCTION

The provisions of the Cable Television Consumer Protection and Competition Act of 1992 (the "Cable Act" or the "Act"), concerning which the Commission seeks comment in this proceeding, were enacted by the Congress in considerable detail. Many of these provisions are self-executing. However, in certain areas, the Congress has directed the Commission to adopt rules to govern compliance with the Act, often within specified time limits. NBC believes the Commission has, to date, performed an herculean task in commencing various proceedings required by the Act and in attempting expeditiously to comply with Congress' intent to implement by the statutory deadlines the legislative scheme the Act envisions.

In interpreting and executing a law as complex and detailed as this one, many different potential problems and conflicts can be envisioned. For example other laws and Commission regulations contain provisions that may not conform with some of the geographic, definitional and timing aspects of the 1992 Act. NBC urges the Commission not to become enmeshed and entrapped in attempting to deal in its current rulemaking proceedings with all the questions and

inconsistencies, many of them occurring only in rare or marginal situations, that may hypothetically or even realistically arise. Nor should the Commission, in the brief period before the provisions of the Act become effective, attempt to conform all the new and existing statutory and regulatory timetables and definitions that may appear to be inconsistent.

Any attempt in these proceedings to adopt regulations which create absolute conformity between the new statutory requirements and existing provisions of, for example, the copyright law or the Commission's non-duplication and territorial exclusivity rules, will bog Commission proceedings down and inevitably delay the adoption of a broad regulatory framework that will guide the cable and broadcast industries, local governments and the Commission in the immediate task of complying with a far-reaching new statutory scheme. Once the broadly applicable regulations and concepts contemplated by the Act are put into place, the Commission can address the problems or conflicts that arise in real-world situations by whatever procedure may be appropriate to each particular issue, i.e., by supplemental rulemaking decision, waiver, enforcement proceeding, complaint, declaratory ruling, etc. The Commission should

not lose sight of the forest for the trees in this proceeding.

In these Comments NBC will respond to five broadly applicable issues raised in the Notice.<sup>1</sup>

I. A STATION'S RIGHT TO GRANT RETRANSMISSION CONSENT IS STATUTORY, AND IS NOT DEPENDENT ON ACQUIESCENCE BY THE STATION'S PROGRAM SUPPLIERS

The right to grant retransmission consent to cable systems is a statutory right which the Act confers on stations with respect to their broadcast signals. It is clear that Congress did not intend for a station to have to obtain permission from copyright holders of the programs that are carried within its signal before granting retransmission consent. Since the ability to grant retransmission consent is a right that belongs exclusively

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<sup>1</sup> NBC also supports the proposal contained in the Comments of the National Association of Broadcasters with regard to the administration of the exceptions contained in the Act to the provisions requiring that multichannel video programming distributors obtain retransmission consents of broadcasting stations.

to the individual station, there is no need for the Commission to be concerned about the terms of program supply or network affiliation contracts. It should simply confirm that, as a matter of statutory policy, it is the station's right to grant or withhold retransmission consent to its broadcast signal, and that the exercise of that right cannot be controlled by copyright owners or program suppliers.

Copyright owners are protected by copyright law, which is separate and distinct from the Communications Act and has no bearing on the principle of retransmission consent. Copyright owners have no proprietary interest in retransmission consent rights, just as stations have no proprietary interest in the copyright to someone else's program. The distinction between copyright and retransmission consent was expressly noted in the Senate Report<sup>2</sup> (p. 36). Nothing in the Cable Act indicates that Congress either intended for stations' right to control retransmission of their signals to be dependent on the

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<sup>2</sup> Report of the Senate Committee on Commerce, Science and Transportation, Senate Rep. No. 102-92, 102nd Cong., 1st Sess. (1991) (the "Senate Report").

assent of copyright proprietors, or intended for stations to have to obtain retransmission consent "permission" for each program from each of its many program suppliers before it could grant retransmission consent rights to cable systems.

A Commission regulation that required stations to obtain the permission of program suppliers before granting retransmission consent to cable systems would totally thwart the Congressional intent in enacting Section 325(b) of the Act. It would undermine the statutory right given to stations by Section 325(b), and it would, in essence, transform retransmission consent into another aspect of copyright protection -- undermining the express distinction Congress intended to maintain between the two statutory concepts. One would think that if Congress intended that, in order for it to elect the retransmission consent alternative, each station would first have to obtain the consent of all its individual program suppliers, such a significant requirement would have been expressed or recognized somewhere in the Act or the Committee Reports. However, Congress did not do so.

Of course, each station must have, or obtain from the copyright proprietor or program supplier, the right to

include a program in its broadcast signal. It is this right -- essentially one of copyright -- that is governed by program licensing agreements and which the Act expressly does not affect. But with respect to the programs for which a station has obtained the right to broadcast as part of its signal, Congress has by the Cable Act conferred on the station the right to elect the best way to transmit that signal to the entire public in its ADI, whether over-the-air or through a cable system.

Requiring stations to obtain permission to grant retransmission consent from each of their program suppliers is not only contrary to Congressional intent in enacting Section 325(b), but would undermine the legislative scheme of the compulsory copyright license, which Congress clearly did not intend to do. Indeed, the principal purpose of the law establishing the compulsory copyright license was to eliminate the requirement that each individual copyright owner/program supplier consent to allow cable systems to carry its individual portion of the program schedules of broadcast stations. At the time the compulsory copyright law was adopted, the House Judiciary Committee explained the purpose of the compulsory license as follows:

"In general, the Committee believes that cable systems are commercial enterprises whose basic retransmission operations are based on the carriage of copyrighted program material and that copyright royalties should be paid by cable operators to the creators of such programs. The Committee recognizes, however, that it would be impractical and unduly burdensome to require each cable system to negotiate with every copyright owner whose work was retransmitted by a cable system. Accordingly, the Committee has determined to maintain the basic principle of the Senate bill to establish a compulsory copyright license for the retransmission of those over-the-air broadcast signals that a cable system is authorized to carry pursuant to the rules and regulations of the FCC." H.R. Rep. No. 1476, 94th Cong., 2d Sess. 89 (1976).

If program suppliers could prevent stations from granting retransmission consent to specific programs carried within their signals, it would drive the marketplace to the program-by-program approach Congress sought to avoid by adopting the compulsory license scheme. Certainly if Congress had intended the 1992 Act to change this basic approach of the copyright law, it would have said so clearly. On the contrary, the Senate Committee on Commerce, Science and Transportation, in its Report proposing adoption of what became the retransmission consent provisions of the Act, stated that:

"The Committee has been careful, therefore, to craft the retransmission consent provision of S.12 in a manner which will minimize unnecessary disruption to broadcasters and cable operators. The Committee has also sought to avoid any alteration to the compulsory licensing scheme established under the copyright law.

The Committee is careful to distinguish between the authority granted broadcasters under the new section 325(b)(1) of the 1934 Act to consent or withhold consent for the retransmission of the broadcast signal, and the interests of copyright holders in the programming contained on the signal.

The principles that underlie the compulsory copyright license of section 111 of the copyright law (18 U.S.C. 111) are undisturbed by this legislation . . ." (Senate Report at p. 36.)

For such an "impractical and unduly burdensome" scheme now to be required by the Commission as part of its regulation of retransmission consent was clearly not intended by the Congress. Rather, the quoted portion of the Senate Report states that the new Section 325(b)(1) of the Communications Act distinguishes between the authority of the station to elect or withhold retransmission consent (which is governed by the Act), and the rights of the copyright holders (which are governed by the compulsory license).

Just as the agreements between stations and program suppliers could not create in program suppliers the right to abrogate the statutory compulsory copyright license of cable systems, so they cannot be interpreted as abrogating the statutory retransmission consent right of stations.

It would be especially anomalous to interpret the Act as burdening the station's retransmission consent right with the requirement of supplier consent when the station's alternative choice of must-carry is not similarly limited. Were the station to elect must-carry, no consents of its program suppliers would be required. Under such an interpretation, unless a station was prepared to guarantee in advance, for each entire three-year period for which it was about to make the election, that it could get these rights from each of its program suppliers, it could not undertake the legal risk of electing the retransmission consent route over the must-carry route and consenting to the system's retransmission of the programs.

This is not to say that its program suppliers will derive no benefit from a station's exercise of retransmission consent rights. Correction of the competitive imbalance between broadcasting and cable, and the ability of stations to rectify the present situation where cable systems obtain great benefits from carrying local broadcast signals for which they pay nothing but for which consumers pay them (see the Act's Findings in Section 2(a)(19)), will enable stations to be more sound economically and to afford to compete more vigorously for

suppliers' programs. Program suppliers will therefore benefit if the Senate Committee goal of ensuring "that our system of free broadcasting remains vibrant" (Senate Report, p. 36) is achieved.

II. CABLE SYSTEMS MUST CARRY THE COMPLETE SCHEDULE OF STATIONS ELECTING RETRANSMISSION CONSENT

In paragraphs 60 and 61, the Notice seeks comments on whether stations have to carry the complete program schedule of stations electing retransmission consent. In NBC's view, they do, subject, of course, to such other recognized laws or rules such as network non-duplication and syndicated exclusivity rules.<sup>3</sup>

From the standpoint of the public which subscribe to cable, they expect to receive the same programs on the broadcast channels carried on cable that their non-cable-subscribing neighbors see. In the words of Finding (17) of the Act,

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<sup>3</sup> See Senate Report, p. 38.

"Consumers who subscribe to cable television often do so to obtain local broadcast signals which they otherwise would not be able to receive, or to obtain improved signals."

Other findings of the Act (e.g. (12), (15), & (16)) support the conclusion that Congress intended cable systems to retransmit the entire service of their local broadcast stations.

In furtherance of these objectives, in establishing in detail the basic standards for carriage of stations electing must-carry status, the Act expressly requires cable operators to carry in their "entirety" the program-related signals of those stations (Section 614(b)(3)). While Section 325(b) does not similarly focus on the details of the signal carriage requirements with respect to stations electing retransmission consent, there is no indication in either the Act or its legislative history that "the signal" of the station being retransmitted was to be less than its entire signal or less complete a service than would be supplied to cable viewers of must-carry stations. On the contrary, when the Senate Report specifically pointed out that the parties to retransmission consent agreements might negotiate other issues than monetary compensation, it

referred only to issues not involving modifications of the broadcast signal,

"...such as joint marketing efforts, the opportunity to provide news inserts on cable channels, or the right to program an additional channel on a cable system" (at pp. 35-36, emphasis added).

Had it intended to permit changes in the broadcast retransmission channel itself, it could easily have given such an example, rather than refer only to changes in cable channels.

The Commission should conclude that there is a public interest in assuring that to the extent a station is carried either by consent election, the cable-subscribing public has access in its entirety to the same program schedule that the over-the-air members of the public receive. Indeed, the purpose of the Act is to make possible retransmission of the broadcast signal, not the creation of some new program service of which the broadcast signal is only a part. This is because the Act intended to provide to cable subscribers the same signal the station transmits to its broadcast viewers. The Commission should carry out this legislative intent by requiring cable operators carrying the signals of stations electing rebroadcast consent to carry all the

program-related material transmitted by them, to the same extent as is required by Section 614 for stations electing must-carry.

**III THE COMMISSION SHOULD ADOPT MINIMUM TECHNICAL STANDARDS  
APPLICABLE TO CABLE SYSTEMS' CARRIAGE OF PROGRAMS  
PURSUANT TO RETRANSMISSION CONSENT ELECTION**

As the Notice (§53) points out, Section 325(b)(4) provides that if a station elects to exercise retransmission consent rights with respect to a cable system, "the provisions of section 614 shall not apply to the carriage of the signal of such station by such cable system." However, regardless of the meaning of this provision, it is clear that Congress intended the Commission "to establish minimum technical standards for all classes of video programming signals" (Senate Report, p. 22), and believed the Act "requires the FCC to establish minimum technical standards for the technical operation and signal quality of cable systems." (House Report 102-628, p. 38.) This was provided for in Section 14 of the Act, which amended Section 624(e) of the Communications Act to require the Commission to establish its own "minimum technical standards relating to cable systems' technical operation and signal quality," as well as to allow local franchising authorities to establish

even "more stringent" standards than those prescribed by the Commission.

On matters of technical operation and signal quality, the public cannot distinguish between the must-carry and retransmission consent signals carried by their cable system. As the public tune from station to station, the Commission cannot permit a cable operator to provide them with signals of varying technical characteristics or signal quality.

Therefore, under Section 624, the Commission can and should adopt for retransmission consent cable channels, at a minimum, all those technical rules that the Congress by the Act imposes, or authorizes the Commission to impose, on must-carry cable channels. Furthermore, those technical standards adopted by the Commission for non-broadcast channels should also be imposed on must-carry and retransmission consent channels unless clearly inapplicable.

IV THE COMMISSION SHOULD BE THE PRIMARY FORUM FOR ENFORCING RETRANSMISSION CONSENT ELECTIONS AND AGREEMENTS MADE PURSUANT TO THEM

The Notice (§57) states the Commission's tentative

conclusion that disputes between cable operators and stations over retransmission consent authorizations should be resolved in a court rather than at the Commission. NBC believes that the Commission, as the expert agency designated by Congress to enforce the Communications Act, is a proper forum to enforce retransmission consent authorizations and to resolve disputes over agreements made pursuant thereto.

The statutory retransmission consent right was created as part of the Communications Act, and the Commission is required by Section 1 of that Act to "execute and enforce the provisions of this Act" (47 U.S.C. 151). It is the Commission which has been entrusted by both the Cable Act and the Communications Act to adopt rules to interpret those laws and to flesh out their statutory provisions. This certainly includes the enforcement of retransmission consent elections, a right created by the new Section 325(b) of Communications Act itself.

Agreements which may be entered into by cable operators and stations pursuant to elections made under Section 325(b) will inevitably involve questions of enforcement of both the

Act and of the Commission's rules promulgated thereunder. In addition, since the parties will be conforming their agreements to the Act and the rules, the Commission may well be the only body with the necessary expertise to interpret and apply their terms. Indeed, the less clear question is whether the Commission has, or should assert by preemption, the exclusive right to resolve issues involving the exercise of retransmission consent rights. However, even were courts allowed to exercise concurrent jurisdiction over disputes not involving questions of violation of the Communications Act itself (which are the Commission's jurisdiction), they would be likely to refer many issues to the Commission for resolution under the doctrine of primary jurisdiction.<sup>4</sup>

NBC therefore urges the Commission not to adopt the general conclusion that retransmission consent disputes

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<sup>4</sup> For example, if as a result of the termination or breach of its agreement a cable operator is no longer entitled to retransmission consent pursuant thereto, the cable system would be in violation of the Communications Act if it continued to carry the station's signal. While there may be an issue of contract law involved here which may be resolvable in the courts, the Commission has its own jurisdiction to exercise if there is a violation of Section 325(b).

should always be resolved in the courts, but, on the contrary, to state that it has appropriate jurisdiction in this area.

V FOR THE RULES ADOPTED IN THIS PROCEEDING, THE COMMISSION SHOULD USE THE DEFINITION OF "SUBSTANTIAL DUPLICATION" IN SECTION 76.5(j) OF ITS FORMER MUST-CARRY RULES

New Section 614(b)(5) provides that:

". . . a cable operator shall not be 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 network (as such term is defined by regulation).

The Commission has in the past considered the appropriate definition of these terms, and adopted a definition that is substantially consistent with the purposes of the Cable Act. In 1986, when it considered the concept of "substantial duplication" to exempt cable systems from obligations with respect to such stations under the must-carry rules adopted at that time -- the identical purpose of its current consideration -- the Commission adopted the following definition:

"Substantially duplicates. Regularly duplicates the network programming of one or more stations in a week

during the hours of 6 to 11 p.m., local time, for a total of 14 or more hours." (Section 76.5(j).)<sup>5</sup>

Not only did the Congress indicate no dissatisfaction with this definition, but it makes sense in the context being considered in the Notice, virtually the same context in which it was adopted by the Commission in 1986. In both cases, the issue is whether cable systems should be burdened to carry two stations providing service which substantially duplicate each other. Prime time is clearly the principal time when audiences watch television, and the substantial duplication of station programming during that period is the proper basis for exempting cable systems from the requirement that it carry a station's signal.

NBC therefore believes the 1986 must-carry rules definition, adopted by the Commission for the identical situation, should be adopted in this proceeding as well. Of course, if the cable system elects to carry the duplicating station anyway, the Act allows it to do so, assuming the

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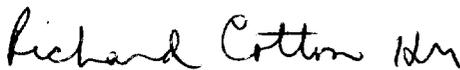
<sup>5</sup> Report and Order in MM Docket 85-349, 1 FCC Rcd 864, 888, 908 (1986).

network non-duplication rules do not apply. (Section 614(a)(5).)

CONCLUSION

The Commission should proceed expeditiously to adopt rules providing the broad framework within which the industries, local governments and the public can begin to comply with the Cable Act. To that end, NBC urges the Commission to adopt the principles set forth in these Comments.

Respectfully submitted,



Richard Cotton  
Ellen Shaw Agress  
National Broadcasting  
Company, Inc.  
30 Rockefeller Plaza  
New York, NY 10112



James H. Rowe  
Howard Monderer  
National Broadcasting  
Company, Inc.  
Suite 930 North  
1331 Pennsylvania Ave., N.W.  
Washington, D.C. 20004

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