

ORIGINAL

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

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

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

COMMENTS

OF

ARTS & ENTERTAINMENT NETWORK

Fleischman and Walsh
1400 Sixteenth Street, N.W.
Suite 600
Washington, D.C. 20036
(202) 939-7900

Its Attorneys

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Summary

The must-carry and retransmission consent provisions of the 1992 Cable Act severely distort the marketplace and threaten to stifle the unprecedented growth and development of new and highly diverse programming which resulted from cable deregulation and the absence of must-carry rules over the last seven years. During this period, A&E has increased its subscribership by over 400% and its investment in programming by over 450% to the point that A&E is currently recognized as one of the fastest growing basic cable programming services. Much of this success is attributable to the excellence of programming for which A&E is recognized and the increasing amount of original programming which it acquires.

The must-carry provisions give an unfair advantage to broadcast networks with whom cable programming networks, such as A&E, compete for advertising support by guaranteeing that broadcast networks will have access to virtually every television household in the United States. At the same time, these provisions make it difficult for cable networks to even maintain access to the 60% of television households that subscribe to cable television. Similarly, the retransmission consent provisions threaten to erode the subscriber fee foundation which is vital to the continued viability of existing cable programming services and the development of new services. Given the diversity of programming which has developed and America's leadership in this area, the FCC must be careful to implement the

statute in a manner that does not exacerbate the market imbalance which the 1992 Cable Act creates and further discourage incentives to invest in new programming and program networks.

The Commission should implement the must-carry requirements in a manner that does not require cable services which were being carried as of the legislation's effective date to be displaced or deleted where sufficient channel capacity does not exist to accommodate all must-carry stations that are not currently carried. Rather, such stations should be given first priority for carriage as new channel capacity is subsequently activated or otherwise becomes available. Similarly, the Commission should give cable operators the flexibility to accommodate broadcaster channel positioning requests within the range of allowable statutory alternatives in order to minimize the incidence of channel positioning conflicts and the repeated disruption to existing channel line-ups and viewing patterns that would otherwise result. Finally, the Commission must make available its special relief procedures to protect the interests of cable programmers by requiring notification to cable programmers prior to any repositioning or deletion resulting from a broadcaster's must-carry or channel positioning request, and by requiring that the status quo be maintained during the pendency of any complaint filed in response to such notification.

The Commission should also implement the retransmission consent provisions of the statute in a way that does not unjustly discriminate against cable programmers beyond the absolute requirements of the statute. Thus, the Commission should not give broadcast stations electing retransmission consent any of the benefits that are accorded to must-carry stations, such as manner of carriage and channel positioning advantages. Additionally, local stations which are carried pursuant to retransmission consent rather than must-carry should be counted towards the number of channels that a cable system is required to set aside for broadcast carriage under the statute. Finally, the Commission must allow retransmission consent costs to be passed through directly to subscribers without the approval of the local franchising authority and must ensure that retransmission consent terms demanded by broadcasters are not unreasonable.

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COMMENTS

Arts & Entertainment Network ("A&E") hereby submits these comments for consideration by the Commission in its rulemaking proceeding to implement the must-carry and retransmission consent provisions of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act").¹ A&E is a twenty-four hour per day television entertainment programming service which was launched on February 1, 1984. A&E is distributed

¹Pub. L. 102-385, 106 Stat. 1460 (1992). Notice of Proposed Rulemaking in MM Docket No. 92-259, ___ FCC Rcd ___ (adopted November 5, 1992) ("NPRM"). A&E is a participant in the lawsuit challenging the constitutionality of the must-carry and retransmission consent provisions of the 1992 Cable Act filed by Turner Broadcasting System. Turner Broadcasting System, Inc. v. Federal Communications Commission, Civil Action No. 92-2247 (D.D.C. filed October 5, 1992). By submission of these Comments, A&E specifically reserves, and does not waive, its constitutional rights, and these Comments are filed without prejudice to A&E's constitutional challenges.

principally to subscribing cable television systems in the United States and Canada. A&E's programming is acquired from, produced by, or co-produced with a variety of American and international sources and consists of entertainment programming in four areas -- comedy, drama, documentaries and performing arts.

Since 1985, when the FCC's must-carry rules were first struck down², A&E has increased its subscribership by approximately 400% as measured by A.C. Nielsen Company. The growth of A&E subscriber base and the diversity and economic viability of new cable networks such as A&E, Black Entertainment Television, Nickelodeon, Lifetime and CNBC, among others, are due in large part to the absence of must-carry rules and other legislative and regulatory restrictions upon the editorial discretion of cable operators. During those years, and for the same reasons, A&E's investment in programming increased by over 450%, to more than \$50,000,000.

A&E's ability to increase its programming expenditures has made possible the excellence of the programming for which A&E is recognized. According to recent reports, A&E logged the fastest subscriber growth among the twelve largest basic cable services in the first quarter of 1992 from 1991. Its primetime ratings grew 33% while household delivery rose by 39% in that period.³

²Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434 (D.C. Cir. 1985), cert. denied, 476 U.S. 1169 (1986).

³"A&E Network Tries To Hone Its Image," Multichannel News (November 30, 1992) at pp. 58-59.

Much of this success is attributable to the fact that A&E has increased its investment in programming to the point where the ratio of original to acquired programming has increased to about 60%/40%.⁴ A&E's ability to continue, let alone increase, its current level of investment in programming hinges directly on its continued carriage by cable operators on channel positions which television viewers have come to expect through viewing for a period of years.

Broadcast networks already enjoy significant competitive advantages over cable programming networks such as A&E. The broadcast networks are able to sell advertising based upon reaching virtually the entire universe of television households. In contrast, the potential viewer base of cable programming networks is substantially smaller, due to the fact that cable service is found in only approximately 60% of television households.⁵ The broadcast networks' ability to reach the universe of non-cable television households translates directly into significant revenue. For example, the Television Bureau of Advertising estimates that total television advertising revenue in 1991 reached \$23.9 billion.⁶ In contrast, total cable

⁴Ibid.

⁵National Cable Television Association: Cable Television Developments (May 1992) at p. 1-A (citing A.C. Nielsen Company and Paul Kagan Associates, Inc.).

⁶National Cable Television Association: Retransmission Consent: Why Bail Out The Broadcasters? (March 1992) at p. 11.

advertising revenue for 1991 barely exceeded \$3 billion.⁷ If cable programming services are dropped to accommodate new must-carry stations, or displaced to service tiers having a smaller viewership, their ability to maintain even the current level of advertising support will be severely undermined.

Indeed, cable programming networks such as A&E have become more reliant upon advertising revenues to support their increased investment in new and original programming and to maintain a reasonable subscriber fee structure. Unlike the broadcast industry, whose growth as medium of mass communications was predicated upon advertising revenues, cable programming networks were forced to rely on subscriber fees for their existence as cable television did not (and still does not) have the audience reach of broadcast television. As the reach and popularity of cable programming services has grown, so too has their ability to attract the advertising revenue crucial for the investment in new programming. It is somewhat ironic that at the same time that the cable programming industry has moved away from its primary reliance on subscriber fees, the broadcast industry has obtained passage of legislation which will enable them to impose retransmission consent charges on cable systems. Unlike cable programmers who do not have the mass audience to survive and grow without the initial support of subscriber fees, broadcasters are

⁷Cable Television Developments at p. 9-A.

merely seeking an additional revenue source that will make them even more profitable than they already are.⁸

At a time when this country is concerned with stimulating new investment and with America's global competitiveness, policy makers should be reminded that one area in which America leads the rest of the world is in the development of new information services and entertainment programming. This global preeminence is a direct result of the fact that deregulation, including the absence of artificial carriage requirements, has created an environment which has encouraged investment in new programming and the development of new programming networks. Taken together, the must-carry and retransmission consent provisions of the 1992 Cable Act distort the marketplace and place cable programmers at a clear competitive disadvantage vis-à-vis broadcasters and broadcast networks with respect to cable carriage, channel positioning and tiering. Absent a proper formulation of the basic rate standards, retransmission consent fees may artificially reduce the ability of A&E's affiliate base to achieve a reasonable profit from carriage of cable networks on the basic tier. At the same time, the must-carry provisions threaten to reduce A&E's universe of potential viewers and thereby diminish the advertising revenue base which has served to

⁸According to the National Association of Broadcasters, the average network affiliate station generated between \$3.4 billion and \$3.6 billion dollars per year in pre-tax profits between 1984 and 1990. Retransmission Consent: Why Bail Out The Broadcasters? at pp.9-10.

support the development of new programming. Given the diversity of programming which has developed and America's leadership in this area, the FCC must be careful to implement the statute in a manner that does not exacerbate the market imbalance which the must-carry and retransmission consent provisions of the 1992 Cable Act create and further discourage incentives to invest in new programming and program networks.

A. MUST-CARRY

With regard to the implementation of the must-carry provisions in the 1992 Cable Act, A&E is primarily concerned with three aspects of these new statutory provisions. These are cable carriage, channel positioning and the lack of any process to protect the interests of cable networks. Each will be discussed more fully below.

1. Cable Carriage

A&E's main concern with the must-carry requirements of the legislation is that they may require cable operators to drop or displace the cable programming services which are currently carried in order to accommodate additional broadcast stations which, though not currently carried on a cable system, will be able to gain cable carriage through the assertion of must-carry rights. By relying on the Area of Dominant Influence ("ADI") to determine the local/distant nature of commercial broadcast stations, and by expanding the geographic must-carry area of non-commercial stations from 35 to 50 miles, the 1992 Cable Act gives must-carry rights to stations which have never had such rights

under any previous versions of the Commission's rules including some stations which duplicate other stations. Under the Commission's 1972 rules, television stations were considered local within a 35-mile zone from their city of license and in those counties where they were significantly viewed.⁹ In certain cases, stations were considered local to cable systems serving communities within the station's Grade B contour.¹⁰ Even under the Commission's 1986 must-carry rules, stations were subject to both a viewing and a mileage standard in order to obtain must-carry rights and both commercial and non-commercial stations counted against the number of channels which a cable operator was required to set aside for must-carry purposes.¹¹

Under the 1992 Cable Act, commercial and non-commercial stations are given must-carry rights over an expanded geographic area without regard to any viewing standard. Between the 33-1/3% must-carry cap for commercial stations and the additional number of channels required to accommodate non-commercial educational

⁹See 47 C.F.R. §§76.61(a)(1), (a)(5); 76.63(a) (incorporating by reference §§76.61(a)(1) and (a)(5)); 76.59(a)(1), (a)(6); 76.57(a)(3), (a)(4) (1972) (repealed). Certain stations were given must-carry rights beyond their 35-mile zones, such as where the station was licensed to a hyphenated market. See 47 C.F.R. §§76.61(a)(4); 76.63(a) (incorporating the provisions of §76.61(a)(4)); and 76.59(a)(4) (1972) (repealed).

¹⁰See 47 C.F.R. §§76.61(a)(2); 76.63(a) (incorporating by reference §76.61(a)(2)); 76.59(a)(2), (a)(3); and 76.57(a)(1) (1972) (repealed).

¹¹See 47 C.F.R. §§76.5(d), 76.56(a) (1987) (repealed). The Commission's "interim" must-carry rules were invalidated on constitutional grounds in Century Communications Corp. v. FCC, 835 F.2d 292 (D.C. Cir. 1987).

stations, cable systems will have only a fraction of their total activated channel capacity remaining for the carriage of cable programming services.¹²

If cable programmers lose access to a significant portion of their programming audience because they are dropped from cable systems, further investment in new programming will be severely reduced and the continued viability of many cable networks will be called into question. Accordingly, the must-carry provisions of the statute should not be interpreted by the Commission to require the deletion or displacement of any cable service by any cable system on which that service was being carried as of October 5, 1992, the effective date of the 1992 Cable Act, where sufficient activated channel capacity does not exist to accommodate all must-carry stations not currently carried. Rather, in such cases, the Commission's regulations must provide that any must-carry stations that were not being carried on the effective date of the 1992 Cable Act would obtain first priority for carriage as new channel capacity is subsequently activated or otherwise becomes available. Such a rule would represent a careful balance between the needs of cable programmers and cable subscribers and Congress' desire to preserve free over-the-air television. The Commission must avoid massive disruption to

¹²The statutory requirements for 10-15% of channel capacity to be set aside for leased access, and for additional capacity to meet non-federal public, educational and governmental access requirements further reduce the amount of channel capacity available for carriage of cable networks.

established viewing patterns and the potentially irreparable damage to cable programming networks that would result if, because of a lack of unused capacity, these broadcast stations were allowed to displace existing cable programming services in the interim.¹³

The Commission's rules should also establish that any change in the ADI status of a distant television broadcast station to qualified local station, whether accomplished via ADI petitions or special relief decisions, should not require the displacement of existing cable programming services if no unused capacity is available. Such a policy would not prejudice non-ADI broadcast stations which are presently afforded cable carriage since the statute provides that such stations cannot be dropped during the pendency of any special relief petition. Rather, such a rule would affect only those distant non-ADI stations which were not presently being carried and which sought to obtain must-carry rights via the Commission's waiver process.¹⁴

¹³Indeed, the avoidance of disrupting established viewing patterns has long been the mainstay of the Commission's regulatory policy with respect to signal carriage. See, e.g., Cable Television Report and Order, 36 FCC 2d 143 (1972) at ¶75, ¶85 fn. 45.

¹⁴As discussed more fully infra, the Commission's special relief procedures should be modified to require any television station or cable system petitioning the FCC for an ADI change to serve a copy of the petition on all cable networks carried on the affected cable system and expressly allow such cable networks to participate as interested parties in any such proceeding.

2. Channel Positioning

Assuring that cable programming services are not dropped to accommodate new must-carry stations provides just one component of the equitable treatment required to be afforded to cable networks. The statutory mandate to create an artificially priced basic tier containing all television broadcast stations could create a disincentive to carry cable programming services on the most widely viewed service tier. A&E urges the Commission in adopting rules that implement the channel positioning requirements of the statute not to create incentives to rearrange cable networks to tiers with little viewership.

Cable programming services have no less of an interest in cultivating a channel identity than do the broadcast stations which are the beneficiaries of Congressional largesse. The statute offers four possible channel positioning options for commercial broadcast signals: their over-the-air channel number; the cable channel on which they were carried on July 19, 1985; the cable channel on which they were carried on January 1, 1992; or such other channel as is mutually agreed upon by the cable operator and broadcast station. In the case of non-commercial educational stations, the three options are the station's over-the-air channel number; the cable channel on which the station was carried on July 19, 1985; or such other cable channel as the cable system and broadcast station mutually agree upon. It is important to note that these channel positioning rights are not automatic. Both Sections 614(b)(6) and 615(g)(5) of the 1992

Cable Act require a broadcast station to make an affirmative election if it desires to obtain channel positioning. However, once a broadcast has made a channel positioning election, the statute is silent as to: (1) whether the station can require carriage on a particular statutory alternative or whether the cable operator can satisfy its obligations under the statute by providing carriage on any of the allowable statutory alternatives; and (2) the ability of a broadcast station to change its election every three years.

A&E submits that once a station elects to assert channel positioning rights, Congress intended to allow the cable operator the flexibility to choose among the allowable statutory options. For example, Sections 614(b)(9) and 615(g)(3) require cable operators to provide 30 days' written notice prior to repositioning any commercial or non-commercial station. Clearly, if a broadcast station could unilaterally require carriage on a particular channel, there would have been no need for Congress to have enacted the notification provisions.¹⁵

Furthermore, to interpret the statute as giving broadcasters the right to choose from the statutory alternatives would allow broadcasters to demand channel positions on which they have never

¹⁵As the Commission tentatively concluded in its NPRM, neither the channel positioning rights set forth in Section 614(b)(6) nor the notification provisions of Section 614(b)(9) apply to commercial stations electing retransmission consent. NPRM at ¶¶55-56. Accordingly, only those stations which are eligible to make the channel positioning election are entitled to notification prior to repositioning.

been carried. Such an interpretation could also require the displacement of cable programming services from their established channel positions despite the existence of contractual arrangements between the cable programming service and the cable operator for carriage on that particular channel or in complete disregard of the longevity of the cable network's carriage apart from any contract. A&E is not suggesting that a broadcaster currently carried in one of the statutory channel alternatives should be displaced. A&E's position is that, if the cable operator's choice of position for a newly carried station or a station requesting a different position can be achieved within one of the statutory alternatives, and without the need to displace other services, that is the proper balance of rights under the law. Given the fact that one of the stated purposes of the 1992 Cable Act is to "rely on the marketplace, to the maximum extent feasible . . ." ¹⁶ it would be inconsistent with the statute to interpret the channel positioning requirements in a manner that would fail to honor to the maximum extent possible existing channel positioning arrangements between cable operators and cable programming services.¹⁷

¹⁶Pub. L. 102-385, 106 Stat. 1460 (1992) at Section 2(b)(2).

¹⁷Indeed, the Commission's own policies regarding signal carriage have sought to rely on the marketplace to the maximum extent feasible and to honor contractual arrangements among the marketplace participants. See, e.g., Report and Order in Gen. Docket No. 87-24, 3 FCC Rcd 5299 (1988).

Clearly, an approach which gives a cable operator the option to choose among the allowable statutory alternatives for channel positioning avoids many of the conflicting claims which will invariably arise and the domino effect that would follow if one station were able to bump another station or cable network from its longstanding channel position. Such an approach also allows cable operators to maintain existing channel positioning arrangements with cable programming services and avoid having the broadcaster make a new channel position election every three years. Broadcast stations are in no way disadvantaged by allowing cable operators such flexibility since they are still guaranteed one of the statutorily provided alternatives for channel positioning.¹⁸ Thus, unlike cable services, which have no statutorily guaranteed channel positioning and cable carriage rights, broadcasters will continue to be carried on the basic tier and on favorable channel positions. Indeed, with respect to those must-carry stations which are already being carried by cable operators, such an approach maintains the status quo by allowing cable operators in most cases to continue to carry such stations on their present channel positions, thereby avoiding the possibility that a wholesale rearrangement of channel lineup

¹⁸Such flexibility is also consistent with the Commission's longstanding policy to allow cable operators to decide how their channels are to be utilized. See Second Report and Order in Docket No. 14895, 2 FCC 2d 725 (1966); Monterey Peninsula TV Cable, 98 FCC 2d 310 at ¶18, recon. denied, FCC 84-451 (October 31, 1984).

would be required merely because of the whim of one or more of those stations.

The Commission has tentatively concluded that the channel positioning provisions of the statute would not require a cable operator to grant a broadcaster's on-channel carriage request where that channel is not offered as part of the basic tier.¹⁹ A&E agrees with the Commission that where a certain channel number is not provided as part of the basic service, that a broadcaster should not be able to require a cable operator to put that channel on the basic service tier.²⁰ Such an interpretation is entirely consistent with the Commission's policy developed under its former carriage rules that on-channel carriage in certain instances could be considered technically infeasible per se, as in the case of on-channel carriage of UHF stations.²¹

Finally, the same considerations concerning signal carriage and channel positioning apply with even more force to distant stations which either now fall within the statute's overly broad

¹⁹NPRM at ¶33.

²⁰Because Section 623(b)(7)(A) requires all broadcast signals except for distant satellite-delivered stations to be carried on the basic tier, an interpretation that would give broadcasters the unfettered right to demand on-channel carriage would have the unintended effect of requiring the basic channels to be spread throughout the cable operator's entire channel lineup and leave many operators with no inexpensive way to provide and secure a low-cost basic service tier.

²¹See, e.g., Teleprompter Cable Communications Corp. 42 FCC 2d 1122 (1973); Ausauble Communications Inc., 51 FCC 2d 412 (1978); Cable Television Service, 48 RR 2d 553 (1980); Monterey Peninsula TV Cable, supra.

definition of a local station but are considered distant for copyright purposes, or that are not considered local under the statute but nevertheless seek to declare themselves local via the Commission's special relief process. The stated Congressional policy behind the must-carry provisions was to protect local stations and local programming. Of the thirteen Congressional findings which are set forth in Section (2)(a) of the 1992 Cable Act dealing with must-carry and retransmission consent, nine expressly make reference to localism.²² There is no compelling reason to favor such stations over cable programming networks which provide diverse, audience specific programming of the type not generally available on broadcast television. Accordingly, the Commission's implementing regulations must ensure that such distant broadcast stations are never entitled to displace existing cable programming services from their channel positions or from carriage on the cable system.

3. Special Relief

A&E requests that the Commission enact an express rule to make available to cable programmers its special relief procedures. The 1992 Cable Act provides several instances where the Commission is directed to establish procedures to allow cable operators and broadcasters to file complaints or seek waivers

²²See subsections (2)(a)(7)-(11), (15)-(17), (19).

from the statutory must-carry requirements.²³ No such express provision exists for cable programmers. Clearly, Congress did not intend that the interests of cable programmers be ignored.²⁴ Indeed, the statute in no way prevents the FCC from adopting a special relief procedure that would require that cable program networks, prior to being dropped from the system, or repositioned pursuant to a new must-carry and/or channel position demand by a local broadcast station, be notified by the cable operator of the broadcaster's demand and that would allow cable programming networks to file objections with the FCC to the must-carry/channel positioning request. A&E urges the Commission to adopt such a special relief procedure. The Commission should

²³For example, Section 614(d) provides commercial broadcast stations with a right to petition the Commission in the event that an operator has failed to meet its must-carry or channel positioning requirements under the statute. A similar provision, Section 615(j), exists for non-commercial educational stations. The 1992 Cable Act provides for either a broadcast station or a cable operator to petition the Commission to "adjust" ADI boundaries for purposes of expanding or limiting a particular broadcasting station's must-carry rights with respect to a particular system. (See Section 614(h)(1)(C)). Indeed, even low power stations and home shopping stations are entitled to have the Commission consider whether or not they should be given mandatory carriage rights, which would include rights for channel positioning as well as carriage. (See Sections 614(h)(2)(B) and 614(g)).

²⁴Congress' concern for the interests of cable programming services is clearly evident in the statute's carriage agreement provisions which are designed to ensure that cable programming services are not discriminatorily prevented from obtaining cable carriage. See Section 616 of the 1992 Cable Act.

further provide that until such complaint is resolved no change in the status quo may occur.²⁵

B. RETRANSMISSION CONSENT

Various aspects of the retransmission consent provisions of the 1992 Cable Act cause concern to A&E. While A&E is not opposed to allowing television broadcasters to have the same ability as cable programmers to negotiate in the marketplace for cable carriage, the statute does not approximate a marketplace for the retransmission of broadcast stations by cable systems. In fact, the legislation ensures that cable program networks are unduly prejudiced under the statute, which fails to establish an equal marketplace for several reasons. First, unlike cable networks that are unsuccessful in obtaining any significant viewership, local broadcast stations are not required to bargain in the marketplace for cable carriage but may demand cable carriage as a matter of right. Second, local broadcast stations have substantial leverage to force payment for retransmission consent rights because they are able to assert network non-duplication and/or syndicated exclusivity blackout rights, thereby preventing the cable operator from obtaining that programming on more favorable terms from a more distant station. Third, retransmission consent stations, unlike cable networks, must be placed on the basic tier under the statute and are in

²⁵Maintaining the status quo is entirely consistent with the provision Congress made for broadcast stations which sought to obtain must-carry rights in market determination proceedings under Section 614(h)(1)(C). See 614(h)(1)(C)(iii).

this way guaranteed access to all of the cable operators' subscribers.²⁶ The statute thus provides retransmission consent broadcasters with significant advantages over cable programming services in their ability to attract advertisers and compete for advertising dollars.²⁷

Although the statute grants these significant advantages to broadcast stations, even when retransmission consent is elected, the Commission should ensure that whenever possible this unjust discrimination is not extended beyond the requirements of the law. This can be done by ensuring that retransmission consent stations are not given the additional benefits which the statute confers upon must-carry stations.

For example, the Commission has requested comment on its tentative conclusion that cable operators may count channels used for the carriage of local television stations granting retransmission consent to meet the channel quota requirements of Section 614.²⁸ The legislative history of the retransmission consent provisions in the 1992 Cable Act directly supports the Commission's conclusions that Congress intended channels used to carry local retransmission consent stations be counted towards the maximum number of channels which cable operators are required

²⁶See Section 623(b)(7)(A).

²⁷These advantages are in addition to those natural advantages which broadcast networks enjoy by virtue of their virtual universal access to U.S. television households.

²⁸NPRM at ¶54.

to devote to the carriage of local television signals.²⁹ The Commission should not require cable operators to cede additional channel capacity above the statutorily mandated cap to certain local stations merely because they elect retransmission consent rather than must-carry. To do so will further thwart the effort of existing and future cable networks to compete in the marketplace for viewers' choice and approval.

The Commission requests comment on its tentative conclusion that the manner of carriage and channel positioning requirements granted to must-carry stations do not apply to retransmission consent signals.³⁰ A&E maintains that the clear language of Section 325(b)(4) leaves no doubt that these provisions do not apply to retransmission consent stations. That section provides:

If an originating television station elects under paragraph (3)(B) to exercise its right to grant retransmission consent under this subsection 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.

47 U.S.C. §325(b)(4). Since manner of carriage and channel positioning requirements are contained in Section 614, it is evident that Congress did not intend for such privileges to apply to stations electing retransmission consent.³¹

²⁹S. Rep. No. 92, 102d Cong., 2d Sess. 37-38, 84 (1992) ("Senate Report").

³⁰NPRM at ¶¶55-56.

³¹Such privileges include channel positioning rights; carriage of closed captioning; carriage of program related material contained in the vertical blanking interval where technically feasible; notification prior to station deletion or

There is no need or sound policy reason to grant channel position and manner of carriage rights to stations electing retransmission consent since such issues, as is the case with cable program networks, can always be negotiated between the cable operator and the station as part of the retransmission consent agreements.³² If the Commission were to allow stations to elect retransmission consent and also impose channel positioning rights and manner of carriage requirements on cable operators, the ability of cable operators to negotiate retransmission consent agreements that reflect a marketplace determined value of cable carriage would be seriously undermined, and higher retransmission consent costs would most certainly result. These higher costs would either exert an upward pressure on basic cable rates or require lower subscriber fee payments to cable programming services. Clearly, the latter alternative could destroy the ability of cable programming networks to continue to invest in new high quality programming.

repositioning; the prohibition on repositioning during a "sweeps" period; carriage of full schedule; the requirement to carry the nearest network affiliate; and limitations on compensation for cable carriage.

³²Because retransmission consent is supposed to approximate marketplace bargaining for cable carriage, the FCC must expressly acknowledge that where a cable network's existing contract provides for channel or tier positioning, those provisions cannot be abrogated by a subsequent retransmission consent agreement between a cable operator and a broadcast station.