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

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JAN 19 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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

**REPLY COMMENTS OF THE
NATIONAL ASSOCIATION OF BROADCASTERS**

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BROADCASTERS
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Executive Summary

A review of the comments filed by the cable industry and others who opposed passage of the 1992 Cable Act shows that they have not heeded Commissioner Duggan's warning at the Commission's November 5, 1992 meeting that they should not ask the FCC to undo or ignore the command of Congress that a new era of regulation be established for the cable industry. The must carry and retransmission consent provisions of the Cable Act include specific directions to the Commission describing in detail the signal carriage regime which Congress intended to create. They are not merely an idea on which the Commission is invited to embroider other notions of a different public policy.

In our opening comments (p. 2), we warned that the breadth of inquiries contained in the *Notice* would lead to comments on issues outside the proper scope of this proceeding, and which were not carefully related to the Commission's task of putting the provisions of the Cable Act into effect. Other parties' comments reflected the same concerns. The comments submitted by cable operators, cable programmers, and other programming interests, many of which suggest ways in which the Act could be undermined or weakened, disclose the validity of our concern.

Stations are generally entitled to be in the must carry "pool" of every cable system which serves subscribers in their ADI, not just on systems which a cable operator deems — based on unknown and unreviewable criteria — to be in a particular ADI.

Modifications to a local market based on a mileage criteria or based exclusively on significant viewing status would be contrary to the Act. Factors other than those specified in the Act should be considered only if they are needed in the context of addressing specific factual situations.

The must carry provisions of the Act allow for no distinction between "commercial" and "individual" subscribers.

The burden of establishing and challenging that a must carry signal fails to comply with the good quality signal requirement should, initially, fall on the cable operator. To comply with this requirement, a station can provide its signal by microwave or other alternative means and cable operators are obliged to use good engineering practices and reception and signal processing equipment at least comparable to that used in connection with non-broadcast signals.

Indemnification of cable operators by must carry stations that are "distant" under the copyright laws should be based on the lowest marginal rate actually paid by the cable operator for the same type of station. No additional requirements should be imposed on broadcasters that are not imposed by the compulsory license on cable operators.

Must carry stations are allowed *their* choice of channel positions, not a channel position of a cable operator's choice. Must carry stations have a statutory priority for carriage and channel positioning that cannot be abrogated by cable systems' private contractual arrangements.

Congress explicitly contemplated that the Commission's syndicated exclusivity and network non-duplication rules would continue to protect stations, regardless of whether they elect must carry or retransmission consent, and regardless of whether cable systems now believe that they would prefer another environment.

Stations failing timely to elect between must carry and retransmission consent must be deemed to have opted for must carry.

Congress required the Commission to establish must carry regulations which will be effective in April, 1993, not some other date when it is convenient for cable operators and networks. Must carry is to take effect six months before retransmission consent, whether or not some cable operators believe that their negotiating position would be enhanced by a different arrangement.

The suggestion that a station must make one election between retransmission consent and must carry for all cable systems within its ADI is frivolous. With the exception of systems whose service areas overlap, a station may elect between must carry and retransmission consent on an individual system basis.

Retransmission consent is required for a multichannel video program provider to carry a radio station.

Cable systems carrying broadcast stations must carry their entire program schedules regardless of the station being carried pursuant to must carry or retransmission consent.

Any multichannel video program provider using retransmitted broadcast signals is required to obtain the consent of the provider of the signal unless must carry has

been elected. This includes SMATV systems supplying MATV facilities and other businesses that resell signals as part of a package with other services. There is no exemption from the retransmission consent requirement for cable systems receiving superstations via microwave or for carriage of so-called "regional" superstations. The suggestion that retransmission consent only applies to stations that could assert must carry rights on a cable system is frivolous.

Retransmission consent rights are totally separate and distinct from copyright interests of individual program suppliers whose works are included in a broadcast signal. Accordingly, a program supplier cannot by contract, defeat a station's ability to assert retransmission consent. The Commission either should clarify this prohibition or not address the issue.

That the above stated positions portray Congress' objectives cannot seriously be questioned. Congress intended to change the environment in which cable systems and broadcast stations operate; it did not cast overwhelming votes in both houses six times for an empty act. Comments which suggest otherwise are not helpful to the Commission, and proposals made in a spirit of avoiding the strictures of the Cable Act should be disregarded.

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TO: The Commission

**REPLY COMMENTS OF THE
NATIONAL ASSOCIATION OF BROADCASTERS**

The National Association of Broadcasters ("NAB")^{1/} submits this reply to the comments responding to the Commission's *Notice of Proposed Rule Making*. A review of the comments filed by the cable industry and others who opposed passage of the 1992 Cable Act shows that they have not heeded Commissioner Duggan's warning at the Commission's November 5, 1992 meeting that they should not ask the FCC to undo or ignore the command of Congress that a new era of regulation be established for the cable industry. The must carry and retransmission consent provisions of the Cable Act include specific directions to the Commission describing in detail the signal carriage regime which Congress intended to create. They are not

^{1/} NAB is a nonprofit, incorporated association of radio and television stations and networks which serves and represents the American broadcast industry.

merely an idea on which the Commission is invited to embroider other notions of a different public policy.

In our opening comments (p. 2), we warned that the breadth of inquiries contained in the *Notice* would lead to comments on issues outside the proper scope of this proceeding, and which were not carefully related to the Commission's task of putting the provisions of the Cable Act into effect. Other parties' comments reflected the same concerns.^{2/} The comments submitted by cable operators, cable programmers, and other programming interests, many of which suggest ways in which the Act could be undermined or weakened, disclose the validity of our concern.

Congress required the Commission to establish must carry regulations which will be effective in April, 1993, not some other date when it is convenient for cable operators and networks. Must carry is to take effect six months before retransmission consent, whether or not some cable operators believe that their negotiating position would be enhanced by a different arrangement. Stations are entitled to be in the must carry "pool" of every cable system which serves subscribers in their ADI, not just on systems which a cable operator deems — based on unknown and unreviewable criteria — to be in a particular ADI. Must carry stations are allowed *their* choice of channel positions, not a channel position of a cable operator's choice. Must carry stations have a statutory priority for carriage and channel positioning that cannot be abrogated by cable systems' private contractual arrangements. Congress explicitly contemplated

^{2/} See, e.g., Comments of CBS Inc. at 2-3; Comments of INTV at 2-3; Comments of NBC at 2-4.

that the Commission's syndicated exclusivity and network non-duplication rules would continue to protect stations, regardless of whether they elect must carry or retransmission consent, and regardless of whether cable systems now believe that they would prefer another environment.

That these were Congress' objectives cannot seriously be questioned. Congress intended to change the environment in which cable systems and broadcast stations operate; it did not cast overwhelming votes in both houses six times for an empty act. Comments which suggest otherwise are not helpful to the Commission, and proposals made in a spirit of avoiding the strictures of the Cable Act should be disregarded.^{3/} We now turn to the various issues raised in the comments.

Definition of a Local Commercial Television Station

The comments of the National Cable Television Association and most other cable system operators posit that there will be many situations where one cable system operates in more than one ADI, and therefore could be subject to must carry obligations to television stations in more than one market. The cable industry contends that Congress could not have intended to impose such obligations, and that cable systems

^{3/} Several parties prefaced their comments with arguments that the must carry and retransmission consent provisions of the Cable Act are unconstitutional, and several parties who have challenged the Act in court submitted copies of their pleadings. The Commission cannot give these arguments any weight. Just as it would be improper for the Commission to consider arguments that its organic statute is unconstitutional, the Commission should not develop implementing regulations based on doubts about the Act. Of course, the Commission should avoid regulations which would create independent violations of parties' constitutional rights, but the arguments raised by the opponents of must carry do not turn on any particular configuration of those requirements.

should be granted unfettered discretion to choose which single television market to which they should be allocated.

Very few of these impassioned comments identify even one situation where a cable system operates in more than one ADI, and the few that mention a particular system provide no specific data about the number of franchise areas served, the technical configuration of the systems, or other factors which would be relevant to the Commission's determination of whether one cable system is really involved, or merely several systems which one MSO operates in tandem. TEL-COM goes so far as to suggest that a cable system might operate in *three* different ADIs, but again gives no example of such a geographically dispersed cable system. In the absence of specific facts, the Commission cannot assume that requiring cable operators to accord must carry rights to each station in the television markets in which they serve customers will create any significant burdens requiring regulatory action.

It is far from clear what many cable commenters believe should be the definition of a cable system. A reading of the NCTA comments suggests that one "cable system" in NCTA's view may include any areas served by a set of cable transmission lines which are interconnected in any way with other transmission lines or reception equipment. *See* Comments of NCTA at 14. Under this interpretation, one MSO might interconnect systems covering hundreds of miles, and then designate the entire structure as being in the television market which contains the fewest number of potential must carry signals. Such a construction of the Cable Act is putatively unreasonable.

Instead, the Commission should use a common sense definition of a cable system. Cable systems operate pursuant to franchises awarded by local governments for specific areas of operation. Each separately franchised system should, barring unique circumstances, be viewed as a separate cable system. Since ADI definitions follow county boundaries, which frequently will also describe the limits of a franchise area, this approach will probably limit the number of instances in which one system could be deemed to be operating in multiple ADIs.

If a cable operator controlling several systems in adjacent franchise areas chooses to provide signals to all of these systems through one headend, it is free to do so. However, its choice as to the technical configuration of its systems cannot be deemed to control each system's signal carriage obligations.^{4/} Congress viewed ADIs as the best definition of the area in which commercial stations should have the rights to signal carriage. *See H.R. REP. NO. 628, 102d Cong., 2d Sess. 97 (1992)*("ADI lines are the most widely accepted definition of a television market. . .") Although Congress provided that the Commission could modify these obligations in particular circumstances, the House Committee warned that "these provisions

^{4/} Certainly, these technical configurations are not immutable. If an MSO were to be denied renewal of the franchise for one or more of its "integrated" systems, it would have to arrange to provide service to the remaining systems. By the same token, it is clearly within a cable operator's power to arrange to deliver to cable homes in an ADI the signals of television stations in that ADI. Further, the Commission should view with considerable skepticism cable operators' claims that consumers have benefitted from the efficiencies they claim are derived from such integrated systems given the pricing practices in the cable industry which Congress found to be unrelated to cable systems' costs.

[should] not be used by cable systems to manipulate their carriage obligations to avoid compliance with the objectives of this section." *Id.* at 98. Allowing cable operators unilaterally to determine that their systems should not have to accept must carry obligations in television markets in which they operate would undermine Congress' intent.^{5/}

If there are cable systems which have must carry obligations to stations in more than one ADI, that would not be at odds with the Cable Act. Section 614(h)(1)(C) of the Act specifically provides that "the Commission may determine that particular communities are part of more than one television market," reflecting Congress' conclusion that in some geographic areas, cable systems should be deemed to operate in more than one market. That Congress anticipated this precise situation is shown in the House committee's explanation of this provision: "The FCC also may determine that certain communities are local to more than one television market, *such as a community which is in one ADI, but is geographically close to television stations in another ADI and which is also served by those television stations.*"^{6/} Even if stations in two ADIs would have the right to be included in the must carry complement of one cable system, that system would still not be obligated to devote more than one third of its channel capacity to must carry signals, and would be entitled to

^{5/} Indeed, the House Committee particularly noted the apparent effort of TCI to manipulate carriage decisions on some Iowa decisions to cause one county to be dropped from an ADI. *See* H.R. REP. No. 628, 102d Cong., 2d Sess. 53 (1992).

^{6/} *Id.* at 97 (emphasis added).

not carry duplicating signals. Cable systems, therefore, are not likely to be unduly burdened if they happen to operate across ADI lines.

Moreover, in most such instances, it is likely that the cable system already carries local signals from both markets. Most of the situations where multiple market carriage obligations could arise would be in areas at the edges of ADIs where viewing is often directed at stations in both markets. In one of the few cable comments which identified specific systems which might have must carry obligations in two ADIs, the comments of Newhouse Broadcasting (p. 30) pointed to two New York systems which Newhouse claimed operate across ADI lines. Newhouse maintains that its Rome, New York system could have must carry obligations to both Utica and Syracuse stations. The 1992 *Television and Cable Factbook*, however, indicates that the Rome system is now carrying stations from both Utica and Syracuse. Similarly, Newhouse's Oneonta, New York system, which is claimed to be in the Utica and Binghamton ADIs, is carrying the signals of stations from both markets. If in the absence of must carry requirements, these cable systems located near market boundaries are voluntarily carrying signals from both markets, it is difficult to understand the cable industry's impassioned objections to having must carry obligations imposed on all cable systems operating within an ADI, unless these arguments are construed as simply an effort to undermine the statutory must carry scheme. The Commission should reject any such efforts.

Definition of a Television Market

With respect to the standards which should be used to modify stations' markets for must carry purposes, many comments were also filed which urge the Commission to adopt standards which would be contrary to Congress' goals.^{7/} In particular, many cable comments suggested that the Commission apply a mileage standard for determinations of television markets, or rely on demonstrations of significantly viewed status or other indicia of over-the-air viewing. As we explained in our initial comments,^{8/} the use of these factors to determine must carry status cannot be justified. Although some cable operators point to the noncommercial must carry provisions as indicative of a Congressional intent to limit must carry rights to a specified mileage zone around a cable system's headend, that instead shows that Congress was fully aware of the fact that must carry rights could be premised on mileage and headend determinations, but chose to reject that approach for commercial stations.^{9/} Moreover, superimposing a mileage restriction on commercial station must carry would remove must carry obligations from many cable systems. The use of ADI bound-

^{7/} See, e.g., Comments of Comcast at 2-7; Comments of Cole, Raywid & Braverman at 4-7.

^{8/} See Comments of NAB at 13-17.

^{9/} Indeed, we note that while the must carry rights of noncommercial stations are established by their geographic location *vis-a-vis* a particular cable system, cable systems outside of the must carry area of any noncommercial station are obligated to import a distant signal. Section 615(b)(2)(B). No equivalent provision is included in section 614, the commercial must carry section, because under ADI-based must carry, all cable systems would have must carry obligations to some local stations, making such a provision superfluous.

aries, in which every county in the continental United States is included in an ADI, to define signal carriage obligations shows Congress' intent that all cable systems be obligated to carry the stations which the viewers in their area deem to be local.

Similarly, commenters such as Comcast which urge the Commission to deem a station's significantly viewed status to be dispositive of its must carry rights ignore the language of the Cable Act. Not only are viewing patterns only one of four factors which Congress specified that the FCC should consider in changing stations' markets, the viewing patterns identified in the Act are "*in cable and noncable households*,"^{10/} not just the off-the-air viewing measured by the significantly viewed standard.

Rather than trying to specify additional factors to be applied in what may be a wide variety of waiver requests and which may have impacts that are unpredictable in particular situations, the Commission should develop additional standards, if they are needed, only in the course of considering specific factual situations. In the same manner, additional factors demonstrating that a community is in a station's television market, such as those addressed in the comments of May & Dunne and Mid-State Broadcasting should be considered in the context of particular requests where they are relevant.^{11/}

^{10/} Section 614(h)(1)(C)(2) (emphasis added).

^{11/} The comments of Cole, Raywid & Braverman (p. 9) submit that if a cable system seeks a modification of television station's market, the cable system should be allowed to decline to carry that station until the Commission acts on its request. Section 614(h)(1)(C)(iii) of the Act plainly states that "a cable operator shall not delete from carriage the signal of a commercial television station during the pendency of any proceeding" to modify the station's market
(continued...)

The Must Carry Provisions of the Act Allow for no Distinction Between "Commercial" and "Individual" Subscribers

Continental Cablevision's suggestion that the Commission should "interpret" (read "make-up") a distinction in section 614(b)(7) of the Act between "commercial" and "individual" subscribers to allow cable operators to offer hotels, banks, and other "commercial accounts" a package of services that does not include the entire complement of must carry signals must be rejected. The requirement in that subsection that the full complement of must carry stations "shall be provided to *every* subscriber of a cable system" (emphasis supplied) could not be clearer. It takes little imagination to conceive of the harm and potential mischief such an exemption would create in, for example, Orlando, Florida, or other popular tourist areas, where one or more must carry stations that rely heavily on tourist-directed advertising could be eliminated on cable services to all hotels and motels.

Allocation of Costs and Duties Associated With the Good Quality Signal Requirement

Section 614(a) of the Act provides that "[e]ach cable operator shall carry, on the cable system of that operator the signals of local commercial television stations . . . as provided by this section." Since a cable operator failing to carry the signal of a local commercial television station under Section 614 will be in violation of the Act and FCC rules, we submit that it is the cable operator and not, as some comments

^{11/}(...continued)

definition. Congress thus made clear that stations have must carry rights across their ADI until the FCC has changed their defined market. Cole, Raywid's proposal would stand this provision on its head.

suggested, the broadcaster, who bears the burden of conducting any tests necessary to assert a claim that a station does not meet the statutory definition of a local commercial television station because it fails to deliver a good quality signal to the system's principal headend.^{12/} Moreover, since a broadcaster may be carried on hundreds of cable systems and would be required to travel to each system to conduct such tests, whereas each cable operator literally need only step outside its own front door to conduct tests on the signal quality of a relatively few stations, it makes no practical sense for the cable operator not to make the initial determination as to whether the good signal quality standard has been met. The cable operator is also in the better position to know which stations provide a signal of even doubtful quality, so the amount of testing can be minimized. If broadcasters were required to make an affirmative showing, each station might be impelled to conduct many unnecessary tests.

The suggestion of Armstong Utilities, Inc. and InterMedia Partners that a station cannot utilize microwave or other so called "extraordinary" means to deliver a good quality signal is also without merit. Such a mechanism is precisely what was intended by allowing stations to provide "a baseband video signal" in lieu of a good

^{12/} That is not to say that the broadcaster should not be permitted to conduct its own tests, if necessary, to verify the results of any tests conducted by the cable operator.

quality signal. Indeed, it is impossible to conceive of any other meaning for this statutory provision.^{13/}

Further, arguments that the Act does not obligate a cable operator to provide *any* reception equipment for over-the-air signals and thus requires the broadcaster to pay for all towers, antennae, and other equipment except that which actually "processes" signals are frivolous.^{14/} To be a local commercial television station, a station must either deliver to the "principal headend" a specified signal quality level, or must agree to be responsible for the costs of delivering to the "cable system" a signal of good quality.^{15/} A cable system's "headend" typically means the "location" of any equipment used to process television signals, and is not limited to the signal process-

^{13/} Attached as Appendix A is a 1987 staff ruling clearly evidencing the intent that stations be permitted to provide a good quality signal via microwave or by means of a translator.

^{14/} Continental Cablevision's comments suggesting that the statute does not obligate the cable operator to provide reception equipment for the over-the-air signals reflects a profound misunderstanding of the intent of the Act in requiring cable systems to carry local broadcast signals. Continental would have the Commission enact a rule that a cable operator does not have to connect even so much as a "rabbit ears" antenna to receive over-the-air signals. Without any antenna whatsoever, clearly there will be no over-the-air signals which meet the -45/-49 dBm signal level requirement for must carry treatment. Thus, presumably, the cable operator would be allowed to disavow all must carry obligations because its failure to provide even a simple antenna would result in no over-the-air signals meeting the signal level requirements for must carry treatment. Such an interpretation would render all must carry provisions totally meaningless. The clear intent of the Act's provision allowing broadcasters to provide a better signal to cable systems was to provide an *alternative* means for the broadcaster to provide, through a separate delivery vehicle if necessary, a good quality signal so that it could be insured of receiving must carry treatment throughout its ADI.

^{15/} Section 614(h)1(B)iii).

ing equipment itself.^{16/} Moreover, a "cable system" encompasses "signal generation, reception and control equipment that is designed to provide cable service."^{17/} Hence, the good quality signal requirement clearly presumes the existence of, and does not require the broadcaster to supply, all equipment normally required to receive over-the-air signals.

In response to claims that the Act does not ever require a cable operator to make any improvements in existing over-the-air reception equipment, section 614(b)(4)(A) of the Act provides that the Commission will adopt carriage standards that, to the extent technically feasible, require: "the quality of signal processing and carriage provided by a cable system for carriage of local commercial television stations will be no less than that provided by the system for carriage of any other type of signal." As MSTV points out, this provision would require a cable system which enhances the quality of non-broadcast signals to offer the same services for poor quality broadcast signals. Hence, the over-the-air reception equipment of a cable system should be at least comparable to the equipment used to receive non-broadcast signals. This section is, of course, a further indication that Congress intended cable systems to acquire and carry local broadcast signals, and not to impose extraordinary burdens on local stations to obtain those rights. The Commission should act here, as elsewhere, with an understanding that a fundamental goal of the Act was to protect and promote delivery of over-the-air television broadcasting. Cable operators should

^{16/} S. REP. No. 92, 102d Cong., 1st Sess. 71 (1991).

^{17/} 47 USC § 522(6).

be obligated to undertake all reasonable efforts, using good engineering practices, to receive all local over-the-air television signals with the best possible quality. This may mean that a cable operator should be held accountable for interference induced into the signal prior to reception if this is as a result of poorly installed antenna or an antenna installed in a poor location, such as nearby electrical lines.

Carriage of Program Related Material

Continental Cablevision (Comments at 23-24) addressed the issue of the technical feasibility of a cable system's carriage of program-related material on aural subcarriers or in the VBI lines of the broadcast signal. Continental claims that carriage of VBI information will prevent it from scrambling its signals, which "represents a risk of theft of signals." Continental, however, provides no evidence that scrambling of over-the-air broadcast signals is a common practice in the cable industry. Continental's admission that in most cases it passes through the entire signal, including the VBI suggests that scrambling techniques using VBI capacity are not the only means available to prevent signal theft. If scrambling of over-the-air signals is neither an operational requirement, a common practice, nor the only method to achieve signal security, then scrambling concerns are not a valid basis by which carriage of broadcasters' program-related material on VBI lines can be judged to be technically infeasible.

Continental's assertion that its perceived "need" to use non-video and audio portions in the signal somehow confers upon it property rights in this portion of the signal is invalid. Any property rights in the signal belong to the broadcaster who

originated the signal. There may be instances where, in some situations and by mutual consent, both the needs of the broadcaster and cable operator could be met by permitting alteration of the content of the VBI. Any notion that cable operators should have authority to obliterate a broadcaster's VBI is insupportable and clearly contrary to Congress' intent that broadcasters' VBI and subcarrier uses be protected in cable carriage unless they are wholly unrelated to the broadcaster's program.

Allocation of Copyright Royalty Related Costs and Duties Associated With the Carriage of Local Stations

Section 614(h)(1)(B)(ii) of the Act conditions a station's must carry status on its agreement to indemnify a cable operator for any increased copyright liability it incurs resulting from the carriage of the station. Regrettably, a number of cable commenters propose adoption of absurd and unreasonable conditions and requirements in connection with this indemnification provision, all of which should be rejected.

The first of these proposals is that the cable operator, in its sole discretion, should decide the method of determining and amount of any indemnification that is due, presumably without providing the broadcaster any underlying justification or documentation. As NAB explained in its comments, the vast majority of cable systems will not incur any increased copyright liability as a result of carrying additional distant signals.^{18/} For those so-called "Form 3" systems that might incur increased copyright liability, additional royalties associated with carriage of a

^{18/} Comments of NAB at 31-33. CATA states that 65% of all cable systems have fewer than 1,000 subscribers. Comments at 5. It is more than likely that none of these systems will require indemnification.

particular additional distant signals could vary from anywhere between .06625% and 3.75% of their gross receipts. Were the Commission to leave to the cable operator the decision as to what rate was to be used in assessing a broadcaster its "fair share" of increased liability, the cable operator would almost certainly choose to allocate the highest rate to broadcasters.

NAB again urges the Commission to adopt its proposal that reimbursement be at the lowest marginal rate actually paid by the cable operator for the same type of station. The purpose of section 614(h)(1)(B)(ii) is to avoid the situation in which a cable operator must both carry a station it would otherwise not have carried and incur compulsory license royalty liability for that carriage. Given this statutory premise, the only appropriate royalty rate would be the marginal rate for the last-added distant signal.^{19/} To allow the cable operator unilaterally to claim that the section 614(h)(1)(B)(ii) signal was among the *first* signals it chose to carry would be to turn the statutory provision on its head and to create a potentially substantial windfall for the cable operator. Designating the station as anything but the last-added signal^{20/}

^{19/} As NAB explained in its comments, for the only cable systems that would incur any increased copyright liability upon adding a distant signal subject to section 614(h)(1)(B)(ii), the royalty percentage rate declines as more distant signals are carried. For some distant signals, whose carriage would not have been permitted by FCC rules in effect prior to 1980, however, the royalty rate is 3.75% of gross receipts, regardless of how many other distant signals the system already carries. For any station subject to section 614(h)(1)(B)(ii) that falls into this category, the appropriate reimbursement would be the 3.75% royalty the system actually pays.

^{20/} If more than one station were carried pursuant to section 614(h)(1)(B)(ii), it might be necessary to sum the lowest marginal royalty rates paid for the same
(continued...)

would be an admission that the system would have carried the signal — and would have paid the copyright royalties for that carriage — voluntarily and without any reimbursement from the station. The Act was not meant to line the coffers of cable operators at the expense of stations in this way.

The second copyright indemnification proposal falling into the category of the absurd is TCI's suggestion that a broadcaster invoking must carry in any portion of a "technically integrated" system must accept full copyright responsibility for that entire system regardless of whether some or most of the communities served by that system are outside of the station's television market. On the one hand, TCI and other cable interests insist that as their use of fiber increasingly expands the coverage of their systems, often beyond a single television market, each system should nevertheless only be assigned to a single television market and should have almost unfettered discretion to decide which market that will be. On the other hand, it is argued that if only one community served by one of these gigantic integrated systems falls within a broadcaster's local market, and the broadcaster only seeks carriage in that community, it must nevertheless incur increased copyright liability for the whole system and all of its gross receipts, even if the vast majority of such receipts are generated by subscribers in communities not within the station's local market. As discussed *supra* pp. 4-6, the Act clearly anticipates that the determination of which communities are, or are not, in a station's television market must be made without regard to how a cable

^{20/}(...continued)

number and type of stations and divide the reimbursement among those stations in proportion to their "DSE" values.

operator chooses technically to figure its systems. The same principles should apply in determining a station's increased copyright liability.

Finally, a number of cable interests urge the Commission to adopt an array of regulations that would require stations to provide advance indemnification, escrow deposits, performance bonds and/or letters of credit, even to cable systems whose current copyright liability is not affected by the number of distant signals they carry, and despite the fact that there is no way to determine the amount of such payments in advance. Clearly all of these proposals should be rejected as far exceeding the provisions of the Act, which merely requires a station to "agree" to indemnify cable operators for any increased copyright liability actually "resulting" from carriage on the cable system. Moreover, parties making these proposals fail to explain why broadcasters should be subject to such onerous burdens while neither the cable compulsory license nor the Copyright Office regulations implementing the license impose any such conditions on cable operators.^{21/}

Issues Relating to Channel Positioning

Conflicting Channel Claims

For the reasons set forth at page 27 of NAB's initial comments, the suggestion of a number of cable parties that cable operators should resolve all conflicting claims to channel positions must be rejected as being contrary to the Act and, given cable's past abuses, the public interest. The Act clearly provides that station preferences must always be accommodated to the extent possible, and that the Commission must

^{21/} See 37 CFR § 201.17.