

arbitrate disputes. Nothing in the Act can be read to support the notion that cable operators are to be given any role in allocating channel positions.<sup>22/</sup>

In order to maximize station preferences, the Commission may wish to establish a mechanism whereby stations must provide the cable operator and all other stations in their market with their channel preference by a certain date. Stations for which there is no conflict will get their preference. Stations which submit conflicting claims would have a specified period to mutually resolve the conflict and report any resolution to the cable operator. Only if this process failed would the Commission either through a set of priorities, or other mechanism, be required to resolve the dispute.<sup>23/</sup>

#### **Channel Positioning and The Basic Tier**

The insistence by cable operators that channel positioning requests by must carry stations must be limited to, and conform with, the basic tier as a cable operator chooses to configure it is devoid of any support in the Act. As is true with so many

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<sup>22/</sup> Similarly, there is a total absence of any support for the proposition advanced by some cable program suppliers that provisions in cable program contracts which specify a particular channel position for a cable program service should be given controlling significance. As Viacom's comments (pp. 7-10) point out, Congress was aware of such contracts. Nonetheless, section 614(b)(6) of the Act explicitly states that the choice of channel positions is "at the election of the station." Anything to the contrary in any private agreements between cable systems and program suppliers is preempted.

<sup>23/</sup> In the various priority schemes recommended by cable interests, the July 19, 1985 position option invariably appears last. In considering any priority system, the FCC must remain cognizant of the reason why this option was included, namely to provide relief to those stations which have been subject to abusive channel positioning practices since the *Quincy* decision.

issues raised by cable parties in this proceeding, the time to express their concerns about technical problems created by the channel positioning and basic tier provisions of the Act was while Congress was debating them. Having decided to oppose any cable reregulation, the cable industry cannot now have the Commission rewrite the Act to solve all the technical difficulties its provisions are claimed to create. *Nothing* in the Act even remotely supports notions such as those presented by TCI that if a cable operator chooses to offer its basic service on channels two through thirteen, every broadcaster must limit their channel selection to that band.

**Channel Positioning, Signal Quality and Attendant Technical Problems**

A number of cable operators urge the Commission to adopt rules that would limit a station's channel position election in situations where placement on the chosen channel would result in: 1) interference or degraded signal quality to the station's signal; 2) interference or degraded signal quality on adjacent channels; or 3) other technical and/or signal security problems for the cable system.

In resolving these issues, the Commission must keep in mind a number of guiding principles. First, neither the Act nor its legislative history provide any basis for compromising a station's channel selection based upon technical considerations. As is true with so many of cable's proposals, except in extraordinary circumstances which have specific factual justifications, what the Act giveth, the Commission is not at liberty to take away.

Second, the reason Congress found it necessary to regulate channel positioning and to provide *broadcasters* with a number of options was because of cable's past

abusive practices. Broadcasters' channel positions often were manipulated to maximize the cable operator's competitive and economic advantage. Moreover, the cable industry has been aware of pending legislation for the last several years that included channel positioning provisions similar to those included in the Act. If cable operators in some circumstances now have to reconfigure their systems to eliminate the results of past discriminatory and abusive practices, or to comply with legislative requirements they knew might be adopted when their existing configuration was implemented, the Commission should not simply conclude that Congress did not intend for its must carry objectives to be achieved, regardless of those temporary inconveniences to cable systems.<sup>24/</sup>

Third, the reason that Congress included as one channel positioning option a channel on which a station and the cable operator mutually agree was to provide the necessary flexibility for *the parties* to resolve technical and other problems that might arise from a broadcaster's choosing one of its other statutory options. Thus, for example, it is unlikely that a broadcaster would insist on its on-channel position if the result would be poor signal quality. Moreover, if the implementation of a particular broadcaster's channel selection would create problems for cable operator, the operator is free to provide incentives to the broadcaster to change its selection.

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<sup>24/</sup> For example, Continental Cablevision presents a hypothetical where a station's selection of channel 2, which is adjacent to carriage of HBO on channel 3, might create technical problems for both the station and HBO. Since the reason for this configuration may well have been to maximize subscriber exposure to HBO by placing it adjacent to a popular broadcast station, a regulation requiring the broadcaster to sacrifice its preferred channel option would be contrary to the intent of the Act.

While there may be occasional extraordinary circumstances under which a broadcaster's channel preference cannot be honored for technical reasons, the Commission should be loath to attempt to deal with them by rule. Ad hoc determinations in which the cable operator has the burden of demonstrating that it has exhausted all reasonable alternatives, including negotiation with the broadcaster, is the appropriate solution.

### **Requirement to Carry the Closest Affiliate**

NCTA (Comments at 20) suggests that the Act's requirement that if a cable operator chooses to carry a network affiliate, it must carry that affiliate which is closest to its principle headend, only applies where the operator has exceeded the cap on the number of local stations. Such a limited interpretation is at odds with Congress' expressed intent that:

*" . . . stations that are close to a cable system are the ones which are most likely to compete with the cable system for local advertising, and thus are the stations which the cable system has the greatest financial incentive to drop from carriage. The same motive is likely to exist where more than one affiliate of a network is qualified for carriage - the closest affiliate is more likely to compete with the cable system; thus the bill requires carriage for that affiliate*

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"[A] cable operator which chooses to carry an affiliate of a broadcast network . . . must, if more than one affiliate of a network qualifies for carriage, carry the affiliate of that network which is closest geographically to the cable

system's subscribers and therefore is most likely to be responsive to their local needs and interests."<sup>25/</sup>

It would not appear to make sense to allow cable operators who have *not* exceeded their cap on the number of local stations to refuse to carry and to discriminate against an affiliate which is closest to the principal headend, is most likely to compete with the cable operator for local advertising, and which is most likely to be responsive to the local needs and interests of the cable operator's subscribers.

### **Must Carry, Retransmission Consent, and the Commission's Program Exclusivity Rules**

Cable commenters offer diverse suggestions that: 1) stations opting for must carry should lose their network nonduplication and syndicated exclusivity rights; 2) must carry stations should not be subject to network nonduplication or syndex deletions; 3) stations opting for retransmission consent should lose their rights to assert nonduplication and syndex protection; and 4) the program exclusivity rules should be eliminated.

Adoption of any of these proposals would flatly contradict the letter and spirit of the Act. Section 614(b)(3)(B) of the Act clearly anticipates that there may be situations where a cable operator is required to carry a station whose programming is truncated by operation of the Commission's program exclusivity rules, in which case the operator is free to substitute alternative programming for that which must be deleted.<sup>26/</sup>

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<sup>25/</sup> S. REP. No. 92, 102d Cong., 1st Sess. 61, 84-85 (1991) (emphasis added).

<sup>26/</sup> H.R. REP. No. 628, 102d Cong., 2d Sess. 93 (1992).

In considering cable operators' suggestion that the Commission should foreclose the right of stations exercising retransmission consent to enforce their program exclusivity rights, or should eliminate its program exclusivity rules entirely, the Commission must remember that the Senate report on the cable bill stated:

"In that connection, the Committee has relied on the protections which are afforded local stations by the FCC's network non-duplication and syndicated exclusivity rules. Amendments or deletions of these rules in a manner which would allow distant stations to be submitted [sic] on cable systems for carriage or local stations carrying the same programming would, in the Committee's view, be inconsistent with the regulatory structure created in S. 12."<sup>27/</sup>

NCTA complains that allowing a station both to elect retransmission consent rights and retain its nonduplication rights would give it an unfair bargaining advantage in negotiating with local cable systems. To the contrary, Congress foresaw that eliminating a station's nonduplication rights in this situation would provide the cable operator with an unfair advantage in that the cable operator could ignore the local affiliate by obtaining its network's programming from a distant affiliate.

While it may be that some anomalies will result from the interaction between the new statutory scheme and the existing program exclusivity rules, the better course is to deal with such situations on an ad hoc basis, develop specific factual settings in which they occur, and fine tune the program exclusivity rules only if, and when, the

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<sup>27/</sup> S. REP. No. 92, 102d Cong., 1st Sess. 38 (1991). The word "submitted" in this passage appears to be a typographical error. NAB believes the word "substituted" was intended.

need to do so is readily apparent.<sup>28/</sup> Wholesale revision of the Commission's program exclusivity rules at this point would be both unjustified and would tamper with the marketplace envisioned by Congress.

### **Treatment of Stations Failing Timely To Elect Between Must Carry and Retransmission Consent**

A number of cable commenters suggest that stations failing timely to elect between must carry and retransmission consent either be deemed to have opted for retransmission consent, or be assigned some sort of "may carry" status under which the cable operator can choose to carry or not carry the station under virtually any terms or conditions it sees fit. For the reasons set forth in NAB's initial comments at pp. 44-45 these proposals should be rejected.

Section 325(b)(1) of the Act provides that as of October 6, 1993, "no cable system or other multichannel video programming distributor shall retransmit the signal of a broadcasting station, or any part thereof, except with the *express* authority of the originating station" (emphasis supplied), unless the station has opted for must carry. Webster's Dictionary defines "express" as: "To make known in words."<sup>29/</sup> Thus,

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<sup>28/</sup> A number of cable operators complain about situations where out-of-market affiliates will be able to assert nonduplication rights requiring the deletion of network programming on an in-market affiliate that demands must carry. Such a scenario requires that the out-of-market affiliate is, at most, within 55 miles of the cable system. In many of these situations a strong argument probably can be made to include the cable system's community in the other affiliate's market and, if it then becomes the closest affiliate to the system's principal headend, the problem is solved. In many situations where the in-market affiliate is the closest to the headend, it is probably also significantly viewed in the cable system's area.

<sup>29/</sup> Webster's II New Riverside University Dictionary (1984).

the Act clearly provides that absent the affirmative written consent of a station, no multichannel video programming distributor is authorized to carry its signal after October 6, 1993, unless the station has opted for must carry. Accordingly, retransmission consent or "may carry" by default is simply not an option.<sup>30/</sup> To the contrary, the only option for stations who fail affirmatively to elect retransmission consent is must carry. The Senate report indicates that "the legislation requires carriage of all qualified local broadcasters not exercising their retransmission rights . . ."<sup>31/</sup> The goal of the Act is to secure carriage for local stations under equitable and predictable conditions, not to establish another system where cable operators can "game" retransmission of local signals.

### **Implementing Must Carry and Retransmission Consent**

A number of parties submitted comments addressing the effective dates for must carry and retransmission consent. Some of these proposals bear little relation to the requirements imposed on the Commission and cable systems by the Act. Many also seek a change in the structure created by the Act in order to obtain a presumed negotiating advantage which Congress did not intend.

Virtually every set of comments submitted by cable program services and cable operators suggest that the must carry rules not require carriage of any stations

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<sup>30/</sup> Interestingly, many of the parties urging retransmission consent or "may carry" by default are also adamant that stations opting for retransmission consent open up each and every aspect of carriage for negotiation. They then fail to explain how the terms and conditions of such carriage would be determined under their default proposal.

<sup>31/</sup> See S. REP. No. 92, 102d Cong., 1st Sess. 63 (1991).

not presently carried until either a free channel opens up or a cable program contract expires. The support for this proposal varies, but most often takes the form of arguments that Congress did not intend to preempt cable systems' programming contracts.<sup>32/</sup> These arguments border on the frivolous. Section 614 of the Act requires cable systems to carry a complement of local commercial television signals. Section 614(f) provides that the Commission will "issue regulations implementing the [must carry] requirements" within 180 days after enactment. Nothing can be read into the statute suggesting that Congress contemplated that carriage of local stations would have to wait an unspecified time until contracts expired or additional channels were added to cable systems.

Moreover, the fact that Congress did not specifically preempt cable programming contracts bears no relevance to the effective date for must carry regulations. Congress placed certain burdens on cable operators because it believed that cable operators' carriage decisions were disrupting our system of local television service. Nothing can be found in the Act or its history which indicates that Congress was so concerned about any incidental effects on any particular cable program service as to justify delay in effectuating the carriage requirements for local television signals.

Viacom's reliance (Comments at 7-10) on the elimination of a specific provision preempting certain program contracts in the *rate regulation* section of the Act is mistaken. That section dealt only with the tier on which cable program services could

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<sup>32/</sup> See, e.g., Comments of the Arts & Entertainment Network at 8; Comments of Viacom at 7-21; Comments of Discovery at 5-7.

be placed on a cable system, not with whether such contracts could take precedence over systems' must carry obligations. A review of the history of that provision will demonstrate that it is unrelated to Viacom's argument.

The 1990 Senate version of this provision permitted a cable operator to "add to or delete from a basic service cable tier any video programming *other than retransmitted local television stations . . .*",<sup>33/</sup> while the comparable House provision prohibited a cable operator from "add[ing] any video programming to the basic tier *that is not a [must carry] signal or programming required to be included in such tier . . .*"<sup>34/</sup> Hence, it is clear that both versions *required* carriage of all must carry signals on the basic tier, without regard to any private contractual arrangements.

The purpose of the preemption language in the 1990 Senate bill which is the focus of Viacom's argument was to remove from the cable operator any *obligation* to carry any program service other than that which was required by the Act, though it could continue to provide any such service if it chose to do so.<sup>35/</sup> The purpose of the comparable 1990 House preemption provisions were to remove from the cable

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<sup>33/</sup> S. 1880, 101st Cong., 2d Sess., Sec. 623(b)(3) (1990) (emphasis added).

<sup>34/</sup> H.R. 5267, 101st Cong., 2d Sess., Section 623(b)(4) (1990) (emphasis added).

<sup>35/</sup> "A cable operator has no obligation to put programming *other than retransmitted local broadcast signals* on this basic service tier." S. REP. No. 381, 101st Cong., 2d Sess. 60 (1990).

operator all obligations to carry non-required programming so as to *prohibit* the inclusion of any such programming on the basic tier.<sup>36/</sup>

In its 1992 version of the Act, the House changed its original position from prohibiting other programming on the basic tier to allowing cable operators to include any additional programming they wished on that tier.<sup>37/</sup> While in the course of making this change, the House dropped the preemption provision, it continued to make it abundantly clear that under section 623(b)(2): "Cable systems will be required to offer on this [basic] tier *all commercial and noncommercial must carry stations*."<sup>38/</sup> Moreover, while the House specifically discussed its intention that section 623(b) was *not* intended to pre-empt or modify PEG access channel franchise requirements, it said nothing to suggest that section 623(b) might not require modifications to cable network program agreements.<sup>39/</sup>

At best, elimination of the statutory preemptive contract language to which Viacom alludes might suggest that in the *absence* of conflicting basic tier obligations, cable networks may be able to continue to enforce contractual provisions relating to their being carried on the basic tier. It is, however, abundantly clear that neither

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<sup>36/</sup> "Section (b)(4) prohibits a cable operator from adding any video programming to the basic tier *that is not a [must carry] signal* or programming required to be included in such tier . . . . A contract or other agreement that requires carriage on the basic tier . . . of a signal or programming that is not required to be included in such tier may not be enforced . . . ." H. REP. No. 682, 101st Cong., 2d Sess. 81 (1990).

<sup>37/</sup> H.R. 4850, 102d Cong., 2d Sess., Section 623(b)(2)(B).

<sup>38/</sup> H. REP. No. 628, 102d Cong., 2d Sess. 85 (1992)(emphasis added).

<sup>39/</sup> *Id.*

such contracts,<sup>40/</sup> nor any franchise provisions, can supersede a cable system's must carry obligations. Had Congress intended to delay the implementation of a cable operator's must carry and channel position obligations until cable network program contracts had expired, surely some mention of this extraordinary exception would have been included in Sections 614 or 615 of the Act.

Further, the Cable Act is not retroactive legislation. It does not affect carriage in the past nor impose any penalty for systems' failure to carry certain broadcast signals before the effective date of the must carry requirements. Instead, it adjusts cable systems' behavior in the future. When Congress establishes a regulatory structure for an industry, it is free to change that structure and impose new obligations without such changes being considered impermissibly retroactive, even if private parties' expectations are affected. *See, e.g., Multi-State Communications, Inc. v. FCC*, 728 F.2d 1519, 1525-26 (D.C. Cir.), *cert. denied*, 469 U.S. 1017 (1984). Moreover, any expectancy interests of cable program suppliers that there would be no carriage obligations affecting the availability of channels on a cable system were unjustified. The reimposition of must carry regulations has been on the "front burner" of discussion since the Commission's original rules were vacated in 1985. Must carry legislation was under active consideration in both of the last two Con-

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<sup>40/</sup> Section 325(b)(6) of the Act, which provides that nothing in that section shall be construed "as affecting existing or future video programming licensing agreements between broadcast stations and video programmers" serves as evidence that Congress knew exactly how to express an intention that existing program contracts not be preempted. The absence of any parallel provision regarding cable network-cable operator contracts further suggests preemption of such contracts was, in fact, intended.

gresses. Cable systems and cable program networks were certainly aware that must carry requirements might be reinstated when they negotiated any current program contracts. Therefore, they had no basis for any expectation that their arrangements would not be affected by cable legislation.<sup>41/</sup>

Must carry regulations should, therefore, become effective in April, and cable systems must begin affording carriage to local commercial television stations. As we noted in our initial comments, *see* pp. 43-44, cable operators should be provided some reasonable period within which to achieve full compliance with the Commission's regulations, particularly given the fact that stations will have to elect their preferred channel position. NAB suggested that 60 days would be adequate to provide all parties with an adequate period within which to rearrange cable systems' channel offerings. Since cable systems may without substantial effort identify all commercial stations within their ADI now and plan any changes necessary to carry the ones not presently on their systems, our proposal provides ample time to achieve full compliance. Given the efforts by cable commenters to find ways to delay compliance, however, the Commission should make clear that 60 days is the outside limit for compliance, and that cable systems are expected to begin carriage of local stations as soon as possible after the rules are issued.

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<sup>41/</sup> Similarly, Viacom's argument (Comments at 12-13) that the must carry obligations imposed by the Cable Act may in some cases be deemed secondary to obligations imposed in franchise agreements ignores the Supremacy Clause of Article VI of the Constitution. Where federal law requires an act to be performed, such as carriage of local broadcast stations, any contrary requirements of, or enforceable under, state law are preempted. *See, e.g., City of New York v. FCC*, 486 U.S. 57 (1988).

Some comments suggested that the effective date for any must carry requirements be put off until either after stations make their election between must carry and retransmission consent or until retransmission consent becomes effective. These suggestions also cannot be reconciled with the Act. As noted above, must carry requirements under the Act must go into effect within six months of enactment, or by early April 1993. Congress knew that when it amended section 325 effective one year after enactment, and directed the Commission to adopt regulations within six months to govern an election to occur before retransmission consent took effect. Congress plainly sought to establish a staggered implementation of the new relationship between cable systems and local broadcasters, under which stations would first have must carry rights and then choose whether to keep that status or instead negotiate for carriage. Delaying the effectiveness of must carry rules or unduly advancing the date when stations must make their retransmission consent election would undermine this process.

NAB agreed that the Commission should establish a date for must carry/retransmission consent elections to allow time to finalize negotiations between stations and cable systems and to permit systems time to adjust their program selections and notify subscribers of any changes. We suggested that requiring initial elections by August 2, 1993 would be appropriate. Some cable operators advocate a much earlier deadline for elections, and NCTA asks the Commission to prohibit negotiations between stations and cable systems before stations make their election. Comments of

NCTA at 30. These requests are based on fears that a later election date would give stations too much of an advantage in retransmission consent negotiations.

The Commission should reject these suggestions. As a number of comments pointed out, broadcasters have been aware since October of the need to make an election this year. The same, of course, is true for cable systems. The Commission should establish a deadline not for the purpose of giving a supposed advantage to one party or another, or for preventing a party from having an advantage, but only as needed to allow negotiations to take place and agreements to be put into effect. As the Senate Committee Report stated:

"It is the Committee's intention to establish a marketplace for the disposition of the rights to retransmit broadcast signals; it is not the Committee's intention in this bill to dictate the outcome of the ensuing marketplace negotiations."<sup>42/</sup>

The Commission should not adopt regulations intended to affect the positions of the parties to the retransmission consent negotiations.<sup>43/</sup> Moreover, even if it could be concluded that broadcasters could be placed in an advantageous position in retransmission consent negotiations, the Commission should recall that the amendment

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<sup>42/</sup> S. REP. NO. 92, 102d Cong., 1st Sess. 36 (1991).

<sup>43/</sup> Similarly, NCTA's request for a ban on negotiations should be denied. NCTA nowhere identifies the authority for the Commission to baldly interfere in what Congress intended to be marketplace negotiations. Further, preventing parties from discussing their mutual business interests could only have the effect of increasing the likelihood of disruption and preventing mutually beneficial business arrangements. No cable system, of course, can be required to negotiate before a station makes its election. But no public policy would be served by preventing willing parties from undertaking earlier discussions.

to section 325 was adopted to overturn "a distortion in the video marketplace which threatens the future of over-the-air broadcasting."<sup>44/</sup> The Commission should not adopt regulations which would establish a different balance than the one Congress intended. It should therefore make its must carry regulations effective as soon as possible after they are adopted, and require stations to make their retransmission consent elections only after the must carry system is in place and no earlier than two months before the amendments to section 325 become effective.

CATA asks the Commission to adopt something like a "most favored nation" regulation for small cable systems, under which they could choose to pay a retransmission consent fee equal to the highest fee paid by any cable system within a station's city grade contour or could choose to enter into some other arrangement, or could choose not to negotiate at all. The first problem with this proposal is that it is based on the false premise that the benefits of carriage on many of these cable systems have been exclusively those of the broadcaster and the burdens have all been on the cable operator. Were that the case, the remedy for such small cable systems would be to refuse to carry stations which demand excessive retransmission consent compensation. A second purely hypothetical, and seemingly contradictory, premise of CATA's proposal is that carriage of stations on these systems is so essential (i.e.

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<sup>44/</sup> S. REP. No. 92, 102d Cong., 1st Sess. 35 (1991).

beneficial) that broadcasters will impose exorbitant demands for retransmission consent.<sup>45/</sup> There is, of course, no basis for these speculations.

The second problem with CATA's proposal is that there is nothing in the Act to justify it. To the contrary, the special must carry provisions for small cable systems<sup>46/</sup> evidences the fact that Congress was sensitive to their needs and could have also included special retransmission consent provisions if it had wanted to do so. Finally, CATA's proposal would violate Congress' intent in the Act "to establish a marketplace for the disposition of the rights to retransmit broadcast signals . . . not . . . to dictate the outcome of the ensuing marketplace negotiations."<sup>47/</sup>

### **Stations May Elect Between Retransmission Consent and Must Carry on an Individual System Basis**

Some of the most extraordinary efforts to distort the Cable Act came in the comments of NCTA and others suggesting that a station must make one election between retransmission consent and must carry for all cable systems within its ADI.<sup>48/</sup> The language of the Cable Act and its legislative history plainly permit

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<sup>45/</sup> CATA also complains about potentially excessive transactional costs. Again, these concerns are speculative. On average, such systems probably carry no more than three to six non-must carry eligible signals. The "transaction" to obtain retransmission consent may require no more than an exchange of letters.

<sup>46/</sup> Section 614(b)(1).

<sup>47/</sup> S. REP. No. 92, 102d Cong., 1st Sess. 36 (1991). This mandate also should inhibit the Commission from acceding to requests to impose other limitations on retransmission consent terms such as that they be "reasonable" or non-exclusive.

<sup>48/</sup> See, e.g., Comments of NCTA at 26-28; Comments of Newhouse at 19-20.

stations to elect between retransmission consent and must carry on a system-by-system basis, with one limited exception. Section 325(b)(3)(B), dealing with stations' elections, states that "[i]f there is more than one cable system which services the same geographic area, a station's election shall apply to all such cable systems." If Congress had intended stations to make one choice for all cable systems within an ADI, it could have required the same election "for all cable systems in a station's television market," or "for all cable systems on which the station would have the right to carriage under section 614." Congress, however, did not use any such language pointing towards an intent that stations make one uniform election across an ADI. Indeed, in section 325(b)(4), the Act speaks of a decision to exercise retransmission consent rights "with respect to *a cable system*." (emphasis added) That language addressing the obligations of a single cable system would be inconsistent with an obligation to make one election for all cable systems in an ADI.

The Senate Report also states that "a broadcaster's election with respect to one cable system will apply to any so-called overbuild systems which serve the same geographic area."<sup>49/</sup> Not only does this refer to making an election for one particular cable system, it also indicates that the only instance in which one election will apply to more than one cable system is where the two systems are overbuilt. As the Commission is well aware, in only a few situations do two cable systems compete with each other. Most cable systems in most ADIs are local monopolies and certainly

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<sup>49/</sup> S. REP. No. 92, 102d Cong., 1st Sess. 38 (1991).

do not compete with other cable systems which serve other areas in the ADI.

Requiring a single ADI-wide election, therefore, is not consistent with the Act.

### **Retransmission Consent Applies to Radio**

The comments submitted by cable operators almost universally support the Commission's proposal (*Notice* ¶ 43) that retransmission consent rights be limited to television stations and, therefore, that cable systems and other multichannel video program providers be allowed to use the signals of radio stations without the consent of the stations. As NAB discussed in its initial comments (pp. 38-40), that interpretation would be contrary to Congress' design in amending section 325. The Senate Report is very explicit. After setting out the text of section 325 as enacted in 1934, the Committee states its belief "that Congress' intent was to allow broadcasters to control the use of their signals by anyone engaged in retransmission by whatever means."<sup>50/</sup> The Committee points out that during debate on the Radio Act of 1927, Senator Dill — the Act's sponsor — referred to what appears to have been early cable retransmission of radio signals as a use which the Act would bar without the station's consent.<sup>51/</sup> After discussing the Commission's 1959 decision holding that section 325 did not apply to cable systems' use of broadcast signals, the Committee states that "[t]he amendments to section 325, therefore, close a gap in the retransmission consent

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<sup>50/</sup> S. REP. No. 92, 102d Cong., 1st Sess. 34 (1991).

<sup>51/</sup> *Id.* at 34-35.

provisions which, in the Committee's view, was not intended by the drafters of the 1934 Act."<sup>52/</sup>

In 1927 and 1934, there were no television signals, and Congress' concerns were entirely with the use of radio stations' signals by others. Congress' objective in 1992 was to reverse the exception to section 325 created by the Commission and restore the principle that stations have the right to control the use of their signals. That the legislation was largely occasioned by problems created by cable systems' use of television signals is true, but the words of the 1992 Act are broader — "no cable system or other multichannel video programming distributor shall retransmit the signal of a *broadcasting station*," (emphasis added) — and the legislative history mandates a broad reading of the statute to include the use of the signal of any station, radio or TV.

### **The Entire Program Schedule of All Stations Carried by a Cable System Must be Retransmitted**

NAB explained at length in our initial comments why the Commission erred in proposing that the requirement in section 614(b)(3)(B) of the Act that cable systems carry the entire program schedule of all stations carried on the system should not apply to signals carried pursuant to retransmission consent. We pointed out that the language of that section differs from the other provisions of section 614 and evidences a rule applicable to carriage of any television signal, no matter how carried. We

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<sup>52/</sup> *Id.* at 36.

showed that the legislative history revealed Congress' intent to prohibit "cherry-picking" of broadcast signals, without limiting that intent only to must carry signals.

None of the comments filed in support of the Commission's proposal address the specific language of section 614(b)(3)(B) or its legislative history. Instead, they rely on section 325(b)(4) which generally provides that retransmission consent stations will not be entitled to the protections of section 614. The conference report, however, demonstrates the narrow nature of this exclusion. Describing the Senate retransmission consent provisions incorporated into the conference bill, the Committee said that "stations which elect to require retransmission consent from a cable system will not have *signal carriage rights* under sections 614 or 615 on that cable system. .

.."<sup>53/</sup> Section 614(b)(3)(B) does not create any right of signal carriage; instead it limits cable operators' discretion in dealing with signals they do carry, whether under retransmission consent or must carry.

This interpretation of the Act not only avoids many of the issues which the Commission identified as arising out of its proposal (*Notice* ¶ 61),<sup>54/</sup> it also is consistent with the distinction Congress drew between communications and copyright interests. *See infra* pp. 46-48. Retransmission consent involves negotiations for

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<sup>53/</sup> H.R. REP. No. 862, 102d Cong., 2d Sess. 76 (1992)(emphasis added).

<sup>54/</sup> Cable operators' comments identified yet another difficulty which the Commission's construction of the statute would create. They indicated that, if a cable system carried any part of a station's program schedule pursuant to retransmission consent, that should be counted towards the system's must carry obligations as if the entire signal were carried. The Commission should not contemplate creating such an obvious loophole in its must carry rules.

stations signals, not for individual programs carried by a station. Rights to individual programs remain a matter of copyright law. Were the Act construed to permit negotiations by cable systems for particular parts of a station's signal, the line Congress perceived between signals and programs could become very faint. The Commission, therefore, should conclude that the Act requires that cable systems carry the whole program schedule of every station carried on their systems, regardless of under what legal regime the signal was acquired.

### **The Scope of Retransmission Consent Requirements**

Most of the comments filed agreed that, except for a simple MATV system, any business using retransmitted broadcast signals will be required to obtain the consents of the stations involved.<sup>55/</sup> A few comments raised particular questions or suggested limitations on the scope of retransmission consent which are not supported by the Act.

Liberty Cable Company agrees that SMATV systems are multichannel video programming distributors and that MATV systems are not since their only function is that of a local antenna. Comments of Liberty Cable at 2-3, 7-8. Liberty, however, goes too far in suggesting that a SMATV operator which distributes its programs

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<sup>55/</sup> Nynex raises the question of the relationship between retransmission consent and local telephone companies providing "video dial tone" service. If the telephone company's role is limited to providing transmission capacity and does not include the selection or sale of content, then it would not appear that the telephone company would be required to obtain retransmission consent. That obligation would fall on whatever entity placed a broadcast signal on the system. If the telephone company itself is providing specific program services to the public, including the signals of broadcast stations, then it should be required to obtain retransmission consent.

through MATV facilities would thereby be exempt from the requirement of seeking retransmission consent. As Liberty itself argues (Comments at 5-6), Congress wanted to include within the definition of a multichannel video program provider all services which use broadcast signals and which provide competitive services to traditional cable systems. SMATV systems clearly provide a competitive alternative to cable systems and fall within the definition of a multichannel video programming distributor, regardless of how they distribute their signals. If a SMATV operator provides a package of signals to a MATV system which includes the signals of broadcast stations, then it should obtain the consents of those stations.

Spectradyne asks that its operations providing the signals of broadcast stations to multiple hotel locations also be exempted from retransmission consent. Like cable operators, however, Spectradyne operates a business reselling the signals of broadcast stations. Section 325 rests on the premise that other entities should not be able to use broadcast signals for their own purposes without the originating stations' consents. Nothing about Spectradyne's operation suggests a reason why it should be treated differently. If an individual hotel establishes an antenna system to obtain broadcast signals over the air and carry them into hotel rooms, the hotel would not have to obtain retransmission consent. Like a MATV system, that is merely a common antenna and no separate business is based on delivery of broadcast signals. Spectradyne, however, appears to have established a service offering broadcast signals to many hotels in an area, in conjunction with other video services which Spectradyne

provides.<sup>56/</sup> Its use of broadcast signals should be subject to negotiations with the stations which provide them.

The comments of Newhouse Broadcasting (pp. 17-19) ask the Commission to broaden the exemption in section 325 for signals of superstations. The Act provides that consent need not be obtained for retransmission "of the signal of a superstation if such signal was obtained from a satellite carrier and the originating station was a superstation on May 1, 1991." Section 325(b)(2)(D). Newhouse claims that some of its cable systems carry pre-May 1991 superstations, but obtain the signals by microwave relay rather than from a satellite carrier. It asks the Commission to rule that it need not obtain consent to carry such signals.

That is an unwarranted extension of the statutory language. The exception to section 325 for carriage of superstations explicitly applies to signals which are obtained from a satellite carrier. If a cable system obtains the signals in any other fashion, the exception does not apply. Exceptions to statutes should be construed narrowly to prevent erosion of the Congressional goal. Even if Newhouse could claim that its carriage of a microwave-delivered superstation signal is functionally the same as if it obtained the signal from a satellite carrier, that does not support disregarding the clear language of the statute. *See Chicago Professional Sports Limited*

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<sup>56/</sup> Spectradyne appears to provide service that competes with similar cable system service offerings, *see* Comments of Continental Cablevision at 15-16, and should be treated no differently in being required to obtain retransmission consent.

*Partnership v. National Basketball Association*, 961 F.2d 667, 671-72 (7th Cir. 1992).

For the same reason, Continental errs in arguing that "regional superstations" should be deemed exempt from retransmission consent. Comments of Continental Cablevision at 11-13. Continental states that these signals "fall entirely outside of the Act both for retransmission consent and must-carry purposes." *Id.* at 11. Continental wrongly assumes that all stations should be either subject to must carry or viewed as coming within the superstation exemption. Instead, carriage of stations which are not subject to must carry can only occur if the stations consent, unless they fall within the narrow superstation exemption. If Congress had intended otherwise, the superstation exemption would have been written broadly, instead of using the specific, narrow language Congress chose to employ. Continental may continue to carry such regional distant signals, but must first obtain the stations' consent.<sup>57/</sup>

Perhaps the most astonishing demand for an exception to retransmission consent is found in Viacom's comments which insist that retransmission consent only applies to stations that could assert must carry rights on a cable system. Comments of Viacom at 23-36. Viacom's tortured exegesis of the Cable Act and its history are a triumph of examining the trees and ignoring the forest. The nub of Viacom's argu-

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<sup>57/</sup> Continental (Comments at 13) suggests that it would be illogical to allow stations to control the use of their signals in areas where they could not acquire territorial exclusivity, although it never explains how those two matters are in any way related to each other. Its comment also appears to be inconsistent with its view (Comments at 26) that retransmission consent is entirely separate from programming interest.