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

In the matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992 Mandatory Carriage of Broadcast Television Stations	MM Docket No. 92-259

TO: The Commission

REPLY COMMENTS OF WNYC COMMUNICATIONS GROUP

WNYC Communications Group, licensee of qualified noncommercial educational Station WNYC-TV, New York City, hereby replies to comments filed in the above-captioned proceeding, in which the Commission has solicited comments on rules to govern the mandatory carriage provisions of Sections 614 and 615 of the Communications Act of 1934, as amended (the "Act"), as adopted by Sections 4 and 5 of the Cable Television Consumer Protection and Competition Act of 1992 (the "1992 Act").[1]

[1] WNYC's failure to reply to any comments filed in this proceeding is not necessarily intended to be construed as concurrence with those comments.

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List A B C D E

I. DEFINITION OF "QUALIFIED NONCOMMERCIAL EDUCATIONAL".

A. General.

Several commenters have noted an ambiguity in the Commission's Notice of Proposed Rulemaking in this proceeding ("NPRM"), which requests comment on when, if ever, the Commission should grant noncommercial educational status to stations or translators operating on channels other than those reserved for noncommercial educational use. NPRM at 5. WNYC concurs with the Association of America's Public Television Stations and with the Educational Broadcasting Corporation (licensee of WNET-TV, Newark, New Jersey), in urging the Commission to recognize that Section 5(l) of the 1992 Act clearly establishes that any station that satisfies the specified definitional criteria of Sections 5(l)(1)(A)(i) or (ii) (neither of which requires that a station operate on a reserved channel) is a "qualified noncommercial educational television station" for the purposes of Section 5, regardless of whether it is licensed on a reserved or a non-reserved channel.[2]

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[2] However, WNYC notes that the Association of America's Public Television Stations erroneously suggests that a station must hold a noncommercial FCC license in order to satisfy either of the definitional criteria of Section 5(l). This suggestion is clearly inaccurate, and the Commission should recognize that a municipally-owned station may satisfy the standards of Section 5(l)(1)(A)(ii) without being licensed as a noncommercial educational station by the FCC.

WNYC's initial comments in this proceeding proposing criteria governing when any additional stations, other than those satisfying the specified definitional criteria of Section 5, should be afforded qualified noncommercial educational status by the Commission for the purposes of Section 5, were not intended to suggest that any time a station does not operate on a reserved channel, it should have to satisfy WNYC's proposed criteria in order to qualify as a noncommercial educational television station for the purposes of Section 5.

B. Municipal Stations.

WNYC opposes the proposal of Newhouse Broadcasting Corporation that a municipally owned station should be deemed to transmit "predominantly" noncommercial programming for educational purposes only when 80 per cent of its programming satisfies this standard. WNYC also opposes the proposal of International Family Entertainment that the term "predominantly" should be interpreted to require a benchmark "far more stringent" than 50 percent.

These proposals fly squarely in the face of the plain Congressional intent underlying adoption of the municipal station provision, which was referenced by WNYC in its initial comments. (WNYC Comments at 3-4.) Congress' clear intent was that a fifty-one percent

benchmark, which conforms to the plain meaning of the term "substantial", should be utilized.[3]

Finally, WNYC strongly disagrees with Newhouse's proposal that municipally-owned stations must satisfy all of the conditions set forth in Section 73.621(a) of the Commission's rules establishing eligibility standards for noncommercial educational television licensees in order to qualify as noncommercial educational television stations for the purposes of Section 5. (Newhouse Comments at 26-27.) This proposal again flies in the face of the plain language of Section 5, which explicitly affords qualified status to municipally-owned stations which transmit predominantly noncommercial programming for educational purposes, regardless of whether they are, or are qualified to be, FCC noncommercial licensees. Had Congress intended to adopt Newhouse's proposal, Congress would simply have provided for the mandatory carriage of any station holding an FCC noncommercial license. Instead, Congress intended to afford mandatory carriage rights to, among others, municipally-owned stations which provide

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[3] The Association of America's Public Television Stations advocates that the measure should be made on a daily basis. WNYC urges that a municipal station should not be deemed to be unqualified if, due to unusual circumstances, a municipal station fails to meet the benchmark on a given day. The measure should accordingly be made on an average basis over the course of the broadcast week.

significant amounts of noncommercial programming to their communities, regardless of the nature of their FCC license.

II. PRINCIPAL HEADEND LOCATION.

For the reasons set forth in its initial comments, WNYC disagrees with the proposals advanced by cable interests advocating that cable operators be afforded the right to select the "principal headend" of their cable systems for the purpose of determining qualification for carriage of noncommercial stations located within a certain proximity of a system's principal headend.

None of the initial comments setting forth this proposal has provided any persuasive reason why a determination presenting such a potential conflict of interest should be left to the unbridled discretion of the cable operator. In contrast, the proposal set forth in WNYC's initial comments establishes a reasoned procedure for designation of the principal headend in a fashion which would best further the underlying goals of Section 5 of the 1992 Act.

Several cable commenters articulated a concern that they have the ability to change a principal headend designation to take account of cable system expansions and reconfigurations. Such a concern, while legitimate,

does not justify conferring wholesale discretion on the cable operator in making the principal headend designation in the first instance. The proposal advanced by WNYC can easily be structured to take account of the need to change the principal headend determination when necessary due to system rebuilding or reconfiguration.

III. SUBSTANTIAL DUPLICATION.

A. Definition.

Cable interests argue that the programming of a noncommercial station should be deemed to "substantially duplicate" that of another station carried by the same system if such programming, while the same, is carried at different times by the two stations. Some commenters go so far as to suggest that programming carried on different days by two stations should be deemed nevertheless to be "substantially duplicative".

The cable position ignores the underlying purpose of the substantial duplication exemption, which is to ensure that cable operators not be required uselessly to carry signals in which subscribers have no interest. Subscribers naturally will not (because they cannot) watch the same program simultaneously on two channels, and it is accordingly pointless and burdensome to require cable operators to present significant amounts

of such programming. Different subscribers will watch the same program at different times, however, and the availability of such an option is a valuable one. Noncommercial stations regularly carry programming that is carried at different times by other noncommercial stations in the same market. Such scheduling decisions are made in recognition of the fact that there is a significant audience for programming repeated at different times of day or on different days.

The Commission should acknowledge this reality by narrowly defining the term "substantial duplication" to include only simultaneously duplicative programming. This is consistent with the current definition of the term in the Commission's existing rules. See Section 76.33(a)(2) of the Commission's Rules.

B. Effect of Grandfathering Provision.

The Commission should also reject the proposal made by Time Warner Entertainment Company L.P. that the grandfathering rights of qualified noncommercial stations under Section 5(c) (pertaining to carriage of stations carried on the cable system as of March 29, 1990) should not supercede the "substantial duplication" exemption to the noncommercial carriage requirements.

Time Warner's proposal violates the plain grandfathering language of Section 5(c), which provides

in part: "Notwithstanding any other provision of this section, all cable operators shall continue to provide carriage to all qualified local noncommercial educational television stations whose signals were carried on their systems as of March 29, 1990." (Emphasis added.) The exemption for carriage of substantially duplicative stations does not override the clear grandfathering rights of noncommercial stations under Section 5(c).

C. State Public Television Network Exemption.

Several commenters note that Section 5(b)(3)(C) exempts medium-sized systems from carriage of more than one qualified noncommercial station affiliated with the same State public television network if the programming of the stations is substantially duplicative. They propose that in cases where a cable operator is located in one state and near another, and more than one qualified noncommercial signal affiliated with different State networks would qualify for mandatory carriage, the operator need only carry the station from the state in which the cable operator's subscribers reside.

This proposal contravenes the plain language of Section 5, which clearly provides a carriage exemption only for stations affiliated with the same State public television network. The proposal also ignores

altogether the very important second prong of the exemption, which only permits cable operators to refrain from carriage of additional must-carry stations affiliated with the same State network if the programming of the stations is substantially duplicative. Commenters' suggestion that cable operators need carry no more than one qualified noncommercial station affiliated with any State public television network, regardless of whether the programming of the stations is duplicative, should accordingly be rejected.

IV. CHANNEL CONFLICTS.

Several commenters have advocated a system of priorities to be followed in cases where multiple stations have competing claims to carriage on the same cable system channel. A number of commenters have suggested that achieving uniformity of channel position throughout a station's service area should be the paramount goal. Other commenters argued that carriage on a station's over-the-air channel should be preferred.

WNYC recognizes that a system must be established for resolving conflicting channel positioning claims. Whatever that system might be, any procedure for locating an alternative channel for stations not afforded their first channel positioning choice should

not automatically require a station's alternative channel to be that which will create uniformity of channel position.

WNYC, for example, is carried on Channel 31 (its over-the-air broadcast channel) on many cable systems, but has been carried for over twenty years on Channel 3 on the cable systems in Manhattan. Because cable subscribers in Manhattan have identified WNYC-TV with Channel 3 for decades, maintaining that continued identity to the extent possible (or, at the least, continuing carriage on a channel close to Channel 3) is far more important to WNYC than would be establishing uniform channel positioning throughout its service area.

For the same reasons, WNYC opposes any system which would afford an irrebuttable presumption that carriage on the over-the-air channel number is preferable to the channel on which a noncommercial station was carried in 1985.

The system advocated by WNYC for locating an alternative channel in cases of channel positioning conflicts avoids hard-and-fast rules and irrebuttable presumptions which may be inappropriate in any given case, by affording stations the right to carriage on a channel that is roughly in as favorable a channel position as the channel on which the station would be

entitled to carriage but for a conflicting claim of right.

A number of commenters also contend that stations should not be afforded the channel position of their choice if that position is not otherwise on a cable system's basic tier of service. The 1992 Act clearly requires cable operators to provide carriage both on the basic service tier and on certain specified channels. It would be inappropriate for the Commission to adopt wide-ranging rules affording a blanket exemption to these requirements. Cable systems unable to satisfy these separate requirements of Section 5 of the 1992 Act should be able to petition the Commission for special relief in individual circumstances, as appropriate.

In any case, a cable operator should never be permitted to avoid carriage of a Section 5 station on the basic service tier by reason of the fact that the station's channel position of right is not on that system's basic service tier. If a choice must be made, a station must be guaranteed carriage on the basic service tier if it so chooses.

Finally, the Arts & Entertainment Network contends that a cable operator need not honor a station's channel positioning choice if the station has not previously been afforded carriage on that channel. The suggestion is directly in violation of Section

5(g)(5), which explicitly entitles stations to carriage on their over-the-air broadcast channel, regardless of whether they have previously been afforded cable carriage on that channel.

V. MANNER OF CARRIAGE.

The Arts and Entertainment Network and International Family Entertainment contend that cable operators should not be required to displace existing cable program services in order to afford mandatory carriage to broadcast signals under Sections 4 and 5 of the 1992 Act. The proposal directly contravenes the plain language of Sections 4 and 5, which requires mandatory carriage of specified broadcast signals, and, while creating certain narrow exemptions, establishes no exemption whatever relating to displacement of existing services. Such an interpretation would contradict the judgment of the Congress that mandatory carriage signals are services of paramount importance which cable operators must offer to their subscribers.

Finally, Cole, Raywid & Braverman contends that noncommercial stations need not be carried in their entirety. Cole, Raywid proposes no system or guidance for determining under what circumstances partial carriage would be appropriate or how such carriage would be effectuated.

As WNYC noted in its initial comments, such a reading is at odds with the language of Section 5, which makes no provision for partial carriage, and plainly directs cable operators to afford carriage to specified stations entitled to mandatory carriage.

VI. COMPLAINT PROCEDURES.

Tele-Communications, Inc. contends that the FCC should afford "substantial deference" to the judgments of cable operators and take remedial action pursuant to Section 5(j) of the 1992 Act only in cases where the cable operator has behaved arbitrarily and capriciously by behaving in bad faith or in clear violation of the law. There is no basis whatever for affording deference to the judgments of cable operators in matters pertaining to the carriage of local broadcast signals. Indeed, the primary purpose of the must carry provisions of the 1992 Act was to counteract the monopoly power of cable operators over local stations and their strong incentives to use that power for their own economic gain, through carriage and channel positioning decisions, rather than for the public interest.

CONCLUSION

In sum, WNYC replies by advocating the following:

-- The Commission should recognize that stations can be qualified noncommercial educational stations under Section 5 regardless of whether they operate on a reserved FCC channel, or (in the case of municipally-owned stations) pursuant to an FCC noncommercial broadcast license.

-- A station owned by a municipality should be deemed to transmit predominantly noncommercial programs for educational purposes if over 50 per cent of its programming satisfies this standard.

-- Cable operators should not be afforded wholesale discretion to designate their system principal headend.

-- Any measure for substantial duplication should only include programming simultaneously duplicated, and the grandfathering provisions of Section 5 should be recognized as effective even in cases where affording grandfathering rights results in carriage of duplicative programming.

-- The Commission should reject adopting the irrebuttable presumptions advocated by several commenters for resolving channel positioning conflicts; should recognize that stations can be entitled to carriage on a channel on which they have not previously

been carried; and should require cable operators to comply with both the channel positioning and basic service tier carriage requirements.

-- The Commission should clarify that mandatory carriage signals must be carried even if carriage would require displacement of other program services, and that the entire program service of Section 5 stations must be afforded carriage.

-- Finally, no deference should be afforded to the mandatory carriage judgments of cable operators.

Respectfully submitted,

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