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

FCC 93-144

In the Matter of	)	
Implementation of the Cable Television Consumer Protection and Competition Act of 1992	)	MM Docket No. 92-259
Broadcast Signal Carriage Issues	)	
Reexamination of the Effective Competition Standard for the Regulation of Cable Television Basic Service Rates	)	MM Docket No. 90-4
Request by TV 14, Inc. to Amend Section 76.51 of the Commission's Rules to Include Rome, Georgia, in the Atlanta, Georgia, Television Market	)	MM Docket No. 92-295 RM-8016

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REPORT AND ORDER

Adopted: March 11, 1993 ; Released: March 29, 1993

By the Commission: Commissioner Marshall not participating.

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I. INTRODUCTION

1. By this Report and Order, the Commission adopts the rules needed to implement the mandatory television broadcast signal carriage ("must-carry") and retransmission consent provisions of the Cable Television Consumer Protection and Competition Act of 1992 ("Cable Act of 1992" or "1992 Act").[1]

2. On November 5, 1992, the Commission adopted a Notice of Proposed Rule Making ("Notice") in this proceeding to consider two provisions of the Cable Act of 1992 concerning the carriage of broadcast signals by cable television systems and other "multichannel video programming distributors".[2] The first of these, set forth in Sections 4 and 5 of the 1992 Act, concerns mandatory signal carriage ("must-carry") rights of commercial and noncommercial television broadcasting stations that are "local" to the area served by a cable system.[3] The second provision, set forth in Section 6 of the 1992 Act, is one that prohibits cable operators and other multichannel video programming distributors from carrying the signals of broadcast stations without first obtaining their consent in certain circumstances. While each of the provisions is distinct and functions in a separate fashion, they are related in that, with respect to local cable carriage, for example, television broadcasters on a system-by-system basis must make a choice once every three years whether to proceed under the mandatory carriage rules or to govern their relationship with cable operators by the retransmission consent requirement. The Commission decided to address these two matters in a single Notice based primarily on administrative convenience and not because it believed that the matters are not severable.[4]

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[1] Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992).

[2] Notice of Proposed Rule Making in MM Docket No. 92-259, 7 FCC Rcd 8055 (1992). The Commission received 82 comments and 46 replies in response to the Notice. A list of commenters is contained in Appendix A. We accept the late-filed reply comments of Major League Baseball and Satellite Broadcasting and Communications Association.

[3] The Commission's pending Second Further Notice of Proposed Rule Making in MM Docket No. 90-4 requested comment on the adoption of must-carry rules in conjunction with the effective competition standard. See 6 FCC Rcd 4545 (1991). We terminate that proceeding here in light of the must-carry provisions of the 1992 Cable Act.

[4] On December 23, 1992, a three-judge court of the U.S. District Court for the District of Columbia held that it will hear only constitutional challenges to the must-carry rules pursuant to Section 23 of the Cable Act of 1992, which provides that challenges to the constitutionality of Sections 4 and 5 shall be heard by a district court of three judges. Turner Broadcasting Systems, Inc. v. Federal Communications Commission, No. 92 Civ. 2247 (D. D.C. Dec. 23, 1992). Thus, constitutional challenges to the retransmission consent and other provisions of the 1992 Act will be considered separately. Several commenters address the constitutionality of the 1992 Act's must-carry and

II. MUST-CARRY REGULATIONS

A. Carriage of Local Noncommercial Educational Television Stations

1. Definition of Qualified Local NCE Station

3. Section 5 of the Cable Act of 1992 adds a new Section 615 to the Communications Act of 1934, as amended.[5] Under Section 615 of the 1992 Act, a local noncommercial educational (NCE) station qualifies for must-carry rights if it is licensed by the Commission as an NCE station and if it is owned and operated by a public agency, nonprofit foundation, or corporation or association that is eligible to receive a community service grant from the Corporation for Public Broadcasting.[6] An NCE station is also considered qualified if it is owned and operated by a municipality and transmits predominantly noncommercial programs for educational purposes. In the Notice, we sought comment on various aspects of the definition of a qualified local NCE station. This section first will address the criteria for determining whether a municipal NCE station transmits predominantly noncommercial programs for educational purposes. We will then examine whether stations or translators operating on channels other than those reserved for NCE use should be granted NCE status. Finally, to determine whether a particular NCE station is "local" to a given cable system for purposes of Section 5 of the 1992 Act, we will discuss establishment of a "principal headend" for cable systems with multiple headend facilities.

4. Municipally-owned Stations. The Commission proposed in the Notice that a municipally-owned station will be deemed to transmit predominantly noncommercial programming for educational purposes if it broadcasts such

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retransmission consent provisions. See, e.g., Turner Broadcasting System (Turner), Discovery Communications (Discovery), Time Warner Entertainment Company (Time Warner). As these matters are currently under court review, we will not address them here.

[5] The statutory must-carry requirements for NCE stations became effective on December 4, 1992, the general effective date of the Cable Act of 1992. On December 9, 1992, the U.S. District Court for the District of Columbia issued a "Standstill Order" that contemplates that during the pendency of the District Court case the Commission will take the full 120 days permitted under the statute (see Section 615(j)(3)) to resolve any complaint filed by an NCE station. Turner Broadcasting Systems, Inc. v. Federal Communications Commission, C.A. Nos. 92-2247, et al. (D. D.C. Dec. 9, 1992).

[6] Section 615(l)(1)(A). Alpha-Omega Broadcasting of Albuquerque (Alpha-Omega) is concerned that the Notice refers to NCE eligibility without incorporating the formula for determining whether a station is eligible for a community service grant from the Corporation for Public Broadcasting in Section 396(k)(6)(B) of the Communications Act of 1934, as amended. Alpha-Omega Comments at 4-7. It is not our intention to undermine these established criteria, and the rule has been written accordingly. See Appendix C.

programming, as it is defined in Section 73.621 of the Commission's rules, for at least 50 percent of its broadcast week.[7] Commenters addressing this issue tend to agree with the 50 percent standard but believe programming should be evaluated on other than a weekly basis. For example, the Association of America's Public Television Stations (APTS) and TKR Cable (TKR) believe that programming should be measured in terms of broadcast hours, with APTS suggesting a time frame of 6 AM to midnight.[8] The Consumer Federation of America and the Media Access Project (CFA/MAP) recommends that the Commission review audience ratings and demographic data to establish the primary hours of viewing, generally and for specialized audiences, and mandate that 50 percent of that time period per day be devoted to NCE programs.[9] WNYC Communications Group (WNYC), a municipally-owned NCE station, agrees with the Commission's proposal.[10]

5. We will adopt the definition proposed in the Notice. While two commenters, International Family Entertainment (IFE) and Newhouse, believe that the 50 percent standard is inadequate,[11] we find that the standard clearly reflects Congressional intent, as indicated in the legislative history, and these parties offer no evidence to the contrary. The House Report indicates that body's understanding that a municipal station transmits predominantly noncommercial programs for educational purposes if "more than one half of a station's programming is noncommercial programming for educational purposes, as measured in broadcast hours."[12] Further, we do not agree with APTS and TKR that the reference to "broadcast hours" in the House Report means that the amount of NCE programming must be measured on a daily basis rather than on a weekly basis.[13] Rather, we believe that the House Report referred to the calculation of "broadcast hours" as an alternative to counting the number of educational programs without regard to length or some other measurement. We prefer a weekly measurement to give municipally-owned NCE stations maximum flexibility in developing their programming schedules. We also believe that the 50 percent of programming threshold is an adequate safeguard to ensure that

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[7] Notice at 8056-57. As Newhouse Broadcasting Corporation (Newhouse) correctly suggests, the Notice did not intend to limit the scope of "educational purposes" only to the requirements of paragraph (a) of Section 73.621, but intended that all of Section 73.621 would be governed by that definition. Newhouse Comments at 27. The new rule has been written accordingly. See Appendix C.

[8] APTS Comments at 6-7; APTS Reply at 1-2; TKR Comments at 2.

[9] CFA/MAP Comments at 5-6.

[10] WNYC Comments at 3-4; WNYC Reply at 3-4.

[11] IFE Comments at 4-5; Newhouse Comments at 27.

[12] See House Committee on Energy and Commerce, H.R. Rep. No. 623 ("House Report"), 102d Cong., 2nd Sess. (1992) at 104.

[13] See APTS Comments at 6-7; TKR Comments at 2.

such stations cannot relegate their NCE programming to undesirable hours.

6. Stations and Translators on Non-NCE Channels. Section 615(1) of the 1992 Cable Act provides that the definition of a qualified local NCE station should include the translator of any NCE station with five watts or higher power serving the franchise area, a full-service station or translator licensed to a channel reserved for noncommercial educational use, and such stations and translators operating on channels not so reserved as the Commission determines are qualified NCE stations.[14] We asked in the Notice if the Commission should grant NCE status to stations or translators operating on channels other than those reserved for noncommercial educational use.[15] Public television interests generally agree that such stations should be considered qualified NCE stations if they meet all applicable criteria as established in the 1992 Cable Act.[16] Cable commenters urge the Commission to make a public interest determination on a case-by-case basis.[17] We conclude that stations and translators on non-NCE channels will be considered qualified if they meet the qualification criteria set forth in Section 5 of the 1992 Cable Act, which are delineated at paragraph 3, supra. These criteria are quite exhaustive and will ensure that stations on non-NCE channels asserting NCE must-carry rights are truly operating as NCE stations.

7. Headends. Section 615(1)(2) of the 1992 Act defines a local NCE station as an NCE station licensed to a principal community with a reference

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[14] With respect to other issues regarding translators, commenters ask the Commission to clarify that NCE status should be permitted for translators of NCE parent stations, that a cable system should be permitted to carry a translator in lieu of a primary signal, that a system should not be required to carry both a parent station and its translator, and that the same channel positioning requirements that would apply to a primary station should apply to its translator. See Adelphia Communications Corporation et al. (Adelphia) Comments at 4; Time Warner Comments at 5; APTS Reply at 10 n.10. We believe it consistent with the legislative history of the 1992 Cable Act to conclude that a translator may be carried in lieu of a primary NCE signal, and that it should be afforded the same must-carry status as the primary signal, including rights to the primary station's channel number, as long as that translator operates with five watts or higher power, serves the cable system's franchise area and the parent station is within 50 miles of the principal headend of the cable system. See House Report at 104. Further, carriage of both a primary station and its translator will not be required, since the programming on the two signals will be substantially duplicative.

[15] Notice at 8057.

[16] APTS Comments at 8; APTS Reply at 3-4; Educational Broadcasting Corporation (EBC) Comments at 1-2, 5-6; National Association of College Broadcasters (NACB) Comments at 2; WNYC Reply at 2.

[17] National Cable Television Association (NCTA) Comments at 4 n.5; Adelphia Comments at 4; Time Warner Comments at 5-6.

point, as defined in Section 76.53 of the Commission's rules,[18] within 50 miles of the principal headend of the cable system, or with a Grade B service contour, as defined in Section 73.683(a) of the Commission's rules, that encompasses the principal headend of the cable system. The Notice proposed that a cable operator with multiple headend facilities, any of which could be considered the "principal headend," should be permitted to select which of those headends will serve as its principal headend, as long as the choice is not intended to circumvent the system's must-carry obligations.[19] Most commenters addressing this issue agree with the Commission's proposal and note that an operator's principal headend may change as its system is reconfigured.[20] On the other hand, APTS believes that the principal headend should be the headend serving the largest number of subscribers or accommodating the majority of the signal processing equipment.[21] WNYC also disagrees with the Notice and suggests that the headend that is closest to the designated reference point of the community of license of a qualified NCE station is the principal headend for that station.[22] NCTA disagrees, arguing that this would essentially nullify the principal headend requirement, as virtually all NCE stations would be afforded must-carry status.[23]

8. With respect to procedural requirements, Adelphia, Newhouse and Time Warner submit that the designation of a cable operator's principal headend could be included on an amended Form 320, the annually-filed Basic Signal Leakage Performance Report.[24] Armstrong suggests that notice of the designation of the principal headend be placed in the operator's public file and that if a change becomes necessary, the operator should be able to designate a different headend upon 30 days' prior notice to must-carry

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18 Adelphia and Time Warner propose that the Commission add some communities and reference points to Section 76.53 so as to supply the coordinates for every community where an NCE station is located. Adelphia Comments at 5; Time Warner Comments at 7. We decline to do so at this time. We note that Section 76.53 provides that where a community's reference point is not given, the coordinates of the main post office in the community shall be used.

19 Notice at 8057.

20 Adelphia Comments at 5; Armstrong Utilities (Armstrong) Comments at 2-3; Continental Cablevision (Continental) Comments at 3-5; InterMedia Partners (InterMedia) Reply at 2-3; NCTA Comments at 4; Newhouse Comments at 28; Time Warner Comments at 6-7; TKR Comments at 3.

21 APTS Comments at 10; APTS Reply at 6-7.

22 WNYC Comments at 6-9; WNYC Reply at 5-6.

23 NCTA Reply at 3 n.2.

24 Adelphia Comments at 5; Newhouse Comments at 28; Time Warner Comments at 6-7.

stations on the system.[25] NCTA does not object to including principal headend designations in operators' public files and notifying stations and the Commission of those designations, but does not believe that an operator should have to inform the Commission when it changes its headend.[26] APTS proposes that cable systems be required to notify the Commission and local NCE stations of their principal headend designations and supports a public file requirement. APTS further urges the Commission to issue a public notice listing the principal headend designated by each cable system, and proposes that a cable operator must file a petition with the Commission and serve affected stations in order to change its designation.[27]

9. The term "principal headend" is not defined in the 1992 Cable Act, although we note that the Senate version of the legislation included a definition consistent with the proposal in the Notice.[28] We believe that, in many cases, the cable system will have only one headend or, if it has more than one headend, a particular headend will clearly be the principal headend. However, where a system has multiple headends, any one of which could be the principal headend, we believe that Congress intended to allow the system to select its own principal headend, provided that its choice is reasonable and is not made in order to circumvent the must-carry obligations imposed by the 1992 Act. We expect, in light of the record on this issue, that the "principal headend" in the majority of systems will be the headend serving the most subscribers, accommodating the most signal processing equipment, or lying closest to the geographical center of the system. We will consider these factors in evaluating a complaint regarding a cable system's principal headend designation, as noted below. WNYC's proposal that the principal headend be different for different stations would cause confusion and would be inconsistent with the 1992 Cable Act. The plain language of the statute contemplates that a system will have a single principal headend.

10. We will require an operator to designate its principal headend by May 3, 1993, and to make such designation part of its public file on June 17, 1993.[29] Cable operators with more than one headend also must notify all qualified NCE stations by certified mail regarding the location of the designated principal headend on May 3, 1993. In general, a cable operator may change its choice of principal headend only for good cause (e.g., where the system adds communities that necessitate redesignation or relocation of its headend). An operator making any subsequent changes in its principal headend

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25 Armstrong Comments at 2-3.

26 NCTA Comments at 5 n.7; NCTA Reply at 3-4, 4 n.4.

27 APTS Comments at 10-13.

28 See Senate Committee on Commerce, Science, and Transportation, S. Rep. No. 92 ("Senate Report"), 102d Cong., 1st Sess. (1991) at 101.

29 This requirement will apply to all cable systems and will be included in a new Section 76.302 of our rules that specifies the records relating to must-carry obligations that must be maintained in the system's public file.

must notify all stations carried on its system pursuant to the must-carry rules at least 60 days before the change takes place, and include the new designation in its public file.[30] In the event that a cable operator abuses its discretion and either selects or manipulates the location of a principal headend for the apparent purpose of avoiding must-carry obligations, an aggrieved NCE station may file a complaint with the Commission to seek carriage on the operator's system. To simplify the complaint process, we will require only that the complaining station provide the Commission with a short statement of facts supporting the station's assertion that the cable operator either initially designated or later moved its principal headend to avoid carrying the station. We believe that the cable system will bear a significant burden in demonstrating the reasonableness of its designation where the principal headend is not the headend serving the majority of the system's population, the headend with the majority of the system's signal processing equipment or the headend closest to the geographical center of the cable system.

2. Signal Carriage Obligations

11. Section 615(b) of the 1992 Cable Act requires cable operators to carry qualified local NCE television stations requesting carriage.[31] Small systems, with 12 or fewer usable activated channels, must carry the signal of one qualified local NCE station, and medium capacity systems, with 13 to 36 usable activated channels, must carry the signal of all qualified local NCE stations up to a total of three. Systems with a capacity of more than 36 usable activated channels are generally required to carry the signals of all qualified local NCE stations requesting carriage. If a small or medium capacity system operates beyond the presence of a qualified local NCE station,

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[30] This requirement includes notification of commercial as well as NCE stations.

[31] The NCE must-carry rules became effective on December 4, 1992. Thus, cable operators should already be carrying the number of qualified NCE stations required under Section 615 of the 1992 Act. However, under our new regulations adopted herein, by June 2, 1993, a cable operator will be required to send a list of all broadcast television signals carried on the cable system, and their channel positions, by certified mail to all local broadcast stations, including those not designated as must-carry signals and those not carried on the system. Sections 615(g)(4) and (i)(2) provide that a cable operator is not required to carry an otherwise qualified NCE station if it fails to deliver a good quality signal to the cable system's principal headend or would increase the cable system's copyright liability. To the extent these signal quality problems or copyright liability matters have not already been resolved, on May 3, 1993, a cable operator will be required to notify by certified mail those local NCE stations that may not be entitled to carriage because they either (1) fail to meet the signal strength requirements or (2) may cause increased copyright liability to the cable system.

it is required to import and carry a qualified NCE station.[32] In addition, Section 615(c) requires that cable operators, regardless of capacity, must continue to provide carriage to all qualified local NCE television stations whose signals were carried on their systems as of March 29, 1990, regardless of the proximity of those stations to the system's principal headend. Further, Section 615(h) provides that qualified NCE signals shall be available to every subscriber at all television sets connected to the cable system as part of the cable system's lowest priced service tier that includes the retransmission of local commercial television broadcast signals.

12. In the Notice, we sought comment on a number of specific issues regarding a cable operator's NCE signal carriage obligations. This section will first discuss the definition of "activated channels" for purposes of the 1992 Cable Act. Next, we will address how operators are to select among requests for carriage if those requests exceed their mandatory carriage obligations. We will then determine when an NCE signal is "substantially duplicated" for purposes of certain limited exceptions to the must-carry provisions of the 1992 Cable Act. Finally, we will discuss issues regarding use of public, educational or governmental channels for carriage of NCE stations, and identification of NCE must-carry signals.[33]

13. Activated Channels. The 1992 Cable Act defines "activated channels" as "channels engineered at the headend of a cable system for the provision of services generally available to residential subscribers of the cable system, regardless of whether such services actually are provided, including any channel designated for public, educational, or governmental use." The statute defines "usable activated channels" as "activated channels of a cable system, except those channels whose use for the distribution of broadcast signals would conflict with technical and safety regulations as defined by the Commission."[34]

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[32] Section 615(b)(2)(B)(iii) provides that a small capacity cable system without sufficient channel capacity to comply with this importing requirement will not be required to remove any programming service provided to subscribers as of March 29, 1990, but must use the first channel that subsequently becomes available. The 1992 Act includes no similar provision for medium capacity systems.

[33] We note that the carriage obligations imposed by the 1992 Cable Act generally do not conflict with existing Commission rules. Section 615(f), however, provides that a qualified local NCE television station whose signal is carried by a cable system "shall not assert any network nonduplication rights it may have pursuant to [S]ection 76.92 [of the Commission's rules] . . . to require the deletion of programs aired on other qualified local noncommercial educational television stations whose signals are carried by that operator." Thus, as between qualified local NCE stations, no network nonduplication requirements will be enforced once the NCE must-carry rules become effective. Section 76.92 of the rules will be amended accordingly.

[34] These definitions are included in Sections 2(c)(5) and 2(c)(7) of the 1992 Cable Act, which amend Section 602 of the Communications Act, 47 U.S.C. § 531.

We proposed in the Notice to add these definitions to Section 76.5 of the Commission's rules.[35] We received no objection to incorporating these definitions into our rules and we thus will do so. Acton Corp. et al. (Acton), and NCTA request further clarification, however. Acton submits that the definition should include only channels that can be delivered to subscribers without additional equipment and expense; that is, it should not include premium or pay-per-view channels that require special converters or other equipment in order to be received by individual subscribers.[36] We believe, however, that such a qualification would be contrary to the plain language of the statute, which even counts channels that are not currently used to provide service to subscribers. NCTA asserts that an operator that has designed a system with bandwidth greater than the number of video carriers generated should not have increased signal carriage obligations.[37] We intend to count only channels engineered at the headend, so if a system is theoretically capable of providing, for example, 40 channels but only has equipment at the headend to carry 30 channels, it will be considered to have 30 activated channels.[38]

14. Selection of Signals. As noted above, small capacity cable systems are required to carry one qualified local NCE station and medium capacity cable systems are required to carry no more than three qualified local NCE stations. The Notice proposed that if a small or medium capacity system receives multiple requests for carriage that outnumber its must-carry obligations, it will have discretion to select the NCE stations it will carry. Armstrong and CFA/MAP agree that cable operators should be permitted to choose among NCE requests in these situations.[39] CFA/MAP additionally suggests, however, that cable systems be required to first select from among those requests made by NCE stations

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35 Notice at 8057 n.9.

36 Acton Comments at 20-22.

37 NCTA Comments at 6-7.

38 If such a medium capacity system subsequently brings the other channels into use, it will be responsible for the carriage obligations of a large system. See Section 615(b)(3)(D).

NCTA further notes that there may be situations where an operator uses a microwave link to deliver only a portion of the system's channels to a separate community. NCTA asserts that the Commission should make clear that a portion of a single system may have a lesser number of activated channels despite the fact that another community on the same system may have a greater number of channels available. NCTA Comments at 6 n.13. We note that if a portion of a cable system has insufficient wiring or microwave capacity to receive the full complement of channels available at the system's principal headend, we will not require the cable operator to upgrade that part of the system. We will resolve other problematic situations when presented with the specific facts of a particular case.

39 Armstrong Comments at 4; CFA/MAP Comments at 6.

licensed as noncommercial broadcasters.[40] APTS, on the other hand, disagrees with the Notice and suggests that cable operators faced with requests in excess of their obligations should be required to carry the in-state station that is most local, unless the NCE stations involved agree otherwise.[41]

15. We conclude that if a cable system receives requests for carriage of qualified local NCE stations in excess of its must-carry obligations, the cable system may select which signals to carry. We do not believe that cable operators will abuse this discretion, and we note that the statute prohibits cable operators from accepting consideration for carriage of NCE stations.[42] We expect that cable system operators will be naturally inclined to carry the NCE stations that are of most interest in their service area, or, in the case of multiple stations, those that provide some degree of diversity. Since the 1992 Act appears to show no priority to carriage for licensed NCE stations vis-a-vis municipally-owned stations, we will not, as CFA/MAP suggests, mandate preferences among the types of NCE stations a cable operator may choose in fulfilling its must-carry obligations. The APTS proposal would be difficult to implement and would not necessarily ensure the best service to the public. While the Commission might be able to determine which station is "most local" with respect to a particular cable system, mandatory carriage of that station rather than another local station will not necessarily always serve the public interest. We note that our conclusion regarding this issue will not relieve cable systems of their obligation to adhere to Section 615(c) regarding continued carriage of existing stations. Moreover, we emphasize that in any event a cable operator may choose to carry NCE signals in excess of the number required by the statute.[43]

16. Substantial Duplication. The 1992 Cable Act sets forth limited exceptions to must-carry obligations for medium capacity and large capacity

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[40] CFA/MAP Comments at 6-7.

[41] APTS Comments at 14-15; APTS Reply at 8-10; accord Independence Public Media of Philadelphia (IPM) Reply at 7; contra Community Antenna Television Association (CATA) Reply at 7; NCTA Reply at 5-6.

[42] Section 615(i).

[43] Adelphia notes that Section 614(a) exempts cable systems with 12 or fewer channels and less than 300 subscribers from any commercial must-carry obligations and asserts that the Commission should adopt the same exemption for NCE must-carry. Adelphia Comments at 7 n.3. We find, however, that such an exception would violate the plain language of Section 615(b)(2)(A), which provides that systems with 12 or fewer channels must carry at least one NCE station. Additionally, WNYC asserts that where a qualified local NCE station does not exist at all with respect to a cable system, the Commission should develop guidelines to ensure that the mandatory NCE station the system selects for carriage is devoted to predominantly educational purposes. WNYC Comments at 4-5. We believe that the statute already provides sufficient guidance regarding this issue. See Section 615(l)(1), the definition of a qualified NCE station.

systems. Section 615(b)(3)(C) provides that if a cable operator with 13 through 36 channels carries the signal of a qualified local NCE station that is affiliated with a state public television network, that operator shall not be required to carry the signal of additional local NCE stations affiliated with the same network if the programming of those stations substantially duplicates the programming of the state network station already being carried. Similarly, Section 615(e) provides that systems with more that 36 channels shall not be required to carry the signals of additional local NCE stations if the programming of those stations substantially duplicates the programming of a qualified local NCE station requesting carriage. The Notice proposed that for purposes of both exceptions, a station will be deemed to "substantially duplicate" the programming of another station if more than 50 percent of its weekly prime time programming consists of programming aired on the other station.[44]

17. All commenters addressing this issue agree with our proposal that the definition of "substantial duplication" should be the same for the medium capacity system exception and for the large capacity system exception.[45] In addition, cable commenters argue that the duplication should not have to be simultaneous to justify non-carriage of a "substantially duplicating" station,[46] while public television interests and consumer groups contend that the duplication must be simultaneous.[47] Otherwise, the comments vary widely regarding the definition of substantial duplication. For example, NCTA and WNYC agree with the Notice that substantial duplication exists if a station duplicates more than 50 percent of another station on a weekly, prime time basis,[48] although IFE and NACB oppose the 50 percent benchmark.[49] Continental supports the 50 percent standard but submits that the Commission should look at the content of a full week's programming rather than just prime time programming,[50] while CFA/MAP believes that the definition should be based on

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[44] Notice at 8057.

[45] Adelphia Comments at 5-6; Armstrong Comments at 5; Acton Comments at 15; NCTA Comments at 7; Newhouse Comments at 29; Time Warner Comments at 8; TKR Comments at 3; Viacom International (Viacom) Comments at 64.

[46] Adelphia Comments at 5-6; Armstrong Comments at 5; Black Entertainment Television (BET) Comments at 5; Acton Comments at 15-16; Continental Comments at 13-14; Newhouse Comments at 29; Time Warner Comments at 8-9; TKR Comments at 3-4; Viacom Comments at 64; Viacom Reply at 16-18.

[47] APTS Comments at 19-20; CFA/MAP Comments at 7-10; IPM Reply at 5-6; WNYC Comments at 10; WNYC Reply at 6-7.

[48] NCTA Comments at 7; WNYC Comments at 10.

[49] IFE Comments at 5; NACB Comments at 3.

[50] Continental Comments at 13-14.

prime time programming.[51] A number of commenters propose a combined approach whereby the Commission would consider the amount of duplication of both overall and prime time programming.[52]

18. Commenters also differ on the length of the comparison period. Acton and TKR agree with the Commission that the test for determining substantial duplication should be one week of programming.[53] Viacom suggests that the comparison be based on the previous calendar month.[54] CFA/MAP proposes a measurement period of four successive weeks.[55] APTS believes that the minimum comparative period should be one representative week in the preceding year, as designated by the Commission.[56] Finally, a number of commenters entirely reject the proposal in the Notice and urge the Commission to revert to the definition of substantial duplication in the former must-carry rules, i.e., duplication during 14 weekly prime time hours.[57]

19. For purposes of both the medium capacity system and the large capacity system exception, we conclude that an NCE station does not substantially duplicate the programming of another NCE station if at least 50 percent of its typical weekly programming is distinct from programming on the other station either during prime time or during hours other than prime time. This standard will be applied as a two-part test. First, the amount of duplicative (simultaneous or non-simultaneous) prime time weekly programming broadcast over the course of a three-month period will be calculated. The end of the three-month period must fall within 30 days prior to the date the cable system notifies the NCE station that it is denying or discontinuing carriage based on substantial duplication. Second, the amount of duplicative (simultaneous or non-simultaneous) weekly programming broadcast outside of prime time over the course of the same three-month period will be determined. Only if the station duplicates more than 50 percent of the other station's

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51 CFA/MAP Comments at 7-8.

52 BET Comments at 5; Acton Comments at 14-15; TKR Comments at 3-4; Trinity Christian Center (Trinity) Comments at 9; Viacom Comments at 63-65. We note that Viacom urges the Commission to adopt a four-hour definition of prime time (7-11 PM, 6-10 PM central) as set forth in the Commission's Prime Time Access Rule, Section 73.662(g). Viacom Comments at 62-63. WNYC suggests a definition of 8-11 PM. WNYC Comments at 10.

53 Acton Comments at 14-15; TKR Comments at 3-4.

54 Viacom Comments at 64.

55 CFA/MAP Comments at 8.

56 APTS Comments at 19-20.

57 Adelphia Comments at 5-6; Armstrong Comments at 5; InterMedia Reply at 6; Newhouse Comments at 29; Time Warner Comments at 7-9.

weekly programming in both of these respects can it be denied carriage.[58] By contrast, if the NCE station broadcasts 50 percent or less duplicated programming on either a prime time or a non-prime time basis, it will not be deemed substantially duplicative of the other station and will be entitled to carriage under our must-carry rules. The cable operator will bear the burden of demonstrating to an NCE station seeking carriage that the station substantially duplicates another NCE must-carry station if the operator denies carriage on this basis.

20. Section 615(e) of the 1992 Cable Act provides that "[s]ubstantial duplication shall be defined by the Commission in a manner that promotes access to distinctive noncommercial educational television services." We consider the programming broadcast in prime time distinct from the programming broadcast at other times because we believe that prime time often is intended for different purposes and tends to attract different viewers than other dayparts. Therefore, if a station broadcasts a program in prime time that is broadcast on another station during the day, the two broadcasts will not be considered duplicative. Conversely, two broadcasts of the same program aired during the same daypart over the course of a week will be considered duplicative, even if they occur at different times or on different days. While the House Report indicates that substantial duplication is a simultaneous standard with respect to commercial stations,[59] neither the House Report nor the Senate Report mentions a standard for noncommercial stations. We believe that a non-simultaneous, weekly standard is appropriate for NCE stations because, unlike commercial network affiliates, NCE stations often broadcast their PBS network programming at different times.[60] In addition, we believe that the 50 percent

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[58] Armstrong points out that a cable system located near a state border or a tri-state area might be required to carry substantially duplicative signals of state NCE stations from two or three different states. Armstrong is faced with this situation and, through fiber optics, currently combines three stations with identical programming from three different states on one channel and provides each state educational channel only to the residents of that state. Armstrong suggests that the cable operator be permitted to choose one station as its must-carry signal in this situation. Armstrong further argues that if an operator is located in only one state and two state signals qualify for must-carry status (i.e., one in the home state and one in a neighboring state), the operator should only be required to carry the NCE station in the state where its subscribers reside. Armstrong Comments at 6-7; contra WNYC Reply at 8-9. We note, however, that the state public television network exception for medium capacity cable systems included in the 1992 Cable Act only applies to stations that belong to the same state network. Accordingly, a medium capacity cable system in an area with two qualified local NCE stations affiliated with two different state networks must carry both stations. This is true regardless of whether the cable system is located entirely in one state or covers portions of both states, or whether the programming on the stations in question is substantially duplicative.

[59] House Report at 94.

[60] See e.g., APTS Comments at 18-19.

benchmark for prime time and non-prime time programming will fulfill the goal of the statute, to encourage distinctive NCE services, without posing any undue hardship on NCE stations.

21. We clarify here, as APTS suggests, that programs in foreign languages (e.g, MacNeil/Lehrer in Spanish) are not duplicative of the same programs broadcast in English, as they target different audiences. We will likewise not consider different episodes of the same program duplicative, since not all episodes of a series cover the same subject. For example, the PBS "Nova" series addresses a wide range of topics that appeal to different audiences. We further clarify that we will follow the definition of "prime time" already included in Section 76.5(n) of the Commission's rules (i.e., 5-10 PM in the central time zone and 6-11 PM in all other time zones; stations in mountain time zone may choose either). In addition, we emphasize that the plain language of the statute dictates that the substantial duplication exception does not supersede the requirement to retain stations that were on the system prior to March 29, 1990.[61]

22. PEG Channels. Section 615(d) of the 1992 Cable Act provides that a cable operator required to add the signals of qualified local NCE stations to its system may do so by placing such additional stations on unused public, educational or governmental (PEG) channels not in use for their designated purposes, subject to approval by the franchising authority. Pursuant to Section 611 of the Communications Act, the franchising authority determines how much of a cable operator's channel capacity, if any, will be set aside for PEG use.[62] In the Notice, we sought comment on what procedures to follow if a

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[61] Adelphia and Time Warner argue that if NCE stations carried on March 29, 1990, have since been dropped, the cable operator should be permitted to refuse carriage if the station does not compensate the cable operator for any additional copyright liability or does not deliver a signal of adequate quality. Adelphia Comments at 3-4; Time Warner Comments at 4-5. Section 615(i)(2), which states that stations may be required to pay the cable operator for increased copyright costs, excludes stations not already carried under the provisions of paragraph (c), which in turn requires operators to continue carriage of signals that were carried as of March 29, 1990. In this regard, we will use the effective date of the noncommercial must-carry rules, December 4, 1992, for determining the affected signals. Signals already deleted by that date do not come within this obligation and thus copyright payment could be required. With respect to signal quality, Section 615(i)(1) does not exclude stations carried on the system as of March 29, 1990. Accordingly, any station seeking carriage or already being carried may be required to bear the cost associated with delivering a good quality signal to the principal headend of the cable system, regardless of whether that station had been carried by the cable system prior to March 29, 1990.

[62] Section 611 (d) provides that "[i]n the case of any franchise under which channel capacity is designated [for PEG channels], the franchising authority shall prescribe (1) rules and procedures under which the cable operator is permitted to use such channel capacity for the provision of other services if such channel capacity is not being used for the purposes

channel reserved for PEG programming is used to carry an NCE signal when no other channel capacity exists and a qualified PEG user subsequently demands access.[63] Commenters addressing this issue suggest a number of safeguards to ensure that PEG channels remain dedicated for their intended use, including public notice requirements, reporting requirements and a specific definition of "unused channels."[64]

23. We decline to adopt stringent requirements regarding the use of PEG channels for NCE must-carry purposes because we believe that these matters are more appropriately resolved by individual franchising authorities.[65] After reviewing the record, we conclude that adoption of additional PEG channel requirements and procedures here could infringe upon the discretion given to franchising authorities under this section of the 1992 Act and under Section 611 of the Communications Act. We accordingly will defer at this time to the judgment of franchising authorities with respect to the procedures to be used to delineate the rights of must-carry NCE stations and PEG channel users, respectively. We remind cable operators, however, that a franchising authority's refusal to permit the use of PEG channels for NCE must-carry signals does not relieve a cable system of its must-carry obligations (i.e., a cable operator without a sufficient number of available channels may be required to drop a non-must-carry station or cable programming service to fulfill its must-carry obligations).

24. Identification of Signals. Section 615(k) of the 1992 Act requires a cable operator, upon request by any person, to identify the NCE signals carried on its system in fulfillment of must-carry requirements. The Notice sought comment on whether a cable operator should be required to provide this information in writing and whether we should require a response within a specified time period. The Notice also asked whether we should require a cable operator to retain a current list in its public file of all stations carried on its system pursuant to the must-carry rules.[66] Most commenters addressing this issue agree that operators should be required to retain a list of must-carry

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designated, and (2) rules and procedures under which such permitted use shall cease."

63 Notice at 8058.

64 See APTS Comments at 21-22; Armstrong Comments at 7-8; CFA/MAP Comments at 10-11; City of Palm Desert (Palm Desert) Reply at 5-7; National Association of Telecommunications Officers and Advisors et al. (NATOA) Comments at 4-8; New York State Commission on Cable Television Reply at 2-4.

65 A related issue arises with respect to carriage of low power television (LPTV) stations. We believe the same conclusions are equally applicable to LPTV carriage on PEG channels.

66 Notice at 8058.

stations in their public files.[67] Time Warner and TKR, however, believe that such a requirement would be overly burdensome.[68] In addition, most commenters agree that there should be some requirement that a cable operator respond in writing to a request for a list of must-carry signals carried on its system.[69] For example, APTS proposes procedures for answering such requests, including a requirement that the operator respond within 10 days.[70] CFA/MAP and Fairfax County suggest a response time of no more than 30 days.[71] TKR asserts that in no event should the cable operator be given less than 45 days to respond to any such request.[72]

25. We will require that, by June 17, 1993, a cable operator shall include in its public file a current list of the NCE stations carried on its system pursuant to must-carry requirements. The list should state the call sign, community of license, broadcast channel number and cable channel position on the system for each must-carry station, and should state whether the station was carried on the cable system on March 29, 1990. We do not believe that inclusion of this readily available information in a cable system's public file unduly burdens the cable operator. We also will require that this list must be provided in writing within 30 days in response to a written inquiry. We believe that 30 days is more than adequate time to photocopy and mail the list, which already is included in the public file.

B. Carriage of Local Commercial Television Stations

1. General Signal Carriage Requirements

26. Signal Carriage Obligations. A new Section 614 of the Communications Act of 1934, as amended, is established by Section 4 of the 1992 Act.[73] Section 614(a) requires each cable operator to carry local commercial television stations and qualified low power stations.[74] Section 614(b) specifies the number of commercial must-carry signals that each cable operator

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[67] Adelphia Comments at 6; APTS Comments at 23-24; Armstrong Comments at 8; Palm Desert Reply at 8-9; CFA/MAP Comments at 12; Fairfax County Reply at 5-6; WNYC Comments at 11-14.

[68] Time Warner Comments at 9-11; TKR Comments at 4.

[69] APTS Comments at 23-24; CFA/MAP Comments at 12; NCTA Comments at 8.

[70] APTS Comments at 23-24.

[71] CFA/MAP Comments at 12; Fairfax County Reply at 5-6.

[72] TKR Comments at 4.

[73] Section 614(f) requires the Commission to issue the regulations implementing this section within 180 days of enactment.

[74] The definition of a qualified low power television station and the must-carry rights of such signals are discussed separately below.

must provide based on its system channel capacity.[75] In particular, it provides that a cable system with 12 or fewer usable activated channels must carry the signals of at least three local commercial television stations.[76] Such cable systems are exempt from the commercial must-carry requirements if they serve 300 or fewer subscribers, as long as they do not delete from carriage any signal of a broadcast television station.[77] A cable system with more than 12 usable activated channels, regardless of the number of subscribers, must carry the signals of local commercial television stations, up to one-third of the aggregate number of usable activated channels of such system.[78] The carriage of other broadcast television signals is at the discretion of the cable operator, subject to retransmission consent, as discussed below in Section III.

27. The Cable Act of 1992 gives the Commission minimal discretion in implementing the general must-carry obligation provisions. A few commenters, however, state their support for our proposal to codify these requirements in our rules.[79] Under the rules we adopt herein, cable operators will be required to begin carriage of their complement of commercial must-carry signals no later than June 2, 1993. With respect to the small system exemption, the National Association of Broadcasters (NAB) suggests that October 5, 1992, be used to

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[75] Section 4 also provides that no cable operator shall be required to provide or make available any "input selector switch as defined in section 76.5(mm)" of the Commission's rules or provide information to subscribers regarding such switch. Accordingly, we will delete Section 76.66 of our rules, 47 C.F.R. § 76.66, in this proceeding. See Appendix C.

[76] The same definition of "usable activated channels" will apply for commercial and NCE stations. See para. 13 supra.

[77] Section 614(b)(1)(A).

[78] Section 614(b)(1)(B). In calculating the number of channels that represent one third of the system's usable activated channels, cable operators may round the result to the nearest whole number. For example, a cable system with 16 such channels need only set aside 5 channels (i.e., 5.33 rounded to the nearest whole number) and a system with 17 channels must carry up to 6 must-carry signals (i.e., 5.67 to the nearest whole number). We also note that the number of channels that must be set aside for commercial must-carry signals are in addition to those that must be set aside for NCE must-carry obligations.

[79] Acton Comments at 3; Tele-Communications, Inc. (TCI) Comments at 3; Golden Orange Broadcasting (Golden Orange) Comments at 2; Trinity Comments at 3. In addition, the New England Telephone and Telegraph Company and New York Telephone Company (NYNEX) seeks clarification that these provisions do not apply to video dialtone providers and that they are not liable for the failure of their program customers to comply. NYNEX Comments at 3-4. We believe that NYNEX is correct in its interpretation that video dialtone providers are not cable operators, pursuant to our video dialtone decision, and thus are not covered by Sections 4 and 5 of the 1992 Act. See Memorandum Opinion and Order on Reconsideration in CC Docket No. 87-266, 7 FCC Rcd 5069 (1992).

determine the carriage obligations of a system with fewer than 300 subscribers since a later date might allow a small system to drop a signal it has historically carried.[80] The new rules will include the signal carriage obligations as set forth in the statute. In addition, we concur with NAB that October 5, 1992, the date this Act was enacted, is an appropriate date for judging whether a system is generally exempt from these must-carry obligations. Thus, a system with 12 or fewer channels and 300 or fewer subscribers need only carry those broadcast stations that it carried on that date.

28. Definition of a Local Commercial Television Station. For purposes of these must-carry obligations a "local commercial television station" is defined in Section 614(h)(1)(A) of the 1992 Act as any full power commercial television broadcast station licensed by the Commission that is located in the same television market as the cable system. The term local commercial television station does not include: (1) low power television stations, television translator stations, or passive repeaters; (2) a television broadcast station that would be considered a distant signal under Section 111 of the Copyright Act,[81] unless such station agrees to indemnify the cable operator for any copyright liability resulting from carriage on the cable system; or (3) a television broadcast station that does not deliver to the principal headend[82] of a cable system either a signal level of -45dBm for UHF signals or -49dBm for VHF signals at the input terminals of the signal processing equipment, unless such station agrees to be responsible for the costs of delivering to the cable system a signal of good quality or a baseband video signal.

29. Few commenters addressed this definition other than to concur that it should be included in our rules.[83] However, Adelphia and Time Warner request an interpretation of this definition that would permit the carriage of a local translator, in lieu of a more distant parent station, thereby eliminating the parent's must-carry rights and, possibly, the need for copyright indemnification.[84] Similarly, Pulitzer seeks the right to designate

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80 NAB Comments at 2.

81 17 U.S.C. § 111. Generally stated, a distant signal under that provision is a broadcast station that could not insist upon cable carriage under the Commission's must-carry rules in effect on April 15, 1976.

82 For purposes of must-carry requirements for carriage of commercial stations, a cable operator must use the same principal headend that has been designated for determining NCE signal carriage requirements. See paras. 9-10 supra.

83 Section 614(h)(1)(B). Indemnification for copyright and the costs of signal delivery are addressed below.

84 Adelphia Comments at 21; Time Warner Comments at 30. Time Warner states that in no instance should a cable operator be required to carry both a station and its translator. Id.

whether its parent or satellite station is requesting must-carry status.[85] In addition, NAB also urges that each cable operator be required to file a certification with the Commission that would be served on each station eligible for must-carry status, within 60 days of the effective date of these rules. The certification would indicate the number of usable activated channels on the system, whether the system has fewer than 300 subscribers, and the call signs of stations it is carrying in fulfillment of its must-carry obligations.[86] NCTA rejects NAB's proposal regarding notification of eligible stations as an additional burden not required by the 1992 Act.[87]

30. First, we note that the statutory definition of a local commercial television station entitled to must-carry rights is very specific. The 1992 Act gives the Commission little discretion regarding its implementation and we will add it as written to our rules. Satellite stations meet this definition and, therefore, are entitled to carriage as must-carry stations. Thus, we do not believe it is appropriate to treat such stations any differently than other must-carry stations with respect to the must-carry/retransmission consent election process or any other provisions regarding must-carry rights.[88] However, Section 614(h) specifically excludes translators from the definition of a local commercial station. Accordingly, we cannot permit a parent station to confer its must-carry rights on a translator retransmitting its signal. However, we believe that a parent station otherwise qualified for must-carry purposes may use a translator to deliver a good quality signal to the cable operator's principal headend, just as it is entitled to use a microwave link for this purpose, or where permitted under copyright law, to employ a translator to eliminate the need for indemnification of copyright liability.[89]

31. While we reject NAB's specific proposal to require cable operators to notify the Commission and all potential must-carry stations of such status, we will require cable operators to notify by certified mail by May 3, 1993, those local signals that may not be entitled to carriage because they either (1) fail to meet the signal strength requirement or (2) may cause increased copyright liability. We are aware that in some cases, especially in fringe areas of a television market, a cable operator may be in a better position than the broadcaster to know whether the quality of the signal delivered to the cable system's principal headend meets the specified standard or whether carriage would result in copyright liability. In addition, on the date that

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[85] Pulitzer Broadcasting Company (Pulitzer) Reply at 6.

[86] NAB Comments at 3-4; Nationwide Communications (Nationwide) states that cable operators should be required to notify stations eligible for must-carry status. Nationwide Comments at 3-4.

[87] NCTA Reply at 7-8.

[88] As discussed below, cable systems are not required to carry duplicative signals. Thus, a cable system is unlikely to be required to carry both a parent station and its satellite.

[89] See para. 104, infra.

cable systems begin carrying their complement of commercial must-carry signals (June 2, 1993), cable operators will be required to send by certified mail to all local broadcast stations a list of all broadcast television stations carried by the system and their channel positions. This notification must be sent to all local television stations, including those not designated as must-carry signals and those not carried on the system.

32. Availability and Identification of Must-Carry Signals. Section 614(b)(7) of the 1992 Act provides that all must-carry signals shall be provided to every subscriber of a cable system and shall be viewable via cable on all television receivers of a subscriber which are connected to a cable system by a cable operator or for which a cable operator provides a connection. If a cable operator authorizes subscribers to install additional receiver connections, but does not provide such connections, or the equipment and materials for such connections, the operator must notify such subscribers of all broadcast stations carried on the cable system which cannot be viewed via cable without a converter box. In such cases, the cable operator shall offer to sell or lease a converter box to such subscribers at rates in accordance with the standards established by the Commission for equipment needed to receive basic cable service pursuant to Section 623(b)(3).[90] Moreover, upon request by any person, cable operators are required to identify those signals it carries to comply with the must-carry requirements, according to Section 614(b)(8).

33. In response to the questions in the Notice about the statutory requirements to make all must-carry signals available to all subscribers and all cable-connected television sets, Continental seeks an exemption for commercial subscribers (e.g., hotels, hospitals) that receive specially designed channel line-ups.[91] With respect to notification to subscribers for the need for converters, NAB recommends that we adopt a requirement similar to that used for the input selector switch and consumer education requirements (Section 76.66).[92] NAB further suggests that this notice be made within 60 days of the effective date of these rules, upon initial installation of cable service for new subscribers and annually thereafter. NCTA states that operators should be required to provide notice at the time of installation in combination with the required offer to sell or lease converter boxes.[93] A few cable operators comment that cable operators should be permitted to include such notification in their monthly billing statements. They also assert that cable operators should not be required to keep decoders on hand for subscriber

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90 Section 614(b)(7). See Notice of Proposed Rule Making in MM Docket No. 92-266, 8 FCC Rcd 510 (1992).

91 Continental Comments at 15-16; contra NAB Reply at 10; Association of Independent Television Stations (INTV) Reply at 15.

92 NAB Comments at 5. We note that the statute requires us to eliminate that requirement in this proceeding.

93 NCTA Comments at 9.

lease or purchase, if decoders are available from local electronics dealers.[94] TKR opposes any rigid procedures regarding a system's obligation to identify the signals carried in fulfillment of the must-carry provisions.[95] However, Fairfax County suggests that cable operators be required to respond to written requests, in writing, within 30 days.[96] For other requests, Fairfax proposes that the cable operator should be able to respond verbally or by directing the requesting party to the public file.[97] In addition, Trinity states that the identity of such signals and eligible stations not being carried should be provided, in writing, to new cable subscribers, and all subscribers every six months.[98]

34. We believe that the 1992 Act is clear in its requirement that all local commercial television stations carried in fulfillment of the must-carry requirements must be provided to every cable subscriber and must be viewable on all television sets that are connected to the cable system by a cable operator or for which the cable operator provides a connection. The Act does not give the Commission authority to exempt any class of subscribers from this requirement. Moreover, there is no reason to believe that viewers in hotels, hospitals or other such establishments are not interested in receiving local broadcast service. Thus, we will make no distinction between individual and commercial subscribers in implementing this statutory provision.[99]

35. Based on the suggestions of commenters, if a cable operator authorizes subscribers to install additional connections, but does not provide such connections, we will require the cable operators to notify subscribers no later than June 2, 1993, that they need converters or additional equipment for connections to receive the system's must-carry signals on each television receiver. The notice must explain the circumstances under which additional equipment is needed, whether the equipment is available from the cable operator or available from local stores and provide information regarding installation

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[94] Tel-Com Comments at 10; Armstrong Comments at 9; InterMedia Comments at 9; TKR Comments at 5.

[95] TKR Comments at 5.

[96] Fairfax County Reply at 5.

[97] Fairfax County Reply at 6. Other parties state that the cable operator should place a list identifying the must-carry stations in its public file. NATOA Comments at 10; Palm Desert Reply at 8-9.

[98] Trinity Comments at 9-11.

[99] Commercial subscribers, of course, may exclude the must-carry signals in cases where converters or other equipment are needed to receive such signals, the subscriber elects not to obtain such equipment, and the cable operator does not provide the connections for all television receivers in the commercial establishment. In this case, the operator will have fulfilled its obligations under the Act if it notifies the establishment about the availability, through lease or sale, of individual converter boxes.

of such equipment. We will permit cable operators to include this notice in a monthly billing statement. We reject the suggestions for a longer time period because a longer lag between the effective date of our rules and such notice may result in cable subscribers being deprived of local broadcast signals that they are unable to receive without additional connections. We further find this approach consistent with the requirement that all must-carry signals be available to all subscribers. In addition, we will require cable operators to notify new subscribers upon initial installation and all affected subscribers once a year of the need for additional equipment to receive the must-carry signals.

36. Consistent with our decision regarding identification of NCE stations carried to fulfill the must-carry requirements, we also will require that, by June 17, 1993, a cable operator must place in its public file a list of the local commercial broadcast stations carried on its system pursuant to Section 614. For each must-carry signal, the list must identify the call sign, community of license, broadcast channel number and channel position on the cable system. In response to a written request regarding carriage of must-carry signals, a cable operator will be required to respond within 30 days, in writing.

2. **Definition of a Television Market**

37. Use of ADI Markets for Determining Must-Carry Obligations. The 1992 Act provides that a local commercial television station will be entitled to must-carry status on all cable systems located in the same Area of Dominant Influence (ADI), as defined by Arbitron, as the station.[100] Each county in the contiguous United States is assigned by Arbitron exclusively to one ADI, based on patterns of television viewing in the county.[101] The Notice requested comment regarding the appropriate procedures for accommodating the sporadic changes that occur in ADI assignments from year to year. It also asked for suggestions for determining the relevant market for stations located outside the continental U.S.

38. While a few commenters suggest that the current list of ADI county assignments be frozen,[102] a majority of commenters favor updating the list of ADI counties once every three years in a manner that coincides with the must-

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[100] Section 614(h)(1)(C) specifies that a broadcasting station's market shall be determined in the manner provided in Section 73.3555(d)(3)(i) of the rules, as in effect on May 1, 1991. Section 73.3555(d)(3)(i), now redesignated Section 73.3555(e)(3)(i), refers to Arbitron's ADI for purposes of the broadcast multiple ownership rules. 47 C.F.R. § 73.3555(e)(3)(i).

[101] See Notice at 8059.

[102] Acton Comments at 7; TCI Comments at 7; Newhouse Comments at 31; Agape Church Comments at 1.

carry/retransmission consent election.[103] For areas outside the continental U.S., a number of commenters propose the use of other available sources equivalent to Arbitron, such as Nielsen Designated Market Areas (DMAs) for Alaska and Hawaii and Mediafax for Puerto Rico, which Mediafax considers one television market.[104] Commenters also suggest that Puerto Rico and the U.S. Virgin Islands should each be considered one ADI.[105] Alternatively, Acton argues that such stations should be required to subscribe to Arbitron so that it will establish ADIs for their areas.[106]

39. We will establish a scheme whereby ADI designations will be set for a three-year period designed to coincide with the three-year election time frame for the must-carry/retransmission consent election. We believe that this procedure will allow us to take into account changing markets while at the same time providing stability for the affected parties. As suggested by INTV, the current list of ADIs will be in effect for the initial election period.[107] For the next election period in 1996, we will use the list published in the Spring of 1995; for the election in 1999, the applicable list of ADIs will be the one published in the Spring of 1998, etc. Thus, each broadcast television station will be considered local in those counties listed in the same ADI to which it is assigned. We will make one exception, however: Each station also will be considered a must-carry station in its home county, even if that station is assigned to an ADI different from that of its home county.[108] For Alaska and Hawaii, we believe that Nielsen's DMAs, which are developed in a manner similar to the ADIs, should be used. Furthermore, as proposed by commenters, we will consider Puerto Rico, U.S. Virgin Islands and Guam each one ADI.

40. In the Notice, we sought comment on how to accommodate systems that serve communities located in more than one county where such counties are

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103 e.g., NAB Comments at 10-11; NCTA Comments at 13-14; INTV Comments at 4-5; TKR Comments at 6; Westinghouse Broadcasting Company (Westinghouse) Reply at 4.

104 NAB Comments at 11; Malrite Communications Group (Malrite) Comments at 3; Burnham Broadcasting Company (Burnham) Reply at 3-4.

105 Caribbean Communications Group (Caribbean) Comments at 3; Puerto Rico Cable TV Association (PRCTA) Comments at 7.

106 Acton Comments at 7 n.7.

107 INTV Comments at 4. The current reference for Arbitron's ADIs is its 1991-1992 Television Market Guide that was published in the Spring of 1992. This list of the counties included in each ADI is based on the viewing patterns reported in Arbitron's 1991 County Coverage Surveys. These ADI assignments will be used for the initial determinations of must-carry status.

108 We note the case of KNTV, San Jose, which is assigned to the Salinas-Monterey ADI, even though its home county, Santa Clara, is considered part of the San Francisco ADI. See Granite Broadcasting Corporation (Granite) Comments at 7-13.