

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

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MAY - 3 1993

In the Matter of)
)
Implementation of the)
Cable Television Consumer)
Protection and Competition)
Act of 1992)
)
Broadcast Signal Carriage)
Issues)

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY
MM Docket No. 92-259

TO: The Commission

**PETITION FOR PARTIAL RECONSIDERATION
AND CLARIFICATION OF THE NATIONAL
ASSOCIATION OF BROADCASTERS**

NATIONAL ASSOCIATION OF
BROADCASTERS
1771 N Street, N.W.
Washington, D.C. 20036
(202) 429-5430

Henry L. Baumann
Jack N. Goodman
Benjamin F.P. Ivins

Counsel

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Table of Contents

	Page
Summary	ii
I. The Commission Should Not Use a Copyright Test to Determine Whether Material Transmitted on Subcarriers or on the VBI is Program-Related	2
II. The Commission Should Clarify that Stations Electing Retransmission Consent Retain Their Must Carry Rights Until October 6, 1993	5
III. The Channel Position of Stations Failing to Elect Between Must Carry and Retransmission Consent Should be One of the Statutorily Provided Options	7
IV. Needed Clarification Regarding Copyright Royalty Reimbursement Procedures	8
V. Clarification and Rule Modifications Are Desirable Regarding Station Compliance With the Good Quality Signal Requirement	12
Conclusion	14
Appendix	

Summary

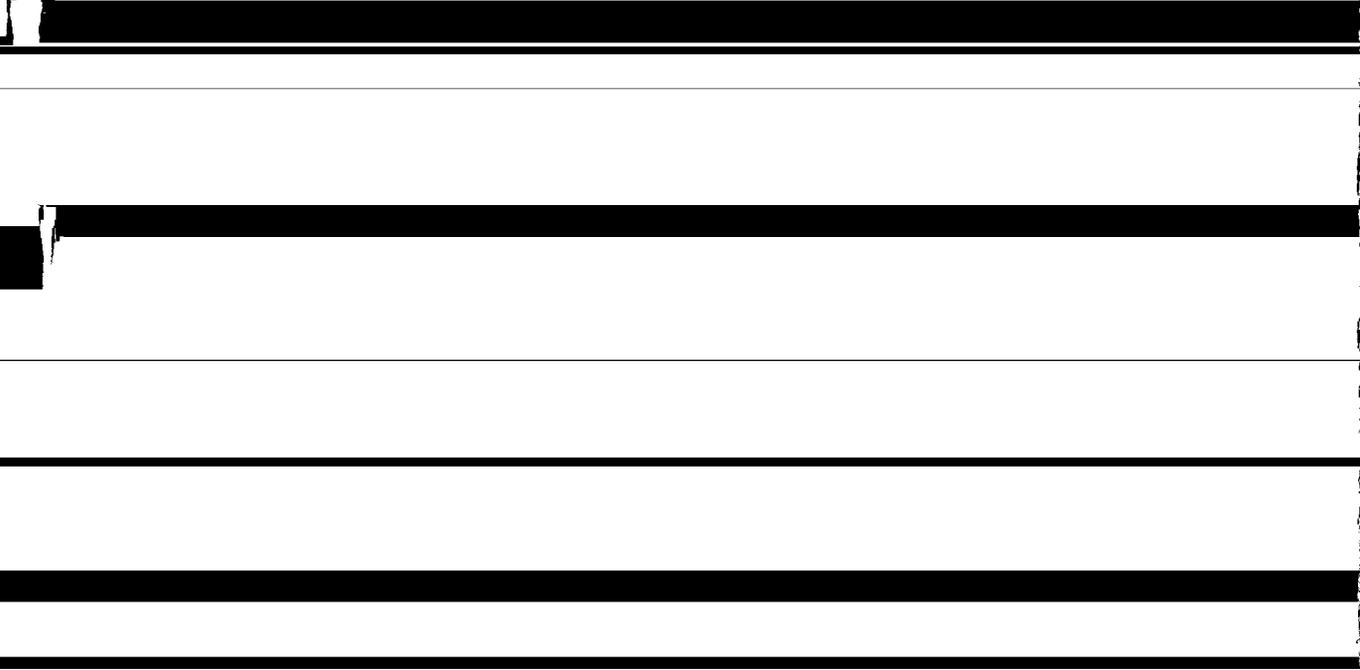
At the outset, NAB would like to commend the Commission for its efforts in this proceedings. Under considerable time pressure involving many complex issues, the Commission has crafted rules that provide a workable basis for implementing must carry and retransmission consent in accordance with the Cable Act and Congressional intent.

The primary focus of this petition is to seek clarification of the Commission's position on several issues which have arisen and may arise as broadcasters and cable systems seek to implement the new rules.

First, NAB urges that the Commission not use a copyright test to determine whether material transmitted on subcarriers or in the VBI is program-related. The application of a copyright analysis is likely to focus on issues which were not contemplated by Congress and which do not appear to have any relevance to the goals of the Cable Act.

Second, the Commission should clarify that stations electing retransmission

percent on June 17, 1992, retain their must carry rights until October 6, 1992, to



Fourth, clarification and rule modification is desirable regarding copyright royalty reimbursement procedures. Upon request, affected stations should be provided with previously submitted semi-annual statements of account, and should be informed of any future plans of cable operators that could materially affect copyright royalty payments. Stations should also not be required to agree to indemnify for copyright royalties for more than one year, and more detailed procedures should be adopted to calculate an individual station's reimbursement obligations.

With respect to cable systems currently carrying local stations that claim such stations fail to comply with the good quality signal requirements, interim continued carriage should be required if the station disputes the alleged deficiency in its signal quality or if it commits to remedying the deficiency.

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The National Association of Broadcasters ("NAB")^{1/} submits this petition for partial reconsideration and clarification of the Commission's *Report and Order* in this proceeding.^{2/} NAB stresses that this petition is a limited one; while NAB does not agree with every choice made by the Commission, its overall decision fully complies with the Cable Act and Congressional intent, and provides a workable basis to put the must carry and retransmission consent provisions of the Act into effect. The primary focus of this petition is to seek clarification of the Commission's position on several

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

^{2/} *Cable Act Implementation: Broadcast Signal Carriage Issues*, FCC 93-144 (released March 29, 1993), 58 Fed. Reg. 17350 (April 2, 1993).

issues which may arise as broadcasters and cable systems proceed to implement the new rules.

I. The Commission Should Not Use a Copyright Test to Determine Whether Material Transmitted on Subcarriers or on the VBI is Program-Related

In the *Notice of Proposed Rulemaking*, the Commission proposed to use the copyright test established in *WGN Continental Broadcasting Co. v. United Video*, 685 F.2d 218 (7th Cir. 1982), to determine whether particular material transmitted by broadcasters on subcarriers or in the vertical blanking interval (VBI) is "program-related" within the meaning of section 614(b)(3)(A) of the Communications Act.^{3/} NAB opposed this approach on the ground that there was no indication in either the Act or its legislative history that Congress intended to limit the material which a cable operator would be required to transmit to that which fit a copyright definition of relatedness.^{4/} In paragraph 81 of the *Report and Order*, the Commission adopted a modified version of its proposal, under which the *WGN* factors are deemed to "provide the best guidance for what constitutes program-related material," but will not be viewed as dispositive.

^{3/} *Implementation of the Cable Act: Broadcast Signal Carriage Issues (Notice of Proposed Rule Making*, MM Dkt. No. 92-259, at ¶ 32 & n. 42. The opinion referred to by the Commission was withdrawn by the court and a different opinion substituted for it. That opinion, together with the court's opinion denying a petition for rehearing and suggestion for rehearing *en banc*, is published at 693 F.2d 622.

^{4/} Comments of the National Association of Broadcasters, MM Dkt. No. 92-259 (filed Jan. 4, 1993) at 22-26 & n. 26.

NAB asks the Commission to reconsider and conclude that the copyright status of any particular service has no bearing on whether it will be viewed as program-related. An examination of the *WGN* decision demonstrates why it should not be used as a way to determine whether subcarrier or VBI services must be carried by cable systems. In *WGN*, a station transmitted a teletext signal in its VBI during a news program which consisted of material related to the main program. The station was the holder of the copyright to both the main program material and the teletext material. The question the court decided was whether the station's copyright in the news program extended to the teletext material as well.

Program-related material transmitted on subcarriers or in the VBI, however, need not always be owned by the same copyright holder as the main program. Thus, that material may not be covered by the copyright on the main program, and would not fall within the *WGN* rationale. Whether the same copyright covers such material, however, has no necessary bearing on whether the material *relates* to the main program. The application of a copyright analysis, therefore, is likely to focus the Commission's attention on issues which were not contemplated by Congress and which do not appear to have any relevance to the goals of the Act.

The court also found that the teletext material transmitted by WGN was program-related because it "is intended to be seen by the same viewers as are watching the nine o'clock news, during the same interval of time in which the news is

broadcast, and as an integral part of the news program."^{5/} It is easy to conceive of subcarrier or VBI services that would not meet this test, but would clearly be program-related. A television station, for example, could provide previews of upcoming programs, or program schedule information as part of a subcarrier or VBI service. That material might not relate to the program being aired at that moment, but it would be related to the broadcaster's program service and should be part of the transmission cable operators are required to retransmit. Also, for the convenience of viewers, stations could offer information supplementing material provided in the main program service at times other than when the initial program aired. These would also be program-related, but would not be transmitted during the same time period as the program they relate to, nor would they be an integral part of the program being aired at that time.

In denying rehearing, the *WGN* court expressly held that under the copyright test it established, "[m]ore than 'relatedness' is required." *Id.* at 629. The *WGN* analysis, therefore, is not useful in determining cable systems' carriage obligations.

If a broadcaster transmits information on a subcarrier or in its VBI, it should be carried by cable systems which retransmit the broadcaster's signal unless the material is wholly unrelated to the primary program. Material which provides information supplementing the main program service should be deemed to be program-

^{5/} 693 F.2d at 626. The court reiterated the importance of these factors in its opinion denying rehearing. *Id.* at 629.

related.^{6/} Only if the material is part of a service separately provided to subscribers or consumers, the contents of which do are not established by reference to the main program service, should cable systems be allowed to choose not to carry it as part of a retransmitted broadcast signal.^{7/}

II. The Commission Should Clarify that Stations Electing Retransmission Consent Retain Their Must Carry Rights Until October 6, 1993

Under the implementation schedule adopted by the Commission, cable systems must begin carrying their full complement of local commercial television stations by June 2, 1993. Those stations will be required on June 17, 1993 to choose, for each cable system in their market, whether they want to retain their must carry rights or instead negotiate for retransmission consent. NAB requests that the Commission clarify that stations electing retransmission consent will retain their must carry status

^{6/} Whether additional equipment is required to obtain the subcarrier or VBI signal should be irrelevant. Receipt of the closed captioning information carried on line 21 of the VBI requires special equipment for most consumers, but that information was clearly viewed by Congress as program-related. The service at issue in *WGN* also required special reception equipment. Similarly, if there is a charge for receipt of the information transmitted by subcarrier or VBI signal, that should not affect its program-related status.

^{7/} Applying this standard, the Nielsen program identification codes to be carried on line 22 of the VBI would appear to be program-related. They are not a service provided to customers other than station viewers, and the data carried on line 22 will by definition relate to the main program service, since its entire function is to describe that service. Alternatively, under section 614(b)(4)(A) of the Act requiring cable systems to provide broadcast signals with the same quality of signal processing provided to any other signal, if a cable system carries such program identification information for any cable program service, it should have to provide such carriage for program identification codes on any broadcast signal as well.

until the retransmission consent provisions of the Act go into effect on October 6. A cable system should not be permitted in June to drop the signal of a television station eligible for must carry status solely because the station has elected to negotiate over the carriage of its signal beginning in October.

Section 325(b)(4) of the Communications Act clearly contemplates that stations must choose between must carry and retransmission consent rights, and that a station electing the right to control retransmission of its signal by a cable system will not retain its must carry rights as well. The Commission recognized that Congress intended the must carry rules to go into effect well before the October 6 effective date for retransmission consent. *Report and Order* ¶ 153. And although Congress required only that stations make their election by October 6, the Commission chose to require an early election to avoid disruption to channel line-ups and confusion to consumers, recognizing that the retransmission consent requirement would not go into effect until October. *Id.* ¶ 156.

Congress certainly contemplated that broadcasters would have a choice between two different sets of carriage rights. On June 17, stations may choose retransmission consent, but that election should not be deemed to be effective until October 6. Otherwise, stations electing retransmission consent would be left without any carriage rights; their signal could be dropped or repositioned (with notice) at will. The only likely reason local stations would be dropped or repositioned during the period after June 17 would be to gain some advantage in retransmission consent negotiations. It would be a strained reading of legislative intent to leave stations in such an exposed

position when Congress took such pains to prevent cable systems from using their monopoly position to gain market advantages over local broadcasters.

Moreover, the public interest would not be served by failing to recognize the interim must carry status of broadcasters choosing to negotiate for retransmission consent. The Commission adopted an early election date and delayed implementing broadcasters' channel positioning rights out of concern that cable systems would be unduly burdened by the requirement to make successive changes in their channel line-ups and that these changes would lead to consumer dissatisfaction. If that is the case, cable systems should also not be permitted to drop or reposition local broadcasters during the transition period, as those changes will be as expensive and confusing as an earlier implementation of the channel positioning provisions would have been. Accordingly, the Commission should make clear that, while the June 17 election constitutes a generally irrevocable choice for a three-year period, it will not become effective until October 6, and that local stations retain their carriage rights until October 6, whether they elect must carry or retransmission consent.

III. The Channel Position of Stations Failing to Elect Between Must Carry and Retransmission Consent Should be One of the Statutorily Provided Options

Paragraphs 158 and 159 of the *Report and Order* discuss how stations failing to make an election between must carry and retransmission consent should be classified, and properly conclude that must carry is the appropriate status in the event of such a default. There remains, however, a need to clarify what channel position a defaulting station will occupy.

NAB recommends that the rules be amended to specify that a cable operator carrying a defaulting station must carry the station on one of the channel positions listed in section 614(b)(6) of the Act, but may choose from among the options listed in that section. It is clear from the statute that a station carried pursuant to must carry is entitled to one of these options, but providing the cable operator with the discretion to choose from among these options in the event of a default should provide stations with an additional incentive to make a affirmative election, and will reduce the operator's burden in establishing its channel line-up.

IV. Needed Clarification Regarding Copyright Royalty Reimbursement Procedures

NAB also requests that the Commission clarify and amend aspects of its *Report and Order* concerning the procedures to be followed when a cable system asserts that a station may not enforce must carry rights unless it agreeS to reimburse the system for additional copyright fees pursuant to Section 614(h)(1)(B)(ii) of the Act. In its Comments, NAB requested that the FCC adopt certain procedural requirements to enable broadcasters and cable operators to enter agreements on reimbursement that reflected the structure of the cable copyright royalty scheme. The Commission acknowledged some of these structural considerations in its *Report and Order*, but did not specify procedures that would accommodate them. *Report and Order* ¶ 114.

NAB is concerned that several aspects of the system could unduly impede the necessary reimbursement agreements between broadcasters and cable operators. The first regards the Commission's statement that "we find it fair to require a cable

operator to provide the broadcaster with an estimate of the expected copyright liability based on previous payments and financial information." *Id.*^{8/} NAB believes that such a requirement is necessary, but requests that the Commission also require the cable operator to provide as part of its estimate, on request by the station, copies of the two most recent Statements of Account it has filed in paying its royalties, along with any amendments or supplements thereto. This will provide the broadcaster with some independent basis for confirming the cable operator's estimate. Since any agreement to reimburse copyright royalties will involve a degree of uncertainty because the amount of the payment cannot be known until after the six month period in which the carriage has occurred, and the amount of the payment depends on factors outside the control or certain knowledge of the broadcaster it will be important for the parties to have equal access to all relevant information in negotiating the terms of the reimbursement agreement. NAB believes that copies of the Statements of Account and amendments or supplements are readily available to the cable operators on whose behalf they are filed, and the Commission should require them to be provided to broadcasters on request.

A second concern relating to the Commission's requirement that broadcasters be provided with an estimate of expected copyright liability based on *previous* payments and financial information is that the requirement is too limited. Cable

^{8/} We understand from reports from stations receiving notices from cable systems that some cable systems do not believe that the Commission intended to require them to provide an estimate of the expected copyright payment with the initial notice. It would be useful for the Commission to make clear that its expectation was more than precatory.

operators should also be required to provide broadcasters with adequate advance notice of any of their plans, such as retiering, or other developments that could appreciably increase a broadcaster's reimbursement liability, before the broadcaster is required to enter into an indemnification agreement.

A third issue in need of clarification is the minimum length of time which a broadcaster should be required to agree to indemnify a cable operator to remain eligible for must carry. There are legitimate concerns on both sides of this issue. From the broadcaster's perspective, it is unfair to require a commitment to indemnify for the full three years of its election, without any limitation on the extent of the broadcaster's liability, especially since the amount of that liability depends on factors outside the knowledge or control of the broadcaster. From the cable operator's perspective, it needs some level of certainty and stability regarding what local broadcast signals it will be required to carry.

NAB believes that a minimum one year commitment by a broadcaster, together with a notice of at least 60 days prior to the next semi-annual accounting period of the broadcaster's intent to discontinue indemnification would reasonably accommodate both of those concerns. In other words, to retain its must carry status, a local broadcaster should not be required to agree to indemnify a cable operator for more than two semi-annual accounting periods. If the broadcaster decides to discontinue indemnification, it must provide the cable operator with written notice at least 60 days prior to the commencement of the semi-annual accounting period for which it will no longer agree to indemnify the cable operator.

A fourth aspect of concern to NAB regards the copyright payment attributable to the carriage of a particular station. As the Commission has agreed, the amount of royalties to be reimbursed is limited to the incremental increased royalty representing carriage of the system's last-added distant signal. *Id.* The Commission may have introduced an impediment to the process, however by stating "we believe that stations should be counted in the order they satisfy all the necessary conditions for attaining must-carry status." *Id.* Because royalty rates, except for the "3.75" rate,^{2/} decline as more distant signals are added, this could create a financial incentive for delaying the reimbursement agreement, in order to qualify for the lowest marginal rate.

In light of this anomalous potential consequence, NAB requests that the Commission clarify its intention by adopting instead a proposal NAB suggested in its Reply Comments at 16, n. 20. That is, if more than one local station is carried pursuant to a reimbursement agreement, and all such stations are being carried as permissible signals (*i.e.*, none are "3.75" signals) the lowest marginal royalty rates paid for the total number and types of "non-3.75" stations who have entered reimbursement agreements should be summed, and then divided among those stations in proportion to their "DSE" values. The effect of this approach would be to require

^{2/} With respect to "3.75" situations where the higher rate is required for distant signals whose carriage would not have been permitted because of the FCC's former market quotas, an opposite effect — penalizing later-added stations could theoretically occur. NAB believes, however, that relatively few cable systems subject to the 3.75% rate are carrying fewer distant signals than the FCC's former quotas would have permitted. For systems in such a situation, NAB believes it best to leave for negotiation among the parties resolution of the question of which station or stations added pursuant to section 614 (h)(1)(B)(ii) should be attributed the 3.75 rate.

stations to reimburse systems' incremental royalty cost at the average rate paid for the entire group of "non-3.75" stations carried pursuant to section 614(h)(1)(B)(ii). The cable operator would be reimbursed for the entire amount of additional royalties incurred as a result of carriage of these stations, but no financial premium would be created for stations to delay reaching a reimbursement agreement until the last possible moment.

Even were the Commission to adopt all of NAB's proposals, it must realize that there will remain additional issues to be resolved in this complex area, such as how to designate which signals of those currently being carried by a cable system are permissive and which are "3.75" signals. While NAB is hopeful that many of these issues can be resolved through individual negotiations, we reserve the right to seek additional modifications to the rules in the event it becomes necessary to do so.

V. Clarification and Rule Modifications Are Desirable Regarding Station Compliance With the Good Quality Signal Requirement

NAB is concerned about preliminary reports it has been receiving with respect to assertions by some cable operators that local stations fail to comply with the good quality signal requirement. For example, attached as an Appendix is a deficiency notice received by one local broadcaster that merely concludes the station fails to provide a good quality signal, without providing any of the underlying documentation which the Commission requires. *See Report and Order* ¶ 103. In another instance, a station received a letter from a cable operator specifying one type of test equipment that was used and, upon calling the operator's engineer, was told that another type of

equipment had in fact been used. Several stations have informed NAB that they have received notices concerning inadequate received signal strength from cable systems which indicate that the measurements were made with antennas less than 20 feet above the ground, far lower than an antenna mounted on the roof of a typical two-story house. Of particular concern, and particularly suspect, are claims of inadequate signal strength by cable operators concerning local broadcast signals they have been carrying for years.

To minimize potential abuse in this area, as well as disruption to subscribers, NAB urges the Commission to modify its rules to provide that if a cable operator is currently carrying a local station that it claims fails to provide an adequate signal, and the station either disputes that claim or commits to remedying the deficiency, the cable operator must continue carriage of the station until either the dispute is resolved, or the station has had a reasonable opportunity (perhaps six months)^{10/} to improve reception of its signal.

The fact that a cable operator has been carrying a local signal would strongly suggest the existence of adequate signal strength, or at worst, a *de minimis* deficiency. Moreover, in instances where there currently is carriage, and the broadcaster commits to remedying any deficiency, there would be no public interest served by allowing the cable operator to drop the signal, and then to recommence carriages when the deficiency is remedied.

^{10/} In determining the appropriate reasonable period, the Commission may wish to

Conclusion

For the foregoing reasons, the Commission should reconsider and clarify its
must carry and retransmission consent rules.

Respectfully submitted,

NATIONAL ASSOCIATION OF
BROADCASTERS
1771 N Street, N.W.
Washington, D.C. 20036
(202) 429-5430

Henry L. Baumann

Henry L. Baumann
Jack N. Goodman
Benjamin F.P. Ivins

JdG

Counsel

May 3, 1993

Appendix

April 23, 1993

VIA CERTIFIED MAIL

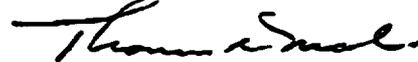
Mr. Marvin R. Chauvin
Vice President and General Manager
WLIG-TV
c/o Trexar Corporation
270 South Service Road
Box 1355
Melville, NY 11747

Dear Mr. Chauvin,

This letter is provided to you pursuant to Section 76.58(d) of the Commission's Rules which requires a system to inform a commercial station why it may not be entitled to carriage. We hereby notify you that WLIG is not entitled to carriage because it fails to meet the standards for delivery of a good quality signal to the cable system's principal headend and it may cause an increased copyright liability to the cable system.

Should you have any questions, or need additional clarification, please contact the undersigned.

Sincerely,



Thomas R. Meli
General Manager

cc: J. Fletcher