

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

FCC 93-284

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

CLARIFICATION ORDER

Adopted: May 28, 1993

; Released: May 28, 1993

By the Commission:

1. On March 11, 1993, the Commission adopted a Report and Order¹ in this proceeding 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 ("1992 Act").² Under the rules adopted in the Report and Order, by May 3, 1993, cable operators were required to notify any local broadcast television station that may not be entitled to must-carry status because: (1) it fails to deliver a good quality signal to its cable system's principal headend; or (2) carriage of such signal would be considered distant for copyright purposes and the cable operator would incur a copyright liability for carriage of such signal. The purpose of this notice was to permit broadcast stations to consider their options regarding their must-carry rights prior to June 2, 1993, when cable operators are required to begin carriage of their complement of commercial must-carry signals and the June 17, 1993, election of must-carry or retransmission consent by such television stations.

¹ Report and Order in MM Docket No. 92-259, 58 FR 17350 (April 2, 1993).

² Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992).

2. In a jointly-filed May 13, 1993, Request for Declaratory Ruling, the Association of Independent Television Stations, Inc. and the National Association of Broadcasters ("INTV and NAB" or "petitioners") seek clarification regarding the obligation of cable systems to provide information to broadcast stations relating to the May 3, 1993, notification. InterMedia Partners, L.P. ("InterMedia"),³ the National Cable Television Association ("NCTA"),⁴ and Cablevision Systems Corporation ("Cablevision") responded to this request.⁵ By this Clarification Order ("Clarification"), we consider each of the specific issues raised by INTV and NAB concerning good signal quality, copyright indemnification and translator ownership separately.

3. At the outset, however, we wish to address an overriding concern of the petitioners that cable operators are delaying discussions with broadcast stations under the assumption that, if they do not resolve these signal quality or copyright issues prior to the June 2, 1993, implementation date, then they will be relieved of their obligations to carry such broadcast signals for the entire three year period designated in the 1992 Act. We clarify that a local broadcast station does not forfeit its must-carry rights, if signal quality or copyright disputes are not resolved by that date. In addition, were the station does not initially meet the criteria for must-carry status, it subsequently may assert its rights once it satisfies the conditions for must-carry status.

4. Good Quality Signal. INTV and NAB are concerned that the May 3, 1993, notices did not provide the specific information required by the Commission.⁷ They believe that, if a cable operator failed to include such

³ On May 18, 1993, InterMedia submitted comments on the Request for Declaratory Ruling. InterMedia argues that it should have the right to respond to allegations made by INTV and NAB in their petition against its cable operations. It also comments on specific points raised in the request for clarification.

⁴ NCTA filed an opposition to the Request for Declaratory Ruling on May 19, 1993. In addition to addressing specific issues raised by INTV and NAB, NCTA asserts that the documentation submitted by the petitioners does not support their generalization that cable operators are trying to obstruct the process of implementing the new must-carry rules. It also contends that some of these issues should be resolved in a rulemaking proceeding.

⁵ In its May 20, 1993, Opposition to Request for Declaratory Ruling, Cablevision refutes what it claims are unproved allegations in the petition that it is using delaying tactics to avoid carrying television station WLIG on its cable systems.

⁶ However, if a television station asserts its must-carry rights and is denied carriage or its requested channel position, it is subject to time limits established for filing complaints. See 47 C.F.R. § 76.61.

⁷ See Report and Order at para. at 103.

information, it should be required to provide the information immediately upon request by a television station. The petitioners further ask the Commission to declare that failure to do so would render the initial notice invalid and permit stations to assert and enforce must-carry and channel positioning rights. NCTA and InterMedia do not disagree that cable operators must provide the detailed information regarding their signal quality tests. InterMedia further proposes that a cable operator that fails to provide this information promptly should lose the benefit of the inadequate signal notice.

5. We acknowledge that there was some confusion between the rules and the text of the Report and Order regarding the detail required in this initial notice.⁸ The intent of the May 3, 1993, notice was to inform broadcast stations that they may need to resolve a signal delivery or copyright liability problem in order to retain their must-carry rights before June 2, the date on which cable systems must comply with the rules regarding must-carry obligations. Thus, we expect cable operators to cooperate fully with broadcast stations so that they are not deprived of the statutorily mandated must-carry rights to which they are entitled. Accordingly, cable operators must provide broadcast licensees with the relevant information promptly. In particular, the cable operator must provide a detailed description of the reception and over-the-air signal processing equipment used, including sketches and a description of the methodology used by the cable operator for processing the signal at issue. This information must include the specific make and model numbers and age of all equipment.⁹ In addition, if a cable operator provides measurements of signal levels in any form other than that specified in the 1992 Act (i.e., -45 dBm for VHF signals and -45 dBm for UHF signals), then it must provide the appropriate conversion formulas. Since any notice that a station does not deliver a good quality signal should reflect measurements made at the cable system's principal headend, we believe that the measurement results and the system's technical specifications should be readily available. Therefore, we expect cable operators to respond to a request for such measurement information within 3 business days of the request. A cable operator that fails to comply with the rules relating to this notification requirement may be subject to sanctions by the Commission. In addition, any future notices to broadcast stations regarding their failure to deliver a good quality signal shall include the detailed information specified in the Report and Order.

6. INTV and NAB contend that, when measuring signal strength, a cable operator should use the same antenna and receiving equipment normally used by the cable system to receive and process broadcast signals currently carried. The cable operator should take these measurements at its designated principal headend and should use an antenna placed at the same height as that currently used by the cable system to receive broadcast signals.

7. InterMedia disagrees with this position because the Commission has traditionally used free space reception by standard antennas at normal roof top

⁸ See 47 C.F.R. § 76.58(d). See also Report and Order at paras. 31, 102-103.

⁹ See Report and Order at para. 103.

levels to measure the availability of broadcast signals. If such standard test procedures do not indicate an adequate signal strength, then the cable operator should be able to choose to use a non-standard antenna for the measurements, according to InterMedia. It also states that if the special antenna supports must-carry, then the broadcaster bears the responsibility to pay for the initial purchase, installation and maintenance of the antenna and a fair share of the maintenance or required upgrading of the supporting tower. InterMedia further asserts that non-employees cannot be permitted to climb its towers to measure signal strength due to limitations in its insurance policies. NCTA states that INTV and NAB appear to object to the use of "inexpensive and non-professional antennas" instead of the antennas normally used to receive local television signals. NCTA asserts that the rules do not require the use of any specific antennas nor do they mandate that the measurement be taken at a particular elevation. Moreover, it states that, even if a measurement is taken at a lower height than the system's regular receiving equipment, those measurements can be correlated to the signal strength at a higher elevation.

8. As the statute specifies that a broadcast station must deliver a good quality signal to the principal headend of the cable system to be entitled to must-carry rights,¹⁰ we clarify that the designated principal headend is the appropriate location for such measurements. For broadcast stations currently received at the designated principal headend and currently carried on the cable system, the signal quality measurements required by the 1992 Act should be made using the equipment now used by the cable operator to receive such signals. For broadcast stations not currently carried on the cable system, to the extent that the cable operator is able to do so, the signal level shall be determined based on measurements made with generally accepted equipment that is currently used to receive signals of similar frequency range, type or distance from the principal headend.¹¹ Where such similarities do not exist or if the measurements were made at a designated headend that is not the current reception location (headend) for the broadcast signals, we expect the cable operator to follow good engineering practices for the measurement of the broadcast signals in question.

9. INTV and NAB state that engineers from the cable system and broadcast station should meet promptly to resolve any matters regarding inadequate signal strength and that both parties should use their best efforts to resolve signal quality problems. We note that InterMedia agrees with this approach. We believe that this statement accurately reflects the Commission's intent and decision in the Report and Order.¹² It is also consistent with the clarification of the requirement that cable operators respond promptly to

¹⁰ See Section 614 (h) (1) (B) (iii). See 47 C.F.R. § 76.55(c) (3).

¹¹ However, cable operators need not employ extraordinary measures or specialized equipment when making measurements for stations that are not currently carried.

¹² See Report and Order at paras. 97, 103.

inquiries from affected broadcast stations.¹³ Where the parties cannot reach agreement, however, either the broadcaster or the cable operator may seek a Commission ruling on the validity of the must-carry claim.

10. The petitioners seek clarification that, if adequate signal quality can be achieved through the use of a higher gain or "notched" antenna, then cable operators should be required to use such an antenna supplied by the broadcaster. They argue that cable operators should not be permitted to refuse to use equipment made available to them. NCTA states that neither the Report and Order nor the rules require cable operators to use higher gain or "notched" antennas and that for purposes of making the required measurements cable operators should not be required to invest in such equipment. InterMedia believes that, with respect to existing antenna, the broadcaster should be responsible for the maintenance of specialty antennas and a fair share of the maintenance of the supporting structure. InterMedia states that it would permit a station to provide new or special antennas for the test of its signal strength, although due to insurance considerations it is unwilling to allow non-employees to climb its towers. If such an antenna proves useful, InterMedia contends that the broadcaster should be responsible for any costs associated with required modifications to its facilities (e.g., changes to the supporting structure or consultations with professional engineers).

11. In the Report and Order, the Commission clearly stated that improved antennas are among the types of equipment that the broadcaster may provide to deliver a good quality signal.¹⁴ A cable operator's refusal to permit a broadcaster to provide this necessary equipment, either to make test measurements or for the continued delivery of the signal, clearly interferes with a broadcaster's statutorily mandated must-carry rights and the Commission will take whatever remedial action deemed appropriate in such cases. Broadcasters shall be responsible for the cost of such specialized antennas or equipment. However, cable operators may not shift the costs of routine reception of broadcast signals to those stations seeking must-carry status. Accordingly, we believe that it is appropriate to require a broadcast station to pay only for antennas, equipment and other needed improvements that are directly related to the delivery of its signal and not to contribute to the general maintenance of the cable system's facilities.

12. INTV and NAB argue that, where the cable operator is currently carrying a television station, it should be required to continue to carry the station while signal quality disputes are being resolved. In addition, they state that the station should be permitted to assert its channel positioning rights on June 17, 1993. NCTA rejects the proposal to require continued carriage until such disputes are resolved because this approach will likely prolong disputes. InterMedia opposes the request to permit a television station that has not resolved its signal delivery problems to elect its channel position on June 17 since channel positioning is at the discretion of the cable operator until October 6 and this matter can be considered in the context of

¹³ See para. 5, supra.

¹⁴ See Report and Order at para. 104.

resolution of other issues.

13. We believe that it is unlikely that a signal that is currently carried by a cable system does not deliver a good quality signal to the principal headend. Thus, we believe that few questions will be raised regarding the continued carriage of such stations under the cable system's June 2, 1993, must-carry obligations. Moreover, we note that NCTA urged the Commission to avoid unnecessary line-up changes in its request to stay the effective date of the must-carry rules.¹⁵ Dropping broadcast signals while disputes are being resolved would lead to greater uncertainty among subscribers. Finally, as indicated above, the local broadcast station does not lose its rights even if it does not satisfy the conditions for must-carry status on June 2 or June 17, 1993. While a broadcast station that plans to bear the cost of establishing or maintaining its must-carry status may elect a channel position on June 17 in anticipation of resolving any problems, it may also make that request when it corrects any problem associated with its signal delivery (or copyright status), thereby attaining must-carry status.

14. The final signal quality clarification sought by INTV and NAB is that a television station that agrees to make signal quality improvements should be entitled to must-carry status on the date the signal is provided to the cable system. In particular, petitioners ask the Commission to state that stations unable to rectify signal problems by June 2, 1993, do not lose their carriage or channel positioning rights for the initial three year period. InterMedia argues that a broadcast station should not have an unlimited period to fulfill its obligations to meet the must-carry criteria. It proposes that a station should make the equipment available within 90 days or lose its must-carry status for the remainder of the three year election period. NCTA does not dispute the contention that a station is entitled to must-carry status when it is able to deliver a good quality signal. However, it states that it may not be feasible to begin carriage of the signal on the date it can be delivered to the cable system because channel line-ups may need to be changed and franchise authorities and subscribers must be notified.

15. We reiterate our clarification that broadcast stations may assert their carriage and channel positioning rights at any time so long as they have not elected retransmission consent. In particular, we note that a broadcast station's ability to deliver a good quality signal may depend on factors that it cannot control (e.g., when a supplier can provide the needed equipment). Therefore, a time limit on the exercise of must-carry rights is not only contrary to the 1992 Act and our rules, but is unrealistic. However, we do not believe that a cable operator can be expected to comply with a must-carry station's request for carriage or channel positioning on the first date the station delivers to the system's principal headend a signal that meets the criteria for must-carry status. Our rules require cable operators to provide notice of changes in their channel line-ups to subscribers and affected stations.¹⁶ Thus, we believe that it is appropriate to give cable operators up

¹⁵ See Order in MM Docket No. 92-259, FCC 93-278, released May 27, 1993.

¹⁶ See 47 C.F.R. §§ 76.58(a) and 76.309(c) (3) (A) (2).

to 45 days to begin carriage of such station on its requested channel in order to allow the operator time to comply with these certification requirements.¹⁷

16. Copyright Indemnification. With respect to the notices received by broadcast television stations regarding copyright indemnification, INTV and NAB state that cable systems should be required to respond promptly to a written request for the necessary information. We concur and, consistent with our requirements for cable system responses to matters relating to signal quality, we expect a cable operator to provide such information within 3 business days of receipt of the request. Clearly, any cable operator that sent a notice to a broadcast station that it would lose its must-carry rights because of copyright liability should have relevant information readily available.

17. Specifically, INTV and NAB state that for stations currently carried by a cable system, a cable operator should provide the station with its most recent form filed with the Copyright Office, detailing the payment made for carriage of the given station. The cable operator also should provide the number of distant signals previously carried by the system and the order in which such signals were carried. Furthermore, INTV and NAB contend that the cable operator should provide a good faith estimate of the potential copyright liability for the next accounting period (July 1 - December 31, 1993) that is associated with carrying the station. For stations not carried by the cable system prior to April 2, 1993, INTV and NAB would require the cable operator to provide the broadcast station with a good faith estimate of the potential copyright liability for carriage of the station during the next copyright accounting period. In addition, the petitioners assert that the station should receive a copy of the most recent form filed with the Copyright Office for existing distant signal carriage that details the payments made for carriage of distant signals.

18. NCTA states that the information sought by INTV and NAB are not required by the rules, although the Report and Order indicates that the cable operator should provide an estimate of the expected copyright liability.¹⁸ Alternatively, InterMedia asserts that making the latest Statement of Account available is a reasonable requirement. However, NCTA and InterMedia argue that some information, such as the order of carriage, is not always readily available and the broadcaster has the same access to sources of such information as the cable operator (e.g., Television Factbooks or earlier copyright filings). Moreover, InterMedia states that the broadcast station can make its own calculations of potential copyright liability based on the reported revenues and signal complements on the most recent Statement of Account.

19. In the Report and Order, the Commission determined that it is appropriate to require a cable operator to provide the broadcaster with an

¹⁷ The Commission provided a similar time period for cable operators to comply with an order issued in response to a must-carry complaint. See 47 C.F.R. § 76.61(a)(4).

¹⁸ Report and Order at para. 114.

estimate of the expected copyright liability. We do not believe that such responsibility should be shifted to the broadcaster, even if the cable operator must use publicly-available documents in lieu of its own records. Furthermore, we believe that the types of information specified by INTV and NAB are consistent with this requirement. Thus, we clarify that, at a minimum, a cable operator should provide the information described here to a broadcast station that may be required to pay for copyright indemnification to retain its must-carry status. The cable operator, however, is not required to make legal judgments pertaining to the amount of indemnity involved.

20. INTV and NAB also seek a requirement that cable operators be required to carry broadcast stations for which they incur copyright liability, if they fail to provide the required information. In such instances, the petitioners argue that stations should not be required to indemnify cable operators until such information is received. InterMedia objects to this requirement and observes that to hold the cable operator liable for such copyright fees is contrary to the 1992 Act. We concur with InterMedia. Under the 1992 Act, a cable operator is not required to carry a station for which it incurs copyright liability.¹⁹ Thus, to clarify the rules in this manner requested by INTV and NAB would go beyond the Commission's authority. However, we do have the authority to take appropriate action against cable operators that do not comply with our rules. Therefore, any cable operator not providing sufficient information to a broadcast station regarding potential copyright liability in the required timely fashion may be subject to Commission sanctions.

21. Translator Ownership. INTV and NAB indicate that a question has arisen regarding the use of translators owned by parties other than the broadcast station with must-carry rights to deliver its television signal to the system's principal headend. Petitioners observe that the Report and Order does not require that the broadcast station own the translator used to deliver its signal. InterMedia also states that independent ownership of a translator should not bar its use for delivery of a good quality signal. However, InterMedia is concerned that some translators, which are owned by non-profit community organizations with limited resources, deliver signals of poor or inconsistent quality. It believes that a cable operator should be entitled to a commitment from a broadcast station that it will provide the resources needed to maintain such translators in good working order.

22. We do not believe that the ownership of the translator is relevant to the matter of delivery of a good quality signal for must-carry purposes. It was our intent to provide another option for broadcast stations to meet the criteria for must-carry status. Thus, we grant the clarification sought by INTV and NAB in this regard. However, we also concur with InterMedia that the signal delivered by a translator must consistently provide a signal meeting the criteria set forth in the statute and our rules. Therefore, where necessary, a broadcast station will be required to bear the cost of maintaining the signal

¹⁹ See Section 614(h)(1)(B)(ii). However, a cable operator may not demand advance payment of estimated copyright fees as a condition for broadcasts to retain must-carry rights.

delivery at the specified level by the translator to retain its must-carry status.

23. Accordingly, IT IS ORDERED pursuant to Sections 4(i), 4(j) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 154(j) and 303(r), that the Request for Declaratory Ruling filed jointly by the National Association of Broadcasters and the Association of Independent Television Stations, Inc., IS GRANTED to the extent specified in this Clarification Order.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary