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

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

MM Docket No. 92-259

MEMORANDUM OPINION AND ORDER

Adopted: September 28, 1994;

Released: November 4, 1994

By the Commission:

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I. INTRODUCTION

1. This *Memorandum Opinion and Order* addresses issues raised in petitions for reconsideration¹ of our *Report and Order*² adopted March 11, 1993, which established rules to

¹ Parties which filed Petitions for Reconsideration, Oppositions, Replies and Comments are listed in Appendix A. Public Notice of Petitions for Reconsideration was given at 58 FR 29582 (May 21, 1993).

² See *Report and Order* in MM Docket No. 92-259 ("Report and Order"), 8 FCC Rcd 2965 (1993).

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 Cable Act").³ In a *Clarification Order* adopted on May 28, 1993, we addressed specific concerns raised in these petitions relating to signal quality, copyright indemnification and translator ownership.⁴ In an *Order* adopted on July 15, 1993, we addressed additional concerns relating to carriage rights, to the failure of broadcast stations to elect either must-carry or retransmission consent status, and to the channel position for such stations.⁵ On October 5, 1993, we adopted a *Stay Order* which stayed two provisions of the retransmission consent rules, with respect to VHF/UHF antenna ownership and carriage in the entirety of broadcast signals, pending our resolution of those issues in this proceeding.⁶ In this *Memorandum Opinion and Order* we will address all remaining issues raised in the petitions for reconsideration, as well as the outstanding issues from the *Stay Order*. We will also take this opportunity, on our own motion, to clarify certain other issues raised in the *Report and Order*.

2. We note that the constitutionality of the must-carry provisions of the 1992 Cable Act were challenged before the Supreme Court. In *Turner Broadcasting Systems, Inc. v. FCC*, a special three-judge panel of the District Court found the must-carry provisions constitutional.⁷ On appeal, the Supreme Court vacated the decision and remanded the case back to the three-judge panel for further proceedings.⁸ While the case is pending, the must-carry provisions of the 1992 Cable Act remain in effect, as do the Commission's must-carry rules.

³ Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("1992 Cable Act").

⁴ See *Clarification Order* in MM Docket No. 92-259, 8 FCC Rcd 4142 (1993) ("Clarification Order"). Translator refers to a television broadcast repeater facility licensed on a secondary basis under Part 74 of the Commission's rules.

⁵ See *Order* in MM Docket No. 92-259, 8 FCC Rcd 5083 (1993).

⁶ See *Stay Order* in MM Docket 92-259, 9 FCC Rcd 2678 (1993).

⁷ *Turner Broadcasting Systems, Inc. v. FCC*, 819 F.Supp. 32 (D.D.C. 1993).

⁸ See *Turner Broadcasting Systems, Inc. v. FCC*, 114 S.Ct. 2445 (1994). In remanding the case, the Court determined that issues of material fact must be resolved by the lower court. Specifically, the Court indicated that the government must show that the must-carry provisions are necessary to alleviate the alleged harms and that they do not burden substantially more speech than necessary to further such protection. *Id.* at 2451.

II. MUST-CARRY REGULATIONS

A. Carriage of Local Noncommercial Educational Television Stations.

1. Definition of a Qualified Noncommercial Station.

3. Section 615(l)(1) provides that a local noncommercial educational television ("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.⁹ An NCE station is also considered qualified if it is owned and operated by a municipality and transmits predominantly noncommercial programs for educational purposes.¹⁰ For purposes of must-carry rights, an NCE station is considered local if its community of license is within 50 miles of, or its signal places a Grade B contour over, the principal headend of the cable system.¹¹ This definition includes 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.¹²

4. The staff has received informal inquiries requesting clarification as to when a translator is "serving the franchise area" of the cable system. Because the service area of a translator differs from that of a full power broadcast station, we believe that guidance should be provided to assist interested parties in determining whether a translator serves the franchise area of the cable system. We believe it appropriate to adopt a standard based on coverage and contour, which has been used in the past and which should be easily identifiable.¹³ Therefore, for purposes of a translator serving the cable system's franchise area, the coverage area of such translator shall be its predicted protected contour as specified in Section 74.707

⁹ All references to Section 614, Section 615 and Section 325 are references to those sections of the Communications Act of 1934, as amended by the 1992 Cable Act, Sections 4, 5 and 6. See 47 U.S.C. §§ 534, 535 and 325.

¹⁰ See 47 C.F.R. §76.55(a). In defining a qualified noncommercial educational television station, Section 76.55(a)(2) incorrectly refers to Section 73.612 rather than Section 73.621. We are revising Section 76.55(a)(2) to refer to Section 73.621.

¹¹ See 47 C.F.R. §§76.55(b), 76.5(pp).

¹² 47 C.F.R. §76.55(a)(3).

¹³ See *Reexamination of the Effective Competition Standard for the Regulation of Cable Television Basic Service Rates*, MM Docket 90-4 and *Carriage of Television Broadcast Signals by Cable Television Systems*, MM Docket 84-1296, 6 FCC Rcd 4545 (1991).

of our rules.

2. Signal Carriage Obligations.

5. In the *Report and Order*, we indicated that Section 615(b) requires cable systems to carry any qualified local NCE television station requesting carriage.¹⁴ Systems with 12 or fewer activated channels must carry the signal of one qualified local NCE station.¹⁵ Systems with 13 to 36 activated channels must carry at least one qualified local NCE station, but need not carry more than three such stations.¹⁵ Cable systems with more than 36 activated channels are generally required to carry all NCE stations requesting carriage.¹⁶ If a system with fewer than 36 activated channels operates beyond the presence of a qualified local NCE station, it is required to import and carry a qualified NCE station.¹⁷ In addition, cable systems 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.¹⁸

6. First, on our own motion, we clarify the carriage requirements of a system with more than 36 activated channels. The 1992 Cable Act states that systems with more than 36 channels must carry the signal of all NCE stations requesting carriage, with one exception: systems with more than 36 channels are not required to carry an additional local NCE station if the programming of such station substantially duplicates the programming of a qualified local NCE station already being carried.¹⁹ It has come to our attention that Section 76.56(a)(1)(iii) of the Commission's rules as adopted in the *Report and Order* has been interpreted by some cable operators to require that only three stations need be carried. However, with respect to systems with more than 36 channels, we clarify that the reference to the number three is a minimum, not a maximum number. A system with more than 36 channels must carry all NCE stations requesting carriage, but is not required to carry more

¹⁴ See 8 FCC Rcd at 2966; see also 47 C.F.R. § 76.56.

¹⁵ Section 615(b)(2)(B)(iii) states that a cable system with 12 or fewer usable activated channels shall not be required to remove any programming service provided to subscribers as of March 29, 1990 to satisfy these requirements, however the first available channel must be used to satisfy these requirements. See 47 C.F.R. § 76.56(a)(3).

¹⁵ Section 615(b)(3)(i).

¹⁶ Section 615(b)(1).

¹⁷ See Section 615(b)(2)(B) and (b)(3)(B); 47 C.F.R. §76.56(a)(2)(i) and (ii).

¹⁸ See Section 615(c); 47 C.F.R. § 76.56(a)(5).

¹⁹ Section 615(e).

than three NCE stations if the additional station substantially duplicates the signal of NCE stations already carried by the system. Section 76.56(a)(1)(iii) is being revised accordingly.

7. Second, we emphasize that the requirement in Section 615(c) to continue carriage of stations carried as of March 29, 1990 applies only to qualified local NCE television stations and does not apply to a non-local NCE television station which was being imported as of that date.²⁰ A cable system which was carrying a non-local NCE station in excess of its mandatory carriage requirements is permitted to drop that station, subject to giving appropriate notice.²¹ However, if a cable system which would be required to import a NCE signal pursuant to Section 615(b)(3)(B) or (b)(2)(B) was importing a non-local qualified NCE station on March 29, 1990, the system is required to continue carriage of such station. Prior carriage of the non-local NCE station generally indicates that a good quality signal is received at the cable system's headend. In addition, where the cable system voluntarily had been importing such signal prior to March 29, 1990, the continued carriage of such station will not result in additional copyright liability for the cable system. In the event a local NCE station subsequently becomes qualified, the cable operator may drop the distant signal (subject to notification requirements) and substitute the qualified local NCE station. Section 76.56(a)(5) is being revised accordingly.

8. Although the Act generally does not require copyright liability to be paid by a cable operator for the carriage of a local NCE station signal added after March 29, 1990, in the case of importation, the non-local NCE station has neither must-carry nor retransmission rights.²² We do not believe it appropriate for a non-local NCE station which is being imported to be required to reimburse the cable operator for copyright costs. The 1992 Cable Act specifically provides that a cable system can recover such costs as part of the basic service tier rate, and we believe that this is the appropriate manner for dealing with such costs.²³

B. Carriage of Local Commercial Television Stations

1. General Signal Carriage Requirements.

9. Small System Exception. Section 614(a) requires carriage of local commercial television stations and qualified low power television stations. Section 614(b) establishes the number of signals which must be carried by cable systems based on their channel capacity. In

²⁰ See Section 615(c); 47 C.F.R. § 76.56(a)(5).

²¹ See 47 C.F.R. § 76.58.

²² Section 325(b)(2)(A) specifically excludes noncommercial broadcast stations, and 47 C.F.R. Section 76.64(a) refers only to commercial broadcast stations.

²³ Section 623(b)(2)(C)(ii).

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.²⁴ Such a system is exempt from any requirements of Section 614, however, if it serves 300 or fewer subscribers, as long as it does not delete from carriage the signal of any broadcast television station.²⁵ In the *Report and Order*, the Commission concluded that, under this exception, a system must not delete any station it carried on October 5, 1992.²⁶

10. Although the language of the text accurately reflects this intention, the Community Antenna Television Association ("CATA") points out that the related rule is misleading because it implies that the system must have had 300 or fewer subscribers as of October 5, 1992.²⁷ We are revising Section 76.56(b)(1) of our rules to reflect that, at any time that a cable system with 12 or fewer activated channels serves 300 or fewer subscribers, it is exempt from the mandatory carriage requirements under Section 614, as long as it does not delete any signal of a broadcast television station which was carried on that system on October 5, 1992.

11. Definition of Local Commercial Television Station. Section 614(h)(1)(A) defines a local commercial television station for the purpose of the must-carry rules as "any full power television broadcast station, other than a qualified noncommercial television station within the meaning of Section 615(i)(1), licensed and operating on a channel regularly assigned to its community by the Commission that, with respect to a particular cable system, is within the same television market as the cable system." In the *Report and Order*, we inadvertently defined local commercial television station as "any full power *commercial* television station . . .", which had the unintended effect of excluding non-qualified noncommercial stations from the definition.²⁸ A non-qualified NCE station is any NCE station which does not meet the qualification criteria established in Section 615(g). Such a station is not entitled to must-carry rights under that section. Colorado Christian University ("CCU") requests that the text of the rule be revised to conform with the language of the statute.²⁹ Otherwise, CCU complains, non-qualified NCE stations will not be able to assert must-carry rights in any situation.³⁰ San Jacinto Television Corporation, licensee of station

²⁴ Section 614(b)(1)(A).

²⁵ 8 FCC Rcd at 2973.

²⁶ *Id.*

²⁷ CATA Petition at 2.

²⁸ 8 FCC Rcd at 2973.

²⁹ CCU Petition at 2-3.

³⁰ *Id.*

KTFH(TV) ("San Jacinto"), and the Association of Independent Television Stations ("INTV") oppose this request, arguing that a non-qualified NCE station should not be granted carriage rights.³¹ We believe that the definition of local commercial television station contained in the 1992 Cable Act clearly includes non-qualified NCE stations; the definition includes all stations other than "qualified NCE stations." Consistent with the language of the 1992 Cable Act, we determine that NCE stations which are not "qualified" NCE stations for must-carry purposes may assert must-carry rights under Section 614 within their local market, just like any other broadcast station.³²

12. Availability and Identification of Must-Carry Signals. Section 614(b)(7) 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 the cable operator provides a connection. In the *Report and Order* we declined to grant a request to provide a special exception for commercial subscribers (e.g., hotels, hospitals) that receive specially designed channel line-ups.³³ We stated our belief that the 1992 Cable Act is clear in its application of Section 614(b)(7) to every subscriber of a cable system, that it grants no authority to exempt a specific class of cable subscribers from the carriage requirements, and that there is no reason to believe that such commercial subscribers are not interested in receiving local broadcast signals.³⁴

13. The National Cable Television Association ("NCTA") and Time Warner Entertainment Company, L.P. ("Time Warner") request that we reconsider the requirement to make all must-carry signals available to all subscribers including commercial subscribers (hotels/hospitals) which have contracted for a special channel line-up.³⁵ NCTA points to a footnote in the text of the *Report and Order* which stated that "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."³⁶ NCTA requests that we expand this caveat to state that the cable operator may provide all of the wiring to individual rooms and yet not require its customer to provide

³¹ San Jacinto Opposition at 2-3; INTV Reply at 8.

³² We interpret local commercial television station to include stations operating under a valid construction permit.

³³ 8 FCC Rcd at 2974.

³⁴ *Id.*

³⁵ NCTA Petition at 15-16; Time Warner Reply at 2-3.

³⁶ NCTA Petition at 15-16 (citing 8 FCC Rcd at 2974 n.99).

connections for all television sets in the commercial establishment.³⁷ These parties argue that "sophisticated buyers of video programming" should not be forced to buy what they do not want.³⁸

14. In opposition, the National Association of Broadcasters ("NAB") argues that there is no basis for distinguishing between residential and commercial subscribers, and that Section 614(b)(7) provides no basis for allowing cable operators to delete must-carry signals from the commercial subscriber channel line-up.³⁹ NAB points out that the issue is not the level of sophistication of commercial entities requesting service, but rather the access to local stations by the viewers in these establishments.⁴⁰

15. We agree with NAB that the must-carry provisions do not distinguish between commercial and residential viewers. Congress made clear its intent that all subscribers have access to local commercial broadcast signals. We do not believe that NCTA or Time Warner has presented sufficient cause to change our earlier interpretation of the 1992 Cable Act. Therefore, we affirm that all subscribers must have access to these signals on all television sets connected by the cable operator or for which the cable operator provides a connection.

16. It is our understanding that the on-channel carriage of some UHF signals has resulted in situations where a converter box supplied by a cable operator does not contain the necessary channel capacity to permit a subscriber to access a UHF must-carry signal through the converter. For example, a converter may supply channels 2-36 while the must-carry station is on channel 55. Where a cable operator chooses to provide subscribers with signals of must-carry stations through the use of converter boxes supplied by the cable operator, the converter boxes must be capable of passing through all of the signals entitled to carriage on the basic service tier of the cable system, not just some of them. In addition, any converter boxes provided for this purpose must be provided at rates in accordance with Section 623(b)(3). Therefore, in a situation where the subscriber's converter is supplied by the cable operator, and is incapable of receiving all signals as required by Section 614(b)(7), the cable operator must make provision for a converter which is capable of providing these signals.⁴¹ If

³⁷ *Id.*

³⁸ *Id.*; Time Warner Reply at 3.

³⁹ NAB Opposition at 9-10.

⁴⁰ *Id.*

⁴¹ See *Memorandum Opinion and Order* (CSR-3903-M) (Complaint of WLIG-TV, Inc. against Cablevision Systems Corporation), DA-93-1365 (released November 10, 1993), in which the Mass Media Bureau noted that converter boxes provided by the cable system must be capable of transmitting all the signals entitled to mandatory carriage on the basic tier, and required Cablevision, because it was in the midst of an upgrade of its system, to switch

it is necessary to replace the converter, the subscriber must not be required to pay additional sums nor to pay for the installation.⁴² As discussed below,⁴³ we have provided a mechanism for relief for cable systems which cannot meet the on-channel requests of must-carry stations. A decision not to seek such relief may not be used to contravene the directives of the 1992 Cable Act.

2. Definition of a Television Market

17. Use of ADI Markets and the Home County Exception. Under the 1992 Cable Act, a local commercial television station is entitled to must-carry status on all cable systems located in the same television market as the cable system.⁴⁴ The 1992 Cable Act states that the television market shall be determined pursuant to Section 73.3555(d)(3)(i) of our rules, which in turn defines a television market in terms of the Area of Dominant Influence ("ADI"), as defined by Arbitron.⁴⁵ In the *Report and Order*, the Commission noted that each county in the contiguous United States is assigned by Arbitron exclusively to one ADI, and that each broadcast station licensed to a community located in an ADI is considered local throughout that ADI.⁴⁶ The Commission established one exception to that rule, determining that each broadcast station will also be considered a must-carry station in its home county, even if that station is assigned to a different ADI from that of its home county (the "home county exception").⁴⁷

station WLIG to a channel receivable by all subscribers, without the necessity of an additional converter box, during the rebuilding of its system.

⁴² We note that where the cable operator authorizes subscribers to install additional receiver connections, but does not provide the subscriber with such connections, or with 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 and the operator must offer to sell or lease such a converter box to such subscribers at rates in accordance with section 623(b)(3). *See* Section 614(b)(7).

⁴³ *See infra* at para. 57.

⁴⁴ Section 614(h)(1)(A) and (C).

⁴⁵ *See* Section 614(h)(1)(C); *see also* 8 FCC Rcd at 2975 n.100. We note that Arbitron has cancelled its television ratings service. However, the decision will not have an impact on the use of Arbitron-designated ADIs until the next must-carry/retransmission consent election which must take place by October 1, 1996. *See* 47 C.F.R. § 76.55(e); 47 C.F.R. § 76.64(f)(2). We will address this issue sufficiently before that date.

⁴⁶ 8 FCC Rcd at 2975.

⁴⁷ *Id.*

18. Cypress Broadcasting, Inc. ("Cypress"), the licensee of television station KCBA(TV), Salinas, California, filed a petition seeking reconsideration of the home county exception because it accords television station KNTV(TV), licensed to San Jose, California, and similarly situated stations, must-carry rights in an entire county outside their Arbitron designated ADI. Cypress argues that the Commission failed to give adequate notice that it might adopt this exception to the must-carry rule.⁴⁸ According to Cypress, nowhere in the *Notice of Proposed Rule Making*⁴⁹ did the Commission suggest that it would allow the automatic addition of counties to the market of some stations.⁵⁰

19. This petition is opposed by Granite Broadcasting Corporation ("Granite"), licensee of KNTV.⁵¹ Granite maintains that the Commission gave adequate notice that it was considering adjustments or modifications of television markets, and sought comment on how to address requests for modification, including those not covered by the 1992 Cable Act.⁵² Granite contends that the home county exception is a logical outgrowth of the Commission's rule making proposal that should have been anticipated by Cypress.⁵³

20. Cypress disagrees that the home county exception is a logical outgrowth of the matters addressed in the *Notice*. It states that the Commission acknowledged in the *Notice* that, pursuant to Section 614(h)(1)(c), "it could only add 'communities' to a station's television market and that it would do so only after a written request in accordance with the procedures to be adopted in the *Notice*."⁵⁴ Thus, Cypress concludes that there was no basis

⁴⁸ Cypress Reply at 6-9.

⁴⁹ *Notice of Proposed Rule Making* in MM Docket No. 92-259 ("Notice"), 7 FCC Rcd 8055 (1992).

⁵⁰ *Id.*

⁵¹ KNTV(TV), Channel 11 (ABC), is licensed to San Jose, California. San Jose is part of the San Francisco-Oakland-San Jose Arbitron ADI. However, the city of San Jose is located within Santa Clara County, a county included by Arbitron in the Salinas-Monterey ADI. In comments filed in response to the *Notice* in this proceeding, Granite stated that although KNTV is listed by Arbitron in the Salinas-Monterey ADI, it and similarly situated stations should be deemed "local" for must-carry purposes in their home county when such county lies outside the ADI in which the station is assigned. Granite Opposition at 16-17. In adopting the home county exception, the Commission noted the case of KNTV. 8 FCC Rcd at 2975 n.108.

⁵² Granite Opposition at 13-16.

⁵³ *Id.*

⁵⁴ Cypress Reply at 8.

for it to anticipate a home county exception, a rule it argues is inconsistent with the 1992 Cable Act.⁵⁵

21. The *Administrative Procedure Act* ("APA")⁵⁶ requires an agency, when issuing a general notice of proposed rule making, to provide the public with "either the terms or the substance of a proposed rule or a description of the subject and issues involved."⁵⁷ The APA, however, "does not require an agency to publish in advance every precise proposal which it may ultimately adopt as a rule."⁵⁹

22. The *Notice* set forth the 1992 Cable Act's direction that such markets would be determined primarily in the manner provided in Section 73.3555(d)(3)(i) of the Commission's rules, (which section uses Arbitron-defined ADIs), and specifically sought comment from the public concerning the Congressionally recognized need for adjustments to or modifications of television markets.⁶⁰ The Commission specifically stated that "it may determine that particular communities are part of more than one television market," and further explained that it would act upon written requests to add or delete communities to a station's market "to better reflect

⁵⁵ Cypress claims that it should not be deemed to have been put on notice that Granite made a home county exception proposal because Granite did not serve Cypress with a copy of its comments. Cypress Reply at 9. We reject Cypress' suggestion that either the Commission or Granite was obligated to serve it with a copy of Granite's comments submitted in response to the *Notice*. Neither the APA nor the Commission's rules of procedure require personal service to specific parties of general rule making comments. Sufficient notice to parties is presumed when the *Notice* is published in the Federal Register, and parties have an obligation to follow proceedings in which they may be interested. See 47 C.F.R. § 1.412. Moreover, the law does not require a new notice whenever an agency responsibly adopts the suggestions of interested parties. See, e.g., *Ethyl Corp. v. EPA*, 541 F.2d 1, 48 (DC Cir. 1976), cert. denied, 426 U.S. 941 (1976).

⁵⁶ 5 U.S.C. Section 551 *et seq.*

⁵⁷ See 5 U.S.C. § 553(b)(3).

⁵⁹ *California Citizens Band Association v. United States*, 375 F.2d 43, 48 (9th Cir. 1967); see also *Spartan Radiocasting Co. v. FCC*, 619 F.2d 314 (4th Cir. 1980). The notice is sufficient if the final rule is a "logical outgrowth" of the rule proposed. *United Steelworkers v. Marshall*, 647 F.2d 1189, 1221 (D.C. Cir. 1980).

⁶⁰ Section 614(h)(1)(C)(i) states that a broadcasting station's market shall be determined in the manner provided in section 73.3555(d)(3)(i) of the Commission's rules, except that the Commission may include or exclude additional communities to better effectuate the purposes of Section 614. 47 U.S.C. § 534(h)(1)(C)(i).

market realities and effectuate the purposes of this Act."⁶¹ We believe that it was apparent that the Commission was likely to receive comments and suggestions regarding methods to assure that television stations' must-carry markets, both generally and in individual cases, best reflect market realities and the objective of localism underlying broadcast signal carriage obligations. While the *Notice* did not specifically seek comment on the home county exception, we believe that the home county exception is a "logical outgrowth" of the *Notice*.⁶² Accordingly, we are not persuaded by Cypress' arguments that the *Notice* did not give adequate notice in compliance with the requirements of the APA.

23. Cypress also asserts that the Commission's adoption of the home county exception is in direct violation of the 1992 Cable Act in that it assigns must-carry rights outside of a station's ADI on a county-wide basis rather than by community as provided by Section 614(h)(1)(C)(i).⁶³ It argues that, under the clear language of that statutory provision, a station's must-carry market is defined by its Arbitron ADI, with no must-carry rights for the station beyond that ADI.⁶⁴ Cypress argues that the 1992 Cable Act establishes a specific procedure for affording a station must-carry rights in communities outside of its ADI, and spells out the precise matters the Commission must consider in ruling on individual written requests, referencing the provision of the 1992 Cable Act that provides:

[F]ollowing a written request, the Commission may, *with respect to a particular broadcast station*, include *additional communities* within its television market to better effectuate the purposes of this section. In considering such requests, the Commission may determine that particular *communities* are part of more than one television market.⁶⁵

Cypress argues that the Commission received no written request from Granite which complied with the evidentiary requirements established by Section 614(h)(1)(C)(ii), and therefore had no record to support the statutorily required finding to afford this relief to KNTV.⁶⁶

⁶¹ See Section 614(h)(1)(C); see also 7 FCC Rcd at 8059.

⁶² See, e.g., *United Steelworkers*, 647 F.2d at 1221; *Health Insurance Association of America, Inc. v. Shalala*, 23 F.3d 412, 421 (1994); *Northwest Tissue Center v. Shalala*, 1 F.3d 522, 528 (1993).

⁶³ Cypress Petition at 7-9; Cypress Reply at 2-4.

⁶⁴ *Id.*

⁶⁵ Section 614(h)(1)(C)(i); 47 U.S.C. § 534(h)(1)(C)(i) (emphasis added by Cypress).

⁶⁶ Section 614(h)(1)(C)(ii) directs that in considering requests to add or exclude certain communities within a television station's market pursuant to this section, the Commission shall afford particular attention to the value of localism by taking into account such factors as:

24. In opposition, Granite states that nothing in the 1992 Cable Act precludes adding a county to a station's market and notes that the Commission adopted the home county exception as a rule of general applicability for all stations whose home county lies outside its ADI.⁶⁷ It maintains that Section 614(h)(1)(C)(i) directs that market adjustments be limited to particular television stations, while the home county exception is entirely separate from a request to modify an individual television station's market.⁶⁸ It contends that the addition of Santa Clara County to KNTV's market was appropriate in the rulemaking proceeding, as opposed to an individual adjudicatory proceeding, "because every similarly situated station -- that is, every station whose home county lies outside its ADI -- should have its market defined to include its home county."⁶⁹ It asserts that in order to serve the 1992 Cable Act's goal of promoting localism, the home county of every station should be included in its must-carry market through the adoption of a general rule, rather than on an *ad hoc* basis.⁷⁰ Further, Granite maintains that the Commission is not precluded from exercising its own rulemaking authority to adopt such an exception.⁷¹ Granite also notes that even under Cypress' reading, there is nothing in the 1992 Cable Act to prohibit the Commission from adding all the

the historical cable carriage of the station on cable systems in the subject community; whether the station provides coverage or local service to the community; whether other must-carry stations in the community provide news coverage of issues of concern to such community, or provide carriage or coverage of sporting or other events of interest to the community; and evidence of viewing patterns in cable and noncable households within the areas served by the cable system in the community. In the *Report and Order*, the Commission determined to use the special relief procedures to modify television markets, pursuant to a modified Section 76.7 of our rules. Moreover, the Commission determined not to restrict the types of evidence that parties may submit to demonstrate the propriety of changing a station's must-carry market, or to prejudge the importance of any of the factors set forth in the statute because each case will be unique. See 8 FCC Rcd at 2977.

⁶⁷ Granite Opposition at 6-7 n.9.

⁶⁸ Granite notes that in the *Report and Order*, the Commission addressed the home county exception in the context of the general definition of local television market, whereas the addition or deletion of specific communities in a market is addressed as a form of relief intended by the 1992 Cable Act to address the "individual situation" of a particular television station. *Id.* at n.8.

⁶⁹ *Id.* at 8. Granite further states that Cypress' contention that the statutory requirements of Section 614(h)(1)(C)(ii) of the 1992 Cable Act have not been met with respect to KNTV is "entirely misplaced," because adoption of the home county exception is not a modification of one must-carry market granted pursuant to a written request under that section. *Id.* at 7.

⁷⁰ *Id.* at 8.

⁷¹ *Id.*

communities of a county to a must-carry market.⁷² Thus, it argues, there is no basis to construe the 1992 Cable Act as preventing the addition of a county to a must-carry market.⁷³

25. We disagree with Cypress that the home county exception violates either the spirit or letter of the 1992 Cable Act. Specifically, we disagree with the proposition that although a television station's must-carry rights are defined primarily by Arbitron ADIs, there can be no must-carry rights beyond the ADI to which a station is assigned by Arbitron. Section 614(h)(1)(C)(i) recognizes a potential, but easily corrected, deficiency in the use of Arbitron ADIs to define a station's must-carry market. We find no basis to presume that the Commission may not adjust ADIs generally to ensure that stations have must-carry rights in those areas where their service is appropriately "local." We agree with Granite that adoption of the home county exception is separate and apart from the procedure established to make individual station market adjustments based on particular situations.

26. Modification of ADI Markets. As noted in the *Report and Order*, the 1992 Cable Act permits the Commission to add or subtract communities from a television station's market to better reflect marketplace conditions or to promote the goal of localism underlying the signal carriage provisions.⁷⁴ In its petition, INTV requests that the Commission add or subtract a community for all stations in the market, not for an individual station. INTV suggests that upon the addition of a community to a market, every station in the community would attain must-carry rights in that market.⁷⁵

27. The Commission has already addressed this subject in the *Report and Order* in response to parties' contentions that ADI modifications should be made on a community, rather than on a station, basis. Both the 1992 Cable Act and our rules require, for each broadcast station, an evidentiary showing from an interested party, with opportunity for comment. INTV's request would not meet this requirement and therefore must be rejected. We reiterate our statement in the *Report and Order* that we will accept joint filings by a group of stations or a single request from a cable operator for changes for more than one station licensed to the same community, so long as the submitted information demonstrates that each station is entitled to have its market modified.⁷⁶ The special relief procedures will ensure that the 1992 Cable Act's objective of promoting localism and reflecting market

⁷² *Id.* at 11-12.

⁷³ *Id.*

⁷⁴ 8 FCC Rcd at 2976.

⁷⁵ INTV Petition at 7.

⁷⁶ 8 FCC Rcd at 2977 n.139.

realities are achieved.⁷⁷

28. As noted above, Section 614(h)(1)(C) directs the Commission, when considering ADI modification requests, to promote localism by taking into account the four factors listed in that section.⁷⁸ Press Broadcasting Company, Inc. ("Press"), the licensee of WKCF(TV), Clermont, Florida, seeks clarification or partial reconsideration of the types of evidence the Commission has indicated that it will consider in assessing proposed changes in a station's must-carry market.⁷⁹ Specifically, Press states that, among other things, the Commission observed in the *Report and Order* that to show that a station provides coverage or other local service to the cable community, "parties may demonstrate that the station places at least a Grade B coverage contour over the cable community or is located close to the community in terms of mileage."⁸⁰ Press maintains, however, that mere geographic proximity is not, in and of itself, meaningful evidence of coverage or service. It asserts that the Commission is not sufficiently clear whether such proximity refers to the distance between the cable community, and, for example, a station's city of license, transmitter or some other aspect of a station's operation. In any event, it suggests that before a station's must-carry status is altered, the Commission should be satisfied that the station's signal is available throughout all or most of the subject cable market.⁸¹ Further, Press suggests that the Commission should consider whether the station can demonstrate that it has chosen to include itself in the market by, for example, voluntarily agreeing to pay programming costs based on market-wide prices.⁸²

29. We clarify that the two factors mentioned in the *Report and Order* are merely examples of the types of evidence that might be considered in a request to modify an ADI. The Commission purposely did not restrict the types of evidence that may be used to demonstrate that a station's must-carry market should be modified.⁸³ The Commission

⁷⁷ *Id.* The same logic applies to a single station requesting the addition of multiple communities.

⁷⁸ Section 614(h)(1)(C)(ii); Section 614(h)(1)(C)(ii) (II).

⁷⁹ Press Petition at 2-4.

⁸⁰ *Id.* at 2 (citing 8 FCC Rcd at 2977).

⁸¹ *Id.* at 2-4.

⁸² *Id.* at 4-5.

⁸³ *Id.* This is consistent with the legislative history of this section of the 1992 Cable Act which states that the particular factors set forth in the statute "are not intended to be exclusive." House Committee on Energy and Commerce, H.R. Rep. No. 628 ("House Report"), 102d Cong., 2nd Sess. (1992) at 97.

declined to prejudge the importance of any of the factors set forth in the statute, noting that each case will be unique.⁸⁴ Accordingly, we note that the factors suggested by Press may be employed by parties to show the appropriateness of altering a station's must-carry market, although the importance of such factors may differ from one situation to the next.⁸⁵

30. Section 76.51 Top 100 Market List. Section 614(f) of the 1992 Cable Act directs the Commission to issue regulations that include revisions needed to update the list of top 100 television markets and their designated communities contained in Section 76.51.⁸⁶ Although the *Notice* sought guidance on how to fulfill this requirement,⁸⁷ the comments were general in nature and did not offer a mechanism for revising the top 100 market list, including criteria for determining when a city of license should become a designated community in a television market.⁸⁸ Accordingly, the Commission concluded in the *Report and Order* that a wholesale revision of Section 76.51 was unnecessary and stated that it would only update the existing list by adding those designated communities requested by parties providing specific evidence that a particular market change is warranted.⁸⁹ The Commission made three specific market modifications, and stated that further revisions to this list would be made on a case-by-case basis.⁹⁰ The Commission stated that requests for modification should demonstrate "commonality" between the proposed community to be added to a market designation and the market as a whole, and that such requests would be made in accordance with the factors in Section 614(h)(1)(C) and the related rules.⁹¹

⁸⁴ 8 FCC Rcd at 2977.

⁸⁵ We note that, in stating that a station may demonstrate that it is located close to the community in terms of mileage, a station may present evidence, as suggested by Press, regarding the distance between the cable community and the station's community of license, transmitter, or other aspect of the station's operation.

⁸⁶ 47 C.F.R. § 76.51.

⁸⁷ 7 FCC Rcd at 8060.

⁸⁸ 8 FCC Rcd at 2977.

⁸⁹ *Id.* at 2978.

⁹⁰ The Commission made the following market modifications: (1) added Chillicothe to the Columbus, Ohio market; (2) added New London to the Hartford-New Haven-New Britain-Waterbury, Connecticut market; and (3) added Rome to the Atlanta, Georgia market. *Id.*

⁹¹ *Id.*; see also Section 614(h)(1)(C); 47 C.F.R. § 534(h)(1)(C). The Commission also stated that the same procedures would be applicable to requests to delete named communities from specific hyphenated markets.

31. A number of broadcast television licensees in Columbus, Ohio filed petitions for reconsideration respecting the addition of Chillicothe to the Columbus, Ohio television market.⁹² These petitioners allege that the Commission's action was taken without sufficient notice to interested parties and was therefore based on an inadequate factual record. They maintain that the *Notice* in this proceeding generally requested comment on suitable criteria for revising Section 76.51 of the rules pursuant to Section 614(f), and indicated that, during the pendency of the rulemaking, market revisions would be made on an *ad hoc* basis through individual rulemaking notices. These petitioners contend that, despite the language of the *Notice*, only the modification of the Atlanta, Georgia television market was the subject of a prior notice of proposed rulemaking, and even in modifying that market, the Commission declined another request to include Athens, Georgia in the market because that proposal was not included in the prior notice.⁹³ By contrast, they assert, the addition of Chillicothe was made without any published notice or an independent notice of proposed rule making consistent with the procedures announced in the *Report and Order*, or any other indication from the Commission that it was contemplating the change, and without interested parties receiving service of the proposal.

32. As noted above, the APA requires an agency, when issuing a general notice of proposed rule making, to provide the public with "either the terms or the substance of a proposed rule or a description of the subject and issues involved," but "does not require an agency to publish in advance every precise proposal which it may ultimately adopt as a rule."⁹⁴ In the *Notice*, the Commission specifically requested that interested parties "comment on what modifications to the television markets specified in Section 76.51 of our rules is needed to ensure that it reflects current market realities."⁹⁵ In so doing, the Commission observed that this proceeding necessarily overlaps with an ongoing proceeding involving, *inter alia*, the makeup of the Section 76.51 market list in relation to the Commission's program

⁹² Petitions were filed by: Anchor Media, Ltd. (WSYX(TV)), WBNS TV Inc. (WBNS-TV), Outlet Broadcasting, Inc. (WCMH-TV), and WTTE, Channel 28 Licensee, Inc. (WTTE(TV)).

⁹³ In its petition, Outlet Broadcasting, Inc. notes that Triplett and Associates, Debtor-in-Possession ("Triplett"), licensee of WWAT(TV), Chillicothe, and proponent of the subject rule amendment, filed comments in this proceeding merely incorporating by reference two earlier requests for modification of the market. Outlet maintains that the Commission never issued a public notice concerning the earlier proposals. Moreover, it claims that the Commission only reported the filing of Triplett's submission in this proceeding in a notice of comments received in this docket, listing Triplett as one of many filers and giving no indication of the nature of those comments. As a result, Outlet states, "the Commission understandably received no oppositions or comments on the idea." Outlet Petition at 6-7.

⁹⁴ See discussion *supra* paras. 21-22.

⁹⁵ 7 FCC Rcd at 8060.

exclusivity rules.⁹⁶ Therefore, the Commission explicitly stated that Docket 87-24 would be reopened for further comment in the context of this rulemaking in order to facilitate coordination of the overlapping aspects of the two proceedings.⁹⁷

33. In light of the nature of this proceeding, the statutory instruction to amend, as necessary, Section 76.51, and the incorporation by reference of the issues in Docket 87-24, we conclude that the *Notice* amply alerted the public that potential amendments to that rule section could be made in the context of this specific proceeding.⁹⁸ The Commission explicitly

⁹⁶ See *Further Notice of Proposed Rule Making* in Gen. Docket No. 87-24, 3 FCC Rcd 6171 (1988). Further, the pendency of Triplett's request to modify the Columbus, Ohio television market is referenced in Docket No. 87-24, 3 FCC 2d at 6176 n.15, which was incorporated into the instant proceeding.

⁹⁷ See 3 FCC 2d at 6171 (1988). In response to the *Notice* in this proceeding, the proponents of three previously-filed market change petitions for rulemaking filed comments which incorporated by reference their rulemaking petitions and urged the adoption of their Section 76.51 market amendment proposals. One of these proponents, Star Cable Associates ("Star"), operator of a cable television system serving the community of Brazoria, Texas, and portions of Brazoria County, Texas, filed a petition for reconsideration based on the concept that although the Commission granted other requests to modify existing television markets, the Commission did not act on Star's request to amend Section 76.51 to add the community of Alvin to the Houston, Texas market. Star states that it has had such a request pending before the Commission since January 1991. Star's comments to the *Notice* in this proceeding were incorporated into and filed with Adelpia, *et al.* and included numerous other cable operators. These parties were arguing that the Commission need not revise the Section 76.51 market list, stating that "[n]o revision to this list is needed to implement the must-carry rules since the current ADI markets are to be used for determining must-carry rights." Adelpia comments to *Notice* at 11-12. It was suggested in those comments that the Commission "might wish to update the list . . . to add new communities to existing markets for stations which have gone on the air since the list was last revised" and, in that context noted the copyright consequences explained in the pending petition regarding the Houston market. *Id.* However, neither Adelpia nor Star specifically requested action in the must-carry context on Star's pending petition for rulemaking. Under these circumstances, we do not believe that it was erroneous to defer action on the Star petition.

⁹⁸ Neither the APA nor the Commission's rules specifically required that the petitioners receive personal service of the particular market change proposals tendered in comments filed in this proceeding. See *supra* note 55. Moreover, we observe that at least one petitioner, Outlet, notes that the filing of Triplett's submission was referenced in a public notice of comments received in this docket. See FCC Filings, Mimeo No. 31317, released January 15, 1993. However, we do not agree that the Commission was somehow obligated to indicate the nature of Triplett's comments, and the petitioners offer no support for that particular

sought public comment on what modifications to Section 76.51 would be necessary to fulfill the directive of Section 614(f), and we believe that specific market change proposals are a natural and logical outgrowth of the range of issues presented in the *Notice* and discussed in the comments filed in this proceeding. Accordingly, we are not persuaded by the petitioners that the *Notice* did not provide adequate notice to interested parties that specific amendments to Section 76.51 were likely to be considered in this proceeding.

34. We disagree with the petitioners' contentions that amendment of the Columbus market first required the issuance of an independent notice of proposed rulemaking. The fact that we said in the *Notice* that we may consider further revisions to Section 76.51 on an *ad hoc* basis did not preclude the Commission's taking specific action on particular modifications consistent with the guidance provided by the 1992 Cable Act where the record indicated that such changes were warranted.⁹⁹

3. Selection of Signals.

35. Definition of Substantial Duplication. Section 614(b)(5) provides that a cable operator is not required to carry the signal of any local commercial television station that substantially duplicates the signal of another local commercial television station which is carried on its cable system, or to carry the signals of more than one local commercial

proposition. To the extent that Triplett incorporated by reference its previous request regarding Chillicothe, which was also noted in Docket 87-24, we do not believe that obviated the responsibility of interested parties to assess the nature of comments received in response to the general rulemaking issues specifically raised in the *Notice*.

⁹⁹ See *Edison Electric Institute v. OSHA*, 849 F.2d 611 (D.C. Cir. 1989). We do not agree that the action taken with respect to a proposal to include Athens in the Atlanta market indicates that the Commission could only act in independent and separate rulemaking proceedings. The Georgia Public Television Commission ("GPTC"), licensee of noncommercial educational television station WGTW(TV), Athens, Georgia, sought to include Athens as a designated community in the Atlanta market essentially to increase the station's visibility and fund raising in the market. GPTC's proposal was not submitted in the instant proceeding directly or incorporated by reference, but rather in comments supporting the requested action in MM Docket 92-295, which specifically addressed the Rome proposal. Parties commenting in MM Docket 92-295 had no opportunity to comment upon the Athens proposal in the context of that proceeding. Moreover, GPTC's proposal differs significantly from the competition and carriage issues vis-à-vis commercial stations raised in either the instant proceeding or in MM Docket 92-295 (relating specifically to Rome). In light of the action taken in the *Report and Order*, the Commission appropriately terminated MM Docket 92-295, and invited GPTC to refile its proposal for consideration in an independent proceeding.

television station affiliated with a particular broadcast network.¹⁰⁰ In the *Report and Order*, based on the legislative history of this section of the 1992 Cable Act, we decided that two stations "substantially duplicate" each other "if they simultaneously broadcast identical programming for more than 50 percent of the broadcast week."¹⁰¹ For purposes of this definition, identical programming means the identical episode of the same program series.¹⁰²

36. NCTA requests that this definition be modified to conform to the definition of duplication in the syndicated exclusivity and network nonduplication rules.¹⁰³ It states that the Commission is not compelled to follow the legislative history because Congress left the definition of substantial duplication to the Commission's discretion, rather than including it in the 1992 Cable Act. NCTA asserts that Congress intended to relieve cable operators of the need to devote channel capacity to duplicative programming at the expense of programming that provides diversity to viewers.¹⁰⁴ It further contends that the Commission's definition will only be met in situations where one station is a satellite of the other.¹⁰⁵ In addition, NCTA argues that requiring carriage of a station that can be blacked out pursuant to the exclusivity rules for a substantial portion of the broadcast day deprives the cable operator of discretion not to carry substantially duplicative stations and cannot be what Congress intended.¹⁰⁶

37. In opposition, NAB notes that under NCTA's proposal, the existence of two stations in separate markets that have exclusivity rights to one program would be sufficient to

¹⁰⁰ 47 U.S.C. § 534(b)(5); 47 C.F.R. § 76.56(b)(5). Western Broadcasting Corporation of Puerto Rico, licensee of Station WOLE, Aguadilla, requests that the Commission reconsider its rules with respect to their application to WOLE, "given the unique situation in Puerto Rico." Western Broadcasting Petition at 1-3. We note that such a request is more appropriately made as a petition for special relief rather than as part of a general rulemaking proceeding.

¹⁰¹ 8 FCC Rcd at 2980-2981 (citing House Report at 94).

¹⁰² We also consider programming to be duplicative where the stations involved are located in contiguous time zones and the hour of broadcast differs by one hour. *Id.* at 2980 n.186.

¹⁰³ NCTA Petition at 12-15. NCTA states that a syndicated program may be duplicative if it is part of a series for which the station has exclusive rights, even if the episodes differ, and that a program may also be considered duplicative regardless of whether it is shown simultaneously or whether the program is not shown at all.

¹⁰⁴ *Id.* at 12 (citing House Report at 94).

¹⁰⁵ *Id.* at 13.

¹⁰⁶ *Id.* at 15.

relieve the operator of carriage obligations, contrary to Congressional intent.¹⁰⁷ It also states that there is no relation between carriage rights and the protection afforded to local stations under the program exclusivity rules, which were designed to level the competitive playing field and permit stations to enforce contractual rights.¹⁰⁸ NAB asserts that Congress did not equate substantial duplication in the must-carry context with the duplication policies under the exclusivity rules. It further claims that Congress did not intend for exclusivity rights to affect either the carriage of stations asserting such rights or the carriage of stations against which these rights are asserted, yet NCTA's proposal appears to permit cable operators to decline carriage of any station against which exclusivity rights are applied.¹⁰⁹ In response to NCTA's contention that cable operators will have to carry duplicative stations and then delete the duplicating programming, NAB points out that cable operators can combine a station's programming not subject to deletion with substitute nonduplicative programming to provide diverse programming consistent with the intent of the 1992 Cable Act.¹¹⁰

38. We continue to believe that our definition of substantial duplication is appropriate for determining signal carriage obligations. We note that it is consistent with the legislative history that indicates that this term refers to the "simultaneous transmission of identical programming on two stations" and which "constitutes a majority of the programming on each station."¹¹¹ While we agree with NCTA that Congress gave the Commission discretion to define substantial duplication, we continue to believe that the most appropriate approach here is to act consistently with the legislative history. Congress did not intend for a single duplicative program, whether subject to blackout or not, to be the determining factor. Finally, we observe that our rules often use different definitions for similar terms based on the purpose of the policy involved.¹¹² The Commission's exclusivity rules are intended to protect the rights that a broadcaster has bargained for with the supplier of a particular program. The must-carry rules, however, are intended to ensure that local stations are available to cable subscribers. Thus, we reject the proposed modification to our definition of substantial duplication.

4. Low Power Television Stations.

¹⁰⁷ NAB Opposition at 4-6.

¹⁰⁸ *Id.* at 5.

¹⁰⁹ *Id.* at 5.

¹¹⁰ *Id.* at 6 (citing 47 C.F.R. §§ 76.62, 76.67).

¹¹¹ House Report at 94.

¹¹² Compare, e.g., 47 C.F.R. § 73.658(v) with 47 C.F.R. § 76.55(f) (definition of network).

39. Qualified Low Power Television Station. Section 614(h)(2) contains the statutory requirements a low power television station (LPTV) must meet before it will be considered "qualified" for must-carry purposes.¹¹³ As we stated in the *Report and Order*, a low power television station must meet all of the statutory requirements to be "qualified" for must-carry status.¹¹⁴ Cable systems are required to carry a qualified LPTV station only if there are not sufficient full power local commercial television stations to fulfill the cable operator's must-carry obligations under Section 614(b).¹¹⁵

40. Moran Communications ("Moran") and the Community Broadcasters Association ("CBA") request a revision to the requirement in Section 614(h)(2)(F) that, in order for a LPTV station to be qualified, there cannot be any full power station licensed to any community within the county or political subdivision served by the cable system.¹¹⁶ Under this exception, Moran and CBA explain, a LPTV station would qualify for must-carry rights if it meets all the requirements of subsections 614(h)(2), except for subsection F, and if none of the full power stations in the county or political subdivision served by the cable system offers local news or informational programming. They contend that when a satellite station is repeating another station's signal and not broadcasting any local news or informational programming to meet the needs of the local community, the satellite station should not be considered a full power station for the purposes of Section 614(h)(2)(F).¹¹⁷ CBA also argues that a satellite station is a "passive repeater," and because Section 614(h)(1)(b)(i) specifically excludes passive repeaters from the definition of a local

¹¹³ Section 614(h)(2) provides that a LPTV station must broadcast for at least the minimum number of hours the Commission requires of commercial broadcast stations. The station must adhere to certain Commission requirements regarding non-entertainment programming and employment. The station must address local news and informational needs that full power stations are not adequately serving because the full power stations are distant from the LPTV station's community of license. The station must comply with the Commission's LPTV interference regulations. The station must be within 35 miles of the cable headend and deliver a good quality over-the-air signal to the headend. The station's community of license and the cable system's franchise area both must have been located outside of the largest 160 Metropolitan Statistical Areas (MSA's) on June 30, 1990, and the population of the LPTV station's community of license must not have exceeded 35,000 on that date. Lastly, there cannot be any full power television station licensed to any community within the county or other political subdivision served by the cable system. 47 U.S.C. § 534(h)(2)(A)-(F).

¹¹⁴ 8 FCC Rcd at 2981.

¹¹⁵ See 47 U.S.C. § 534(c)(1); see also 47 C.F.R. § 76.56(b)(3).

¹¹⁶ Moran Petition at 4; CBA Comments at 1.

¹¹⁷ Moran Petition at 4; CBA Comments at 1.

commercial television station, it follows that Congress intentionally gave less to repeaters than to originating stations in terms of must-carry rights.¹¹⁸ Therefore, argues CBA, "[t]he Congressional recognition of the lesser value of repeaters must be incorporated into the must-carry rule"¹¹⁹ In opposition, NCTA argues that the Commission cannot rewrite the statute, which defines qualified LPTV stations and governs the must-carry rights of LPTV stations.¹²⁰

41. We agree with NCTA that the provisions of the 1992 Cable Act may not be amended by the Commission through the rule making process. Further, contrary to CBA's interpretation of Section 614(h), satellite stations meet the definition of a local commercial television station, are full power stations pursuant to Section 614(h)(2)(F), and are generally not simply passive repeaters.¹²¹ We disagree with CBA's contention that Congress intended satellite stations to be treated differently from other full power stations when reviewing the statutory requirements a LPTV station must meet to gain must-carry status.¹²²

C. Manner of Carriage Provisions Applicable to Commercial and Noncommercial Stations

1. Content to be Carried

42. Section 614(b)(3)(A) and Section 615(g)(1) require cable operators to carry the primary video, accompanying audio, and line 21 closed caption transmission, in its entirety, of both qualified local commercial and NCE stations when fulfilling their must-carry obligations. With respect to qualified local commercial stations, cable operators also are required, to the extent technically feasible, to retransmit program-related material carried in the vertical

¹¹⁸ Moran Petition at 4; CBA Comments at 1.

¹¹⁹ CBA Comments at 3.

¹²⁰ NCTA Opposition at 7-8.

¹²¹ See 8 FCC Rcd at 2973, 2982; see also 47 C.F.R. § 73.606.

¹²² Moran and CBA request that we codify the exception in footnote 217 to the qualification requirements of a LPTV station. Moran Petition at 4; CBA Comments at 1 (citing 8 FCC Rcd at 2983 n.217). While the *Report and Order* had suggested the possibility of additional circumstances in which LPTV carriage might be warranted, it now appears that this is an area where the specific statutory provisions and the balancing incorporated therein must necessarily guide our enforcement of the mandatory carriage provisions for LPTV stations.

blanking interval (VBI) or on subcarriers.¹²³ Retransmission of other material in the VBI or other non-program-related material (including teletext and other subscription and advertiser-supported information services) is at the discretion of the operator.¹²⁴ With respect to local qualified NCE stations, cable operators are required to transmit, to the extent technically feasible, program-related material carried in the VBI, or on subcarriers, that may be necessary for receipt of programming by handicapped persons or for educational or language purposes. Retransmission of other material in the VBI or on subcarriers is at the discretion of the operator.¹²⁵ Cable operators may, where technically feasible and appropriate, remove ghost-cancelling information carried in a station's VBI if the cable operator applies an adequate alternative methodology at the headend.¹²⁶

43. In the *Report and Order*, we decided that the factors enumerated in *WGN Continental Broadcasting, Co. vs. United Video Inc.* ("WGN"),¹²⁷ provide useful guidance for what constitutes program-related material.¹²⁸ We declined to further define "program-related," noting that carriage of information in the VBI is rapidly evolving. As a result of our reliance on the approach followed in *WGN* for guidance, we rejected a proposal by A.C. Nielsen Company ("Nielsen") to require program identification codes to be carried by a cable system.¹²⁹

44. The *WGN* case addressed the extent to which the copyright on a television program also included program material in the VBI of the signal. The *WGN* court set out three factors for making a copyright determination. First, the broadcaster must intend for the information in the VBI to be seen by the same viewers who are watching the video signal. Second, the VBI information must be available during the same interval of time as the video signal.¹³⁰ Third, the VBI information must be an integral part of the program. The court

¹²³ 47 U.S.C. § 534(b)(3)(A).

¹²⁴ *Id.*

¹²⁵ 47 U.S.C. § 535(g)(1).

¹²⁶ 47 U.S.C. § 534(b)(3)(A).

¹²⁷ 693 F.2d 622 (7th Cir. 1982).

¹²⁸ In the *Report and Order*, we used a cite of 685 F.2d 218 (7th Cir. 1982), which was the original citation for the case, prior to rehearing. See 8 FCC Rcd at 2985 n.235. Upon rehearing, the court affirmed the factors on which we are relying.

¹²⁹ 8 FCC Rcd at 2986.

¹³⁰ The court stated that this could be available on a different channel than the video. 693 F.2d at 626.