

accepted WGN's future programming schedules as an "integral part of the program." The court in *WGN* held that if the information in the VBI is intended to be seen by the viewers who are watching the video signal, during the same interval of time as the video signal, and as an integral part of the program on the video signal, then the VBI and the video signal are one copyrighted expression and must both be carried if one is to be carried.¹³¹ While the court did not define an "integral part of the program," the WGN VBI information not only included local news, but also contained future programming schedules for WGN, and the court upheld the VBI as one copyrightable expression with the video signal.¹³²

45. Nielsen and INTV request reconsideration of the use of the *WGN* factors when defining "program-related," in so far as their application excludes the carriage of Source Identification Codes ("SID codes") which are used by Nielsen in the preparation of ratings.¹³³ Nielsen argues that because the SID codes are an integral part of ratings, which support the advertiser-based broadcast industry, a decision to exclude such codes adversely affects the programming and broadcast industries as a whole.¹³⁴ Nielsen states that our decision in this context is completely contrary to other decisions in which we have found such material to be program-related.¹³⁵ Nielsen also states that the exclusion of SID codes is expressly contrary to Congress' stated intent in adopting the 1992 Cable Act, and ignores specific Congressional

¹³¹ *Id.*

¹³² *Id.* at 627.

¹³³ Nielsen Petition at 17-21; INTV Petition at 9.

¹³⁴ Nielsen Petition at 19.

¹³⁵ Nielsen Petition at 11-14. Nielsen states that the Commission has long recognized the value of the information provided by SID codes. Nielsen notes that the Commission has authorized the transmission of SID codes for over 20 years in a variety of cases which expound upon the virtue of such codes. *See* Permitting Transmission of Program-Related Signals in the VBI, 43 FR 49331 (October 23, 1978); Program Identification Patterns, 43 FCC 2d 927 (1973); TV Visual Transmission for Program ID, 22 FCC 2d 779 (1970); TV Visual Transmission for Program ID, 22 FCC 2d 536 (1970); Radio Broadcast Services Order, 46 FR 40024 (August 6, 1981). In addition, Nielsen points to its Authorization, which states with respect to its Automated Measurement of Line-up ("AMOL") system's SID codes, "we believe Nielsen's AMOL systems qualifies as a 'special signal' and should be considered as an integral part of the associated programming within which it is transmitted and is not intended for the use of the viewing public." In *Audiocom Corp.*, 96 FCC 2d 898 (1984), the Commission stated that "SIDS, while not intended for reception by the public, is clearly related to the program material within which it is transmitted and to the normal operation of broadcast service It is . . . clear that the very nature and purpose of the information to be encoded requires that it be recorded and transmitted as an integral part of its associated program material." *Id.* at 899.

directions for the Commission not to transplant arbitrarily Copyright Act concepts to the Communications Act arena.¹³⁶ Nielsen refers to guidance provided in the legislative history with respect to program-relatedness.¹³⁷ Nielsen argues that if we continue to use the *WGN* analysis, we should at least require that SID codes, which are unique to, and transmitted with, main-channel programming, be carried by cable systems carrying such main-channel programming.¹³⁸ INTV further argues that the exclusion of such codes strikes at broadcasters' ability to compete with cable television.¹³⁹

46. NAB also petitions for reconsideration of the use of the copyright test of *WGN*. NAB argues that program-related material on subcarriers or in the VBI need not always be owned by the same copyright holder as the main program because whether or not the same copyright is held by both the main program and the material carried in the VBI has no bearing on whether that material is related to the main program, and therefore, the *WGN* test is inappropriate.¹⁴⁰ NAB argues that there are program-related services that would not meet this test, for example, previews of upcoming programs or a program schedule which may not be related to the main program being aired at that time, but are related to the broadcaster's program service and must therefore be retransmitted.¹⁴¹ NAB asserts that material which supplements the main program service of the broadcaster should be required to be carried by the cable operator and that "[o]nly if the material is part of a service separately provided to subscribers or consumers, the contents of which do [sic] 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."¹⁴²

47. In its late-filed comments, StarSight Telecast, Inc. ("StarSight") supports the Commission's reliance on the factors enumerated in the *WGN* test, but urges the Commission

¹³⁶ Nielsen Petition at 17-20.

¹³⁷ *Id.* at 9 n.7 (citing House Report at 101) ("[p]rogram-related . . . is not meant to include tangentially related matter such as a reading list shown during a documentary or the scores of games other than the one being telecast or other information about the sport or particular players.").

¹³⁸ Nielsen Petition at 22.

¹³⁹ INTV Petition at 9.

¹⁴⁰ NAB Petition at 3.

¹⁴¹ *Id.* at 4.

¹⁴² *Id.* at 4-5.

to defer to the broadcaster to decide what material meets the test.¹⁴³ StarSight asserts that if the primary video and the VBI material can be copyrighted together, then the VBI material is program-related and the cable operator must carry the material.¹⁴⁴ StarSight argues that, according to the *WGN* holding, if the broadcaster intends any portion of the information in the VBI to be seen as part of the broadcaster's expression, then it is program-related and cable operators must transmit the VBI with the primary video.¹⁴⁵

48. Time Warner and NCTA support the use of *WGN* to determine program-relatedness, and to exclude Nielsen source codes. Time Warner argues that NAB does not offer any reason why this test should not be used. Time Warner contends that the Commission correctly determined that Nielsen program codes are not program-related, rather they are intended to measure viewership levels and are not intended to be seen by the viewer of the program.¹⁴⁶ NCTA argues that the inclusion of information in the VBI is left to the discretion of the cable operator and should not be selected by the broadcaster.¹⁴⁷ NCTA states that program-related material is integral matter such as subtitles or translations, not tangentially related matter such as a reading list or sports scores. NCTA contends the test proposed by NAB is too broad and could include anything.¹⁴⁸

49. In response to NCTA and Time Warner, Nielsen claims that the use of the *WGN* test could actually preclude the carriage of subtitles for the hearing impaired while including program schedules and news stories not related to the programming.¹⁴⁹ Nielsen asserts that not only are SID codes program-related, but also items such as Cues, which tell a broadcaster or cable system where to insert advertisements. Nielsen contends that these codes are integrally related to the identification of the programming for advertiser-supported

¹⁴³ StarSight Comments at 9.

¹⁴⁴ *Id.* at 9-10.

¹⁴⁵ *Id.* In an *ex parte* presentation, StarSight requested that the Commission determine that its product, which is transmitted in the VBI, meets the *WGN* test. See Comments of StarSight at 2-4; Notification of *ex parte* presentation (May 5, 1994). We believe that such a request should not be resolved in the context of a rulemaking proceeding, but rather should be dealt with separately through the special relief process.

¹⁴⁶ Time Warner Opposition at 2-3.

¹⁴⁷ NCTA Opposition at 6 (citing House Report at 93).

¹⁴⁸ *Id.* at 6-7.

¹⁴⁹ Nielsen Petition at 2-3.

broadcast television and are integrally related to the main-channel programming.¹⁵⁰

50. We continue to believe that the factors articulated in *WGN* provide the best guidance for determining whether material in the VBI is program-related and, therefore, must be carried by the cable system.¹⁵¹ Accordingly, material that is intended to be seen by the viewers of the main program, during the same time interval as the main program, and which is an integral part of the main program will be entitled to carriage along with the main signal of the must-carry station. However, on reconsideration, we clarify that the factors set forth in *WGN* do not necessarily form the exclusive basis for determining program-relatedness. We believe there will be instances where material which does not fit squarely within the factors listed in *WGN* will be program-related under the statute. For example, on reconsideration, although SID codes may not precisely meet each factor in *WGN*, we find that they are program-related under the statute because they constitute information intrinsically related to the particular program received by the viewer. Further, SID codes provide important information that is useful to both broadcasters and cable operators. We note that the 1992 Cable Act recognized the importance of the national ratings period and prohibited cable operators from repositioning or deleting stations during that time.¹⁵² This interpretation is consistent with previous Commission decisions in which SID codes were found to be program-related in other contexts.¹⁵³ Finally, we reiterate that, in order to be program-related, it is not necessary that the copyright holder in the main program and in the material in the VBI be the same.

2. Channel Positioning

51. The 1992 Cable Act provides both commercial and NCE television stations which elect must-carry status the additional right to select the channel position on which they will be carried by the cable system, within certain specified options.¹⁵⁴ Alternatively, the

¹⁵⁰ *Id.* at 4.

¹⁵¹ NAB's proposal for making a determination with respect to program-relatedness is broader than either the statute or the legislative history support.

¹⁵² See Section 614(b)(9); 47 U.S.C. § 534(b)(9).

¹⁵³ See note 135.

¹⁵⁴ Section 614(b)(6) provides that the signals of a local commercial television station carried pursuant to the must-carry rules must be carried on either (1) the same channel on which the station is broadcast over-the-air, (2) the cable channel on which it was carried on July 19, 1985, or (3) the cable channel on which it was carried on January 1, 1992. The election, in the absence of conflicts, is left up to the station involved. See 47 U.S.C. § 534(b)(6). Similarly, Section 615(g)(5) requires that NCE signals carried pursuant to must-

broadcast station and cable operator may agree on a mutually acceptable alternative channel position. We note that, with respect to channel position, a qualified LPTV station enjoys the channel positioning rights of a commercial television station. Section 76.57 is being revised accordingly.

52. Based on comments received in response to the *Notice*, we declined in the *Report and Order* to adopt a formal priority structure for resolving conflicting channel positioning claims.¹⁵⁵ We stated that we expected compliance with the channel positioning requests of broadcasters "absent a compelling technical reason for not being able to accommodate such requests," and that "inconvenience, marketing problems, the need to reconfigure the basic tier or the need to employ additional traps or make technical changes" would not be sufficient reasons to deny a channel positioning request.¹⁵⁶ In addition, we determined that "only where placement of a signal on a chosen channel results in interference or degraded signal quality to the must-carry station or an adjacent channel, or causes a substantial technical or signal security problem, will we permit cable operators to carry a broadcast signal on a channel not chosen by the station."¹⁵⁷ We noted that most systems would be able to configure their service to meet this statutory requirement and that a cable system claiming that it cannot meet a channel positioning request for technical reasons will have to provide evidence that clearly demonstrates that inability.

53. In the *Order* adopted July 15, 1993, we addressed certain issues relating to continued carriage of retransmission consent stations and the channel position for "default" must-carry stations.¹⁵⁸ In that *Order*, we stated that cable systems which are required to carry the signal of a default station "shall place that signal on one of the statutorily defined positions, at the system's discretion."¹⁵⁹ Although the footnote to that sentence correctly stated that the station licensee makes the election, the text incorrectly stated "at the system's

carry requirements must appear on the cable system channel number on which the qualified local NCE station is broadcast over-the-air, or on the channel on which it was carried on July 19, 1985, at the election of the station. In either case, another channel number that is mutually agreed upon by the station and the cable operator may be selected. See 47 U.S.C. § 535(g)(5).

¹⁵⁵ 8 FCC Rcd at 2988.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ 8 FCC Rcd 5083 (1993).

¹⁵⁹ *Id.* at 5084.

discretion."¹⁶⁰ We clarify that, as required by the 1992 Cable Act, the choice of statutorily defined channel position is made by the station, not the cable system.¹⁶¹ The *Order* also determined that, in the event of a conflict, the station making an affirmative election has priority over the default station.¹⁶² Finally, we stated that, where the station making an affirmative election has selected the only statutory channel position available to the default station, the cable system may place the default station on a channel of the cable system's choice, so long as that channel is included on the basic tier.¹⁶³ Section 76.57 of our rules was amended to reflect the channel positioning options discussed and adopted in the *Order*.¹⁶⁴

54. NCTA requests a revision to our rules relating to on-channel carriage of UHF stations.¹⁶⁵ NCTA argues that UHF stations should not have on-channel carriage rights where the channel request is outside an operator's basic service tier. NCTA states that the Commission erroneously made the assumption that most cable systems could comply with the on-channel carriage requests of UHF stations by reconfiguring their basic service tier.¹⁶⁶ NCTA claims that this assumption ignores that, for many systems, reconfiguring can only be accomplished through significant expenditures of time and money, and that such reconfiguring conflicts with the ability of subscribers to "buy through" services offered on a per-program or per-channel basis.¹⁶⁷

55. NCTA claims that providing on-channel carriage to a station outside the system's basic tier line-up entails significant operational and technical problems.¹⁶⁸ NCTA asserts that in order to isolate the UHF station, the cable operator must use filtering devices

¹⁶⁰ *Id.* at 5084 and n.14.

¹⁶¹ Section 614(b)(6); 47 U.S.C. §534(b)(6).

¹⁶² *Id.* at 5084.

¹⁶³ *Id.* at n.16.

¹⁶⁴ *See* 47 C.F.R. § 76.57(e).

¹⁶⁵ NCTA Petition at 8-12.

¹⁶⁶ *Id.* at 9.

¹⁶⁷ *Id.* at 9, 11. NCTA is referring to the requirement in Section 3 of the 1992 Cable Act which provides that subscribers to the basic tier should be permitted to purchase pay-per-view or per-channel services without being required to purchase intermediate tiers of service. *See* 47 U.S.C. § 543(b)(8); *Report and Order*, 8 FCC Rcd 2274 (1993) ("Tier Buy-Through Order").

¹⁶⁸ NCTA Petition at 9-10.

such as traps, and that, as the number of traps increase, systems experience technical signal quality problems which in turn make the system unable to comply with technical standards. Moreover, NCTA states, the costs of installing traps can be prohibitive, due to, for example, the need to replace all filters on each cable-connected television set in each home.¹⁶⁹ NCTA also claims that the on-channel requirements can cause problems on addressable systems. For instance, NCTA asserts, while a system could scramble all channels surrounding the UHF channel in order to enable basic-only subscribers access to all must-carry stations, it would be required to force expanded basic subscribers to obtain descrambling converter boxes in order to view tiered services that previously were protected by a filter trap.¹⁷⁰

56. NAB and INTV object to NCTA's request to deny on-channel carriage to UHF stations.¹⁷¹ NAB states that NCTA's alleged technical problems may, in some instances, make compliance difficult, but that NCTA's solution would preclude a UHF station from ever having on-channel carriage.¹⁷² NAB asserts that the 1992 Cable Act creates an absolute right to channel position, making no distinction between UHF and VHF signals, and providing no technical difficulty exception.¹⁷³ NAB and INTV point out that UHF stations have historically had the worst channel position, and that few UHF stations will insist on a high on-channel carriage position far removed from other broadcast station channel positions.¹⁷⁴ In addition, NAB contends, where a cable system does have a severe technical problem, the Commission has already stated that it would grant a waiver. NAB asserts that while NCTA complains that the standard for obtaining a waiver is too high, it fails to explain why or to propose any alternative standard.¹⁷⁵

57. The 1992 Cable Act provides that the channel position of a station which has elected must-carry rights is a decision to be made by the broadcaster from among the listed statutory alternatives.¹⁷⁶ The Act does not distinguish between VHF and UHF stations. We emphasize that our statements in the *Report and Order* regarding channel positioning apply to

¹⁶⁹ *Id.* at 10.

¹⁷⁰ *Id.* at 10-11. *But see supra* para. 16, relating to the cost to subscribers for converter boxes provided for the sole purpose of obtaining must-carry signals.

¹⁷¹ NAB Opposition at 1-3; INTV Opposition at 5.

¹⁷² NAB Opposition at 2.

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 3; INTV Opposition at 5.

¹⁷⁵ NAB Opposition at 3; INTV Opposition at 5.

¹⁷⁶ Section 614(b)(6); 47 U.S.C. § 534(b)(6).

UHF, in addition to VHF, stations. As noted there, cable operators must comply with the channel positioning requirements absent a compelling technical reason.¹⁷⁷ Further, in response to a broadcaster's complaint regarding denial of a channel positioning request, a cable system will be required to provide evidence to the Commission clearly demonstrating that the operator cannot meet the request for technical reasons.¹⁷⁸ As part of such a showing, a cable operator may present evidence as to the costs involved in remedying the technical problem.

3. Signal Quality

58. In the *Report and Order*¹⁷⁹ and the *Clarification Order*¹⁸⁰ we addressed issues relating to the signal quality of a broadcast station asserting must-carry rights. We noted that Section 614(h) established specific minimum signal levels for a good quality signal of a commercial television station (*i.e.*, -45 dBm for UHF signals and -49 dBm for VHF signals). Neither the 1992 Cable Act nor the Commission's *Orders* specifically stated what would be considered a "good quality signal" for must-carry purposes with respect to noncommercial stations, educational translator stations, and low power television stations.¹⁸¹ We do so now, on our own motion.

59. We note that in a *Memorandum Opinion and Order*,¹⁸² the Mass Media Bureau decided to utilize the standards for commercial television stations as *prima facie* tests to initially determine, absent other evidence, whether noncommercial stations place adequate signal levels over a cable system's principal headend.¹⁸³ The Mass Media Bureau has relied

¹⁷⁷ 8 FCC Rcd at 2988. As noted above, inconvenience, marketing problems, the need to reconfigure the basic tier or to employ additional traps or make technical changes are not sufficient reasons for denying the channel positioning request of a must-carry signal. Only where placement of a signal on a chosen channel results in interference or degraded signal quality to the must-carry station or an adjacent channel, or causes a substantial technical or signal security problem will we permit cable operators to carry a broadcast station on a channel not chosen by the station. *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* at 2988-91.

¹⁸⁰ 8 FCC Rcd at 4144.

¹⁸¹ Section 615(g)(4) states that the Commission may define a "signal of good quality" for noncommercial stations.

¹⁸² See *Memorandum Opinion and Order* (Independence Public Media of Philadelphia, Inc. against Suburban Cable TV Co., Inc.) (CSR-3806-M), 8 FCC Rcd 6319 (1993).

¹⁸³ *Id.*

on this test in processing must-carry complaint cases and we believe that is appropriate. With respect to low power and NCE translator stations, we are adopting the same signal quality standard of -49 dBm for VHF and -45 dBm for UHF signals.

60. With respect to the manner of testing for a good quality signal, we find that the Mass Media Bureau has adopted an appropriate method for measuring signal strength in the *Memorandum Opinion and Order*.¹⁸⁴ Generally, if a test measuring signal strength results in an initial reading of less than -51 dBm for a UHF station, at least four readings must be taken over a two-hour period. If the initial readings are between -51 dBm and -45 dBm, inclusive, readings must be taken over a 24-hour period with measurements not more than four hours apart to establish reliable test results. For a VHF station, if the initial readings are less than -55 dBm, we believe that at least four readings must be taken over a two-hour period. Where the initial readings are between -55 dBm and -49 dBm, inclusive, readings should be taken over a 24-hour period, with measurements no more than four hours apart to establish reliable test results.¹⁸⁵

61. Cable operators are further expected to employ sound engineering measurement practices. Therefore, signal strength surveys should, at a minimum, include the following: (1) specific make and model numbers of the equipment used, as well as its age and most recent date(s) of calibration; (2) description(s) of the characteristics of the equipment used, such as antenna ranges and radiation patterns; (3) height of the antenna above ground level and whether the antenna was properly oriented; and (4) weather conditions and time of day when the tests were done. We believe that adherence to these procedures and requirements will result in fewer disputes over the signal quality of broadcasting stations.¹⁸⁶

D. Procedural Requirements

1. Compensation for Carriage

62. Copyright Liability.¹⁸⁷ Under the 1992 Cable Act, a cable operator is generally

¹⁸⁴ *See id.* We note that these standards have been followed by the Cable Services Bureau.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* at 6319-20.

¹⁸⁷ We note that the Satellite Home Viewer Act of 1994, P.L. 103-369, 108 Stat. 3477, which was signed into law on October 18, 1994, includes a provision to amend Section 111(f) of title 17, United States Code, specifically with reference to the definition of "local service area of a primary transmitter" by inserting after "April 15, 1976," the following: "or such station's television market as defined in section 76.55(e) of title 47, Code of Federal Regulations (as in effect on September 18, 1993), or any modifications to such television

not required to carry a station that would otherwise qualify for must-carry status if the station would be considered distant for copyright purposes,¹⁸⁸ unless the station indemnifies the cable operator for its copyright liability.¹⁸⁹ The Commission required cable operators to notify local commercial and noncommercial stations by May 3, 1993 that they may not be entitled to must-carry status because their carriage may cause an increased copyright liability.¹⁹⁰ In the *Report and Order*, the Commission stated that it expected cable operators and broadcasters to cooperate with each other to ensure that operators are compensated for the cost of carriage of "distant" must-carry signals and that broadcast licensees pay only their fair share.¹⁹¹ The Commission stated that each licensee should be responsible for the increased copyright costs specifically associated with carriage of its station as a must-carry signal and that stations should be counted in the order they satisfy all the necessary conditions for attaining must-carry status. The Commission also determined that it would be reasonable for a cable operator to receive a written commitment for such payments from a broadcaster in return for an estimate of the broadcaster's expected copyright liability, based on previous payments and financial information.

63. On May 28, 1993, the Commission adopted a *Clarification Order* ("Clarification") that, among other things, addressed certain copyright issues.¹⁹² We stated that

market made, on or after September 18, 1993, pursuant to section 76.55(e) or 76.59 of title 47 of the Code of Federal Regulations." We acknowledge that there may be some effect on pending petitions and on our current rules. We will revisit, to the extent necessary, those rules and policies which may be affected.

¹⁸⁸ See Copyright Act, 17 U.S.C. § 111.

¹⁸⁹ Sections 614(b)(10) and 615(i)(2). However, a qualified local noncommercial station that has been carried continuously since March 29, 1990 is not required to reimburse a cable operator for its copyright liability to retain its must-carry status. See 47 C.F.R. §§ 76.55(c)(2) and 76.60(b). In addition, a distant noncommercial station that has been imported prior to March 29, 1992, and which continues to be imported to meet the statutory requirements of Section 615, shall not be required to reimburse for copyright liability. See *supra* para. 7, regarding the importation requirements; see also 47 C.F.R. §§ 76.55(b)(3), 76.55(c)(2), and 76.60.

¹⁹⁰ See 47 C.F.R. § 76.58(d).

¹⁹¹ 8 FCC Rcd 2993. We clarify that, in situations where copyright liability is incurred for carriage in some of the communities served by a single cable system, the broadcaster must indemnify the operator for that copyright liability for carriage in any community served by the system, unless the operator is able to provide different channel line-ups to the different communities.

¹⁹² 8 FCC Rcd 4142 (1993).

we would require a cable operator to provide a broadcast station with a good faith estimate of the potential copyright liability for carriage of the station during the next copyright accounting period, as well as 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. The cable operator, however, is not required to make legal judgments pertaining to the amount of indemnity involved. In addition, a cable operator is required to provide such information within three business days of receipt of a written request from a broadcaster.¹⁹³ 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.

64. In their reconsideration petitions, NAB and INTV state that we should not require that agreements for copyright reimbursement be open ended, rather parties should be permitted to limit such agreements to one or more semi-annual accounting periods.¹⁹⁴ Petitioners argue that any requirement that agreements to indemnify for copyright cover the entire three-year election period may force broadcasters to pay costs that they do not wish to, especially if the copyright liability changes for some unforeseen reason.¹⁹⁵ NAB specifically proposes that broadcasters be required to make a minimum one-year commitment, with a notice of at least 60 days prior to the next semi-annual accounting period before indemnification can be terminated.¹⁹⁶ Cable interests reject the proposal to allow agreements for less than the entire three-year election period.¹⁹⁷ They contend that the broadcasters' approach is contrary to the statutory scheme that is based on a three-year election period. Furthermore, NCTA asserts that to allow shorter agreements essentially allows a station to change its election to retransmission consent.¹⁹⁸ In its reply, NAB counters that its recommendations regarding the commitment for indemnification is consistent with the decision in the *Clarification* that the three-year election period has no bearing on when a station is able to take steps necessary to secure its must-carry rights.¹⁹⁹

¹⁹³ 8 FCC Rcd at 4144. In its opposition, Time Warner argues that cable operators should be given at least seven days, not three, to respond to any requests for information regarding copyright liability. Time Warner Opposition at 7. We reject Time Warner's proposal and note that in the *Clarification* we observed that the information that must be provided to broadcasters should be readily available to the cable operator. 8 FCC Rcd at 4144.

¹⁹⁴ NAB Petition at 10; INTV Petition at 5.

¹⁹⁵ INTV Petition at 2-3; NAB Petition at 10.

¹⁹⁶ NAB Petition at 10.

¹⁹⁷ NCTA Opposition at 2; Time Warner Opposition at 7-8; United Video Opposition at 5.

¹⁹⁸ NCTA Opposition at 2.

¹⁹⁹ NAB Reply at 2-3.

65. We concur with INTV and NAB that stations should be able to commit to copyright indemnification for periods shorter than the three years specified in the 1992 Cable Act. In light of the numerous factors that affect the liability payments, we believe that commitments can be for periods as short as one year (two six-month accounting periods). Otherwise, a station may be required to make a commitment that cannot be fulfilled, thereby leading to protracted litigation. However, in fairness to cable operators, we support NAB's proposal that broadcasters notify cable operators 60 days prior to termination of any agreements to indemnify them for copyright liability. In particular, this will provide sufficient time for cable operators to notify subscribers regarding the deletion of the station.²⁰⁰ Further, we disagree with NCTA that to permit agreements for periods of less than three years essentially allows stations to revert to retransmission consent. A station electing must-carry status remains a must-carry station for the entire three-year period, but, in situations where the station is considered distant for copyright purposes, a cable operator is not obligated to honor that election unless it receives a commitment for copyright reimbursement. Further, we note that where a 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.²⁰¹

66. In a related matter, NAB requests that cable operators provide broadcasters with advance notice of any actions, such as retiering, that may affect the copyright liability before the broadcaster is required to enter into an indemnification agreement.²⁰² Time Warner states that the requirement that cable operators inform stations of plans that might affect copyright liability has no basis in law and that the requirement of an estimate of liability should be sufficient.²⁰³ United Video opposes such a requirement because many of the changes that affect copyright liability are not predictable.²⁰⁴

67. NAB further asks for a clarification that a station need not agree to indemnify a cable system unless and until copyright liability actually is incurred. NAB claims that some cable operators are requesting commitments for indemnification should such liability be incurred at any time during the three-year election period, even though there is no copyright liability for carriage of the station at this time.²⁰⁵

²⁰⁰ See 47 C.F.R. § 76.58. We note that this rule also requires notification of the affected broadcast station, although in such instances the deletion will be at the request of the broadcaster.

²⁰¹ See 8 FCC Rcd 4142.

²⁰² NAB Petition at 9-10.

²⁰³ Time Warner Opposition at 9.

²⁰⁴ United Video Opposition at 4.

²⁰⁵ NAB Reply at 4.

68. We find it appropriate to require cable operators to notify a broadcaster of any change in service that will have an unexpected change on the amount of copyright reimbursement that will be required to maintain its must-carry status.²⁰⁶ We believe it is reasonable to expect a cable operator to inform a must-carry station when the estimated cost of continued carriage may change. We also agree with NAB that it is inappropriate for broadcasters whose stations do not cause a copyright liability for the cable system to be required to commit to indemnification before such liability is actually incurred. In both cases, a change in a station's potential copyright liability may affect its decision whether to retain its must-carry status by indemnifying the cable operator or to cede its must-carry rights. Accordingly, we will require cable operators to notify broadcast stations at least 60 days prior to any unexpected change on their copyright status. This will allow sufficient time for the station to determine whether it wishes to continue carriage and, if not, it will give the cable operator enough time to send out the required notice of deletion of a signal. However, the broadcast station must indemnify the cable operator for costs incurred during that copyright accounting period, but not for additional costs once the broadcaster has notified the cable operator that it will discontinue must-carry status in light of changes proposed, but not yet effectuated, by the cable operator.

69. Calculation of station liability. INTV and NAB request clarification regarding the method for determining the incremental copyright liability attributable to a particular station.²⁰⁷ NAB proposes a method for averaging rates over affected stations as a way to prevent cable operators from manipulating the copyright liability associated with a particular station.²⁰⁸ Under NAB's approach, if more than one local station is carried pursuant to a reimbursement agreement, and none is carried at the 3.75% penalty rate, the lowest marginal royalty rates paid for the total number and types of non-3.75% stations should be added and then divided among those stations in proportion to their distant signal equivalent values.²⁰⁹ Thus, each station will reimburse the system for the average rate paid for the entire group of permissible (non-3.75%) distant stations, and the system will be reimbursed for the entire amount of royalties paid for carriage of these stations. NCTA and Time Warner oppose NAB's proposed formula.²¹⁰ In particular, NCTA states that each distant station's share is a function of a statutorily established formula, and therefore an operator cannot manipulate the

²⁰⁶ For example, as petitioners point out, there are some circumstances where a permitted signal subject to a .563% royalty rate may become a penalty station and require a payment of 3.75% of the system's gross revenues. See NAB Reply at 3.

²⁰⁷ INTV Petition at 7; NAB Petition at 11-12.

²⁰⁸ NAB Petition at 11-12; NAB Reply at 5-7.

²⁰⁹ NAB notes that its proposal does not deal with signals which are currently being carried for which a 3.75% royalty rate is incurred. NAB Petition at 12.

²¹⁰ NCTA Opposition at 3-4; Time Warner Opposition at 9-10.

process. NCTA is also concerned that cable operators will not be fully reimbursed if this methodology is used. To avoid protracted disputes, NCTA argues that the cable operator must be able to designate which distant signal accounts for which incremental cost. United Video supports the decision in the *Report and Order* to calculate the incremental copyright fees on the basis of the royalty fee associated with the last added distant signal.²¹¹ It and Time Warner explain that most stations that are added will be subject to the 3.75% penalty rate since cable operators are already carrying the maximum number of distant signals permitted at the lower rate.²¹²

70. We indicated in the *Report and Order* that increased copyright liability should be specifically associated with the carriage of each station and further that "stations should be counted in the order they satisfy all the necessary conditions for attaining must-carry status."²¹³ However, this statement does not accurately reflect the reality of copyright liability, nor does it adequately address the concern that cable operators may have the ability to manipulate the liability of stations which have been historically carried on the system, or which are added pursuant to must-carry.²¹⁴ We note that NAB is correct in stating that the copyright liability is determined according to the sequence by which the signal is added to the system.²¹⁵ Section 111(d) of Title 17 provides the method for calculating copyright royalties to be paid by a cable system. In addition, the copyright rules provide specific information regarding statements of account and methods of computation for the payment of copyright royalties.²¹⁶ We agree with NCTA that the copyright rules determine the manner in which the cable operator will have to pay royalties for each station carried.

71. In an effort to eliminate confusion in making the determination of increased liability associated with each station, we believe that stations which were carried prior to the implementation of must-carry should continue to be accounted in the same manner with respect to the sequence of signal carriage. Stations which were or are added by the system should have their copyright liability based on the sequence by which the signal was or is added to the system. In the event multiple signals are added on the same day, the sequence of incremental increase in liability should be based on the order in which the stations met all necessary conditions for attaining must-carry status. We anticipate that providing the station

²¹¹ United Video Opposition at 1.

²¹² *Id.* at 3; Time Warner Opposition at 10.

²¹³ 8 FCC Rcd at 2993.

²¹⁴ NAB Petition at 11; United Video Petition at 1-3.

²¹⁵ NAB Petition at 11.

²¹⁶ See Statements of Account Covering Compulsory Licenses for Secondary Transmission by Cable Systems, 37 C.F.R. § 201.17.

with the statement of account filed with the Copyright Office will ensure the station the opportunity to review how this process is achieved. Therefore, we decline to adopt an alternative system for determining the copyright liability of individual stations' carriage on a cable system.

72. The Commission's must-carry requirements became effective on June 2, 1993, during a Copyright Office accounting period.²¹⁷ INTV argues that stations should be required to pay no more than a *pro rata* share of the first accounting period for carriage between June 2 and June 30.²¹⁸ NCTA and Time Warner oppose this approach and state that the Copyright Office does not allow prorations of such payments and therefore stations should bear the full cost of carriage for the entire six-month period.²¹⁹ Specifically, Time Warner observes that for a must-carry station that was added on June 2, the copyright liability is calculated as though the station were carried for the entire period.²²⁰ INTV, in its reply, contends that NCTA and Time Warner misinterpret its *pro rata* approach. It states that it was referring only to situations where the cable operator carried the signal prior to June 2 without regard to reimbursement. In such cases, INTV argues that the cable operator should not be entitled to a windfall from the station.²²¹

73. Prior to the implementation of the must-carry rules, carriage of any station was at the discretion of the cable operator. In such cases, the cable operator carried such a signal even though it incurred a copyright liability for the period ending June 30, 1993. That liability did not increase due to a change in our regulations for stations which had previously been carried, and therefore the liability had already been assumed. We do not believe it appropriate to require the broadcast station to reimburse for that liability, even if carriage became mandatory on June 2, 1993. However, with respect to a broadcast station which was not previously carried by the cable system and which immediately asserted its must-carry rights on June 2, 1993, we believe that such station should reimburse the cable operator for any increased copyright liability incurred as a result of adding that signal between June 2, 1993 and June 30, 1993. Therefore, in the case of a station that agreed to be added on June 2 and committed to indemnification, the station is responsible for the whole semi-annual fee. In particular, the station had the opportunity to postpone satisfying the conditions of must-carry status until the first day of the next Copyright Office accounting period.

²¹⁷ 47 C.F.R. § 76.56(b). The Copyright Office divides the year into two accounting periods -- January 1 to June 30 and July 1 to December 31.

²¹⁸ INTV Petition at 5.

²¹⁹ NCTA Opposition at 2; Time Warner Opposition at 10-11.

²²⁰ Time Warner Opposition at 10.

²²¹ INTV Reply at 1-2.

74. INTV seeks to establish a rebuttable presumption that all stations are significantly viewed throughout their ADIs. It argues that this option would not alter the 1976 signal carriage rules, but would eliminate the copyright liability for carriage of such stations.²²² Time Warner and NCTA oppose this proposal because it would defeat the intent of the 1992 Cable Act to exclude from must-carry those stations that are considered distant for copyright purposes. In addition, petitioners assert that this proposal improperly shifts the burden to cable operators to rebut the presumption.²²³ In its reply, INTV claims that NCTA and Time Warner offer no valid reason for rejecting its proposal to presume a station is significantly viewed throughout its ADI. It also argues that, since parties would only come to the Commission to rebut the significantly viewed status of a station, the argument regarding the potential administrative burden is speculative.²²⁴

75. We recognize that there may be some merit in considering alternative procedures for addressing significant viewing showings and that there may be both policy and efficiency reasons for attempting to parallel ADI and significant viewing service area decisions. The INTV proposal, however, is in our view sufficiently novel that it is not appropriately considered in the context of this proceeding. This is particularly the case since the significant viewing process has ramifications in terms of other rules, such as the network nonduplication rules, that are not the subject of this proceeding.²²⁵

2. Remedies

76. Section 615(d)(1) and Section 615(j) provide for the resolution of carriage and channel positioning disputes between a broadcast station and a cable operator. With respect to commercial stations, the 1992 Cable Act requires a local commercial station to notify the cable operator of an alleged violation, and requires the cable operator to respond to such a notice, prior to the station's filing a complaint with the Commission. However, with respect to NCE stations, the 1992 Cable Act permits a NCE station to file a complaint with the Commission prior to notifying the cable operator. In the *Report and Order* we discussed these provisions and adopted rules for their implementation.²²⁶ Upon review of those rules, we find it necessary to make some adjustments on our own motion, as they relate to the filing of a complaint by a NCE station.

²²² INTV Petition at 6.

²²³ NCTA Opposition at 2-3; Time Warner Opposition at 13.

²²⁴ INTV Reply at 5.

²²⁵ See also discussion at n.187, *supra*, with respect to the amendment to Section 111(f) of title 17 of the United States Code.

²²⁶ See 47 C.F.R. § 76.7, relating to the filing of petitions for special relief.

77. As indicated above, a NCE station is not required to notify a cable operator prior to filing a complaint with the Commission. In the *Report and Order*, we stated that "it is anticipated, though not required, that if there is any question relating to the carriage obligations of the cable system, the NCE station will make inquiries of the cable system prior to filing a complaint."²²⁷ We also stated that if a NCE station wanted to follow the procedures outlined for complaints filed by a commercial broadcasting station, it could do so as long as it notified the cable system of such intent. In establishing the time frames by which any broadcaster (commercial, noncommercial or LPTV) should file a complaint, we stated that such complaint should be filed within 60 days of an "affirmative action" by a cable operator which directly affects the carriage rights of a broadcast station.²²⁸ We then proceeded to define "affirmative action" as the denial by a cable operator of a request for either carriage or channel position, or the failure of a cable system to respond to such a demand within the required 30-day time frame.²²⁹ It appears that by establishing such a 60-day requirement based upon an "affirmative action," we have made the complaint procedure for NCE stations more rigorous than was intended, either by our rule or the intent of the 1992 Cable Act. Therefore, for the purposes of a NCE station complaint, we are revising Section 76.7 to allow a NCE station to file a complaint at any time it determines that its carriage rights have been violated. We believe this better reflects the language of the 1992 Cable Act and will eliminate the possibility that a NCE complaint would be dismissed based solely on a failure to meet the 60-day time frame, prior to having the merits of the complaint considered.

III. RETRANSMISSION CONSENT

A. Definition Issues

1. Multichannel Video Programming Distributors.

78. Section 325(b)(1) provides that "no cable system or other multichannel video programming distributor shall retransmit the signal of a broadcasting station, or any part thereof, . . ." except with express authorization of the station or if carried pursuant to must-carry.²³⁰ Section 602(12) of the Communications Act defines a multichannel video programming distributor as "a person such as, but not limited to, a cable operator, a multichannel multipoint distribution service (MMDS), a direct broadcast satellite service, or a television receive-only satellite program distributor, who makes available for purchase, by

²²⁷ 8 FCC Rcd at 2994.

²²⁸ *Id.* at 2995.

²²⁹ *Id.*

²³⁰ Section 325(b)(1); 47 U.S.C. § 325(b)(1).

subscribers or customers, multiple channels of video programming."²³¹

79. In the *Report and Order* we found that "local broadcast signals provided by MATV facilities or VHF/UHF antennas on individual dwellings situated within the station's broadcast service area are not subject to retransmission consent, provided that these signals are available without charge at the resident's option."²³² We further stated that this exemption applies to MATV-SMATV, MMDS-SMATV and MMDS-individual antenna combinations, so long as there is no charge. The analogy used was that of an individual purchasing and installing a roof top antenna to receive broadcast signals.²³³ This exception to retransmission consent was added to the Commission's rules as Section 76.64(e).²³⁴ The determining factor used in the rule relates to antenna ownership, not the provision of the service free-of-charge.

80. The Wireless Cable Association ("WCA") contends that the Commission should eliminate the requirement that the wireless cable operator must divest itself of ownership and control of the VHF/UHF antenna in order to avoid retransmission consent obligations.²³⁵ WCA claims that wireless cable operators provide service to individual homes and multiple dwelling units through a combination of a standard VHF/UHF antenna on the same mast as a microwave antenna and that wireless operators generally offer the VHF/UHF antenna as an amenity to ensure that all of the signals received by the subscriber are of the highest quality. Further, explains WCA, such operators generally do not charge for the provision of this service to the extent that, in multiple dwelling units, all residents (including non-subscribers) receive the local broadcast signals over the VHF/UHF antenna supplied by the wireless cable operator. With respect to single family homes, WCA states that the wireless operator does not charge for the antenna and the operator retains ownership so that if the subscriber terminates service, both the VHF/UHF antenna and the microwave antenna are recoverable

²³¹ Section 602(12); 47 U.S.C. § 522(12).

²³² 8 FCC Rcd at 2997.

²³³ *Id.*

²³⁴ 47 C.F.R. § 76.64(e) states that "[p]rovision of local broadcast signals by master antenna television (MATV) facilities or by VHF/UHF antennas on individual dwellings is not subject to retransmission consent, provided that these signals are available without charge at the residents' option. That is, the antenna facilities must be owned by the individual subscriber or building owner and not under the control of the multichannel video programming distributor." On October 5, 1993, at the request of the Wireless Cable Association ("WCA") and the National Private Cable Association ("NPCA"), we adopted a *Stay Order* with respect to Section 76.64(e), pending our resolution of this issue. *Stay Order*, 9 FCC Rcd 2678.

²³⁵ WCA Petition at 3.

and may be reused.²³⁶

81. WCA argues that the ownership or control of the antenna should not be the determining factor as to whether retransmission consent must be obtained. WCA proposes instead that as long as the broadcast signals are provided free-of-charge over a VHF/UHF antenna, then the ownership of the antenna should not matter.²³⁷ WCA, in its motion for a stay, pointed to the unintended effects of the existing rule. WCA claims that where a wireless operator has obtained retransmission consent from all but one local broadcaster, that broadcaster's refusal will effectively negate the consent of all other broadcasters.²³⁸ The wireless operator would immediately be forced to disable or retrieve all of the VHF/UHF antennas in the field. Without the ability to provide common VHF/UHF antenna service to homeowners, even without a charge, to improve reception of local broadcast signals, the wireless cable operator will be unable to effectively compete in the marketplace. Alternatively, if the operator must immediately transfer the ownership and control of the antennas to each individual subscriber, at a significant financial loss to the operator, such operator will be unable to reuse such equipment. If the subscriber is asked to pay the operator for the antenna, WCA claims that most subscribers will discontinue service.

82. Cable operators oppose WCA's request, claiming that such a revision to the rule would create a loophole for wireless cable operators to avoid the retransmission consent provisions entirely. NCTA states that a wireless operator could simply structure its billing in such a way as to indicate that no charge was made to the subscriber for the receipt of broadcast signals, and the operator would be exempt from the provisions.²³⁹ Time Warner argues that the legislative history clearly shows that all multichannel distributors are required to obtain consent, and there is no indication that MMDS operators should be given any special treatment. Time Warner states that Congress intended that a viewer who owns his own antenna is very different from the viewer who receives the signal through an antenna owned by the MMDS operator.²⁴⁰ In the latter case, the MMDS operator is acting in the same capacity as a traditional cable service. NCTA argues that we should not allow "MMDS operators to gain a competitive advantage over cable systems and take themselves outside the constraints of retransmission consent," and that such action can not be "squared with the

²³⁶ *Id.* at 5-7.

²³⁷ *Id.* at 8-9.

²³⁸ *id.* at 3 n.5.

²³⁹ NCTA Opposition at 9.

²⁴⁰ Time Warner Opposition at 15-16 (citing Senate Committee on Commerce, Science and Transportation, S. Rep. No. 92 ("Senate Report"), 102d Cong., 1st Sess. (1991) at 34).

[1992 Cable] Act and should not be adopted."²⁴¹

83. We agree with NCTA and Time Warner that a wireless operator meets the definition of a multichannel video programming distributor ("MVPD") and generally would be responsible for obtaining retransmission consent for all broadcast signals retransmitted over their system. We are cognizant of Congress' desire not to affect a viewer who receives these broadcast signals over an antenna not owned by a MVPD.²⁴² The application of the retransmission consent requirement to MMDS and SMATV facilities was an effort to create regulatory parity between these types of operations and cable systems. In the *Report and Order*, the Commission expressed its belief that to the extent the signal reception involved was under the control of the individual subscriber and the signals involved were not being "sold" by the MMDS and SMATV operators, the consent requirement should not apply. In addition, and in recognition of the concerns raised by WCA, we find that retransmission consent is not required if the broadcast signal reception service is received without a separate subscription charge and the antenna is either (1) owned by the subscriber; or (2) under the control of the subscriber and available for purchase by the subscriber upon termination of service. We believe that this interpretation upholds Congressional intent without causing undue disruption to subscribers. We will amend Section 76.64(e) of our rules to reflect this change.

B. The Scope of Retransmission Consent

1. Radio

84. In the *Report and Order* we concluded that Congress intended to provide retransmission consent to all broadcast signals, including those retransmitted by radio.²⁴³ Petitions for reconsideration argue that the retransmission consent provisions of Section 325 and the must-carry provisions of Sections 614 and 615 were intended to work in concert and, therefore, because the must-carry provisions apply only to broadcast television signals, Congress intended retransmission consent to apply only to broadcast television signals.²⁴⁴ Cable operators argue that most cable systems carry radio stations as an all-band offering, meaning that as with any standard radio receiver, all stations which deliver a signal to the antenna are carried on the system. They contend that the refusal of one radio station to grant consent would preclude all other radio stations from being carried in the all-band method.

²⁴¹ NCTA Petition at 8-9.

²⁴² See Senate Report at 36.

²⁴³ 8 FCC Rcd at 2998.

²⁴⁴ CATA Petition at 7-8; Newhouse Broadcasting Petition at 8-10; United Video Opposition at 5-6. Time Warner supports these requests.

Several commenters assert that cable operators are more likely to drop the all-band radio offering, rather than attempt to bargain for retransmission consent from all stations carried.²⁴⁵

85. We continue to believe that Section 325, as amended by the 1992 Cable Act, applies to radio signals as well as television signals. The statutory language and the legislative history support this conclusion and we have not been presented with a credible argument for reading the statute otherwise.²⁴⁶ Section 325(b)(2) expressly exempts certain broadcast stations from the consent provision, and radio stations are not included in these exceptions.²⁴⁷ However, with respect to the difficulty of obtaining consent for all stations carried in an all-band method, we believe that cable systems have a legitimate concern. In order to make possible the offering of an "all-band" FM radio service, cable operators need only seek the consent of stations within the usual reception area of a high power FM station. Therefore, cable systems must obtain consent from all stations which are located within 92 km (57 miles) of the cable system's receiving antenna(s).²⁴⁸ Other stations, in the absence of specific notice to the contrary, will be presumed to be insufficiently present to be considered carried in the all-band reception mode. This should eliminate concern over obtaining consent from signals which fade in and out of an all-band offering due to atmospheric conditions.²⁴⁹ Alternatively, a cable system may choose to use a filtering device to eliminate those radio stations from an all-band offering for which the cable operator is unable or unwilling to obtain consent. This change will be reflected in Section 76.64 of our rules, under a new subpart (n).

2. Low Power Television Stations

86. In concluding in the *Report and Order* that low power television stations are entitled to retransmission consent, we stated that low power television stations are "television

²⁴⁵ CATA Petition at 7-8; United Video Opposition at 5-6.

²⁴⁶ See Senate Report at 34-36.

²⁴⁷ Section 325(b)(2); U.S.C. § 325(b)(2).

²⁴⁸ The distance of 92 km was selected as a result of the Commission's allotment policies relating to FM radio stations. Because the predicted service contour of a Class C FM radio station is 92 kilometers, the use of such a distance will ensure that retransmission consent is obtained from FM radio stations received by the cable system's receiving antenna(s). See 47 C.F.R. § 73.211.

²⁴⁹ We note that although the cable operator is not required to obtain retransmission consent from stations outside the 92 km zone, any such station that is received and retransmitted by the cable system may affirmatively refuse to grant, or negotiate for compensation in return for granting, retransmission consent to the cable operator.

broadcast stations."²⁵⁰ We incorrectly stated, however, that a low power station meets the definition of television broadcast station in Section 76.5 of our rules. Section 76.5(b) defines television broadcast station as "any television broadcast station operating on a channel regularly assigned to its community by § 73.606 of this chapter" A low power television station, defined in Section 74.701(f), however, is authorized under subpart G of Part 74 of our rules. However, we continue to believe that the statute was clear that low power television stations are entitled to assert retransmission consent over their signals.

3. Exceptions to the Retransmission Consent Requirement

87. Section 325, as amended by the 1992 Cable Act, provides four exceptions to retransmission consent. Section 325(b)(2) states that retransmission consent shall not apply to the retransmission of NCE stations, retransmission directly to a home satellite antenna, the retransmission of the broadcast signal of a network directly to a home satellite antenna of an unserved household, or the retransmission of the signal of a superstation if such signal was obtained from a satellite carrier and the originating station was a superstation on May 1, 1991.²⁵¹ Petitions for reconsideration have been filed regarding the interpretation of the fourth exception.

88. On May 26, 1993, the Commission adopted an *Order* denying a Request for Stay submitted by Yankee Microwave, Inc. ("Yankee").²⁵² In subsequent pleadings Yankee requested reconsideration of that *Order*, or alternatively, the immediate grant of its petition for reconsideration. Yankee sought relief, on behalf of its cable system customers, from the provision of Section 76.64(b)(2) regarding the superstation exception. Alternatively, Yankee requested revision of that section of our rules so it would apply to microwave carriers of a superstation signal, as well as to satellite carriers of such a signal. By *Order* of the Chief, Mass Media Bureau, a temporary waiver was granted to Yankee upon a finding by the Bureau that Yankee would suffer irreparable harm if the provisions of the rule were enforced prior to our decision on the pending petitions for reconsideration.²⁵³ On October 5, 1993, the Mass Media Bureau adopted an *Order* which denied a similar request filed by EMI, Inc. ("EMI") primarily based on that party's lack of a showing of imminent harm.²⁵⁴ We now address the requests and oppositions raised by parties to this proceeding.

89. In the *Report and Order* we rejected arguments that the retransmission consent

²⁵⁰ 8 FCC Rcd at 2998.

²⁵¹ See Section 325(b)(2); 47 U.S.C. § 325(b)(2); 47 C.F.R. § 76.64(b)(2).

²⁵² 8 FCC Rcd 3938 (1993).

²⁵³ *Order*, 8 FCC Rcd. 6248 (1993).

²⁵⁴ *Order*, 8 FCC Rcd 7583 (1993).

requirement should not apply to superstation signals delivered via terrestrial means such as microwave.²⁵⁵ Petitions for reconsideration argue that the effect of the rule is to unfairly discriminate in favor of satellite carriers to the detriment of alternative delivery methods such as microwave. Newhouse argues that the Commission has "elevated form over substance" in its interpretation of the superstation exception.²⁵⁶ These petitions for reconsideration refer to the inclusion of the words "or common carrier" in the Senate version of the statute, claiming that although there is no indication why these words were dropped from the final version of the bill, the failure to include them does not evidence an intent by Congress to discriminate against microwave carriers in the manner that has resulted.²⁵⁷ Yankee submits that Congress left room for interpretation of the statute, in a manner consistent with the intent and purpose of the 1992 Cable Act, where failure to do so would have effects contrary to the stated purpose of the Act.²⁵⁸ Specifically, the parties point to Section 623(b)(7)(A)(iii) of the 1992 Cable Act which excepts from carriage on the basic tier those broadcast signals "secondarily transmitted by a satellite carrier beyond the local service area of such station."²⁵⁹ According to Newhouse, in order to make these provisions consistent with one another, it is the emphasis on secondary transmission by satellite which should control, not the manner of delivery of such a satellite signal. NCTA states that there is no public interest justification for exempting superstations delivered by satellite but not those delivered by microwave.²⁶⁰

90. No party has objected to this request or filed comments, other than WSBK, Boston, which stated that it did not object to the transmission via microwave of its signal outside the local market of its station.²⁶¹ We are persuaded by commenters that the unintended effect of the rule is to unfairly discriminate against alternative methods of delivery of a superstation signal. We believe, consistent with the stated purpose and intent of the 1992 Cable Act, that it is the delivery of satellite signals, not the manner of delivery which should be excepted from the retransmission consent requirement. In other words, if a superstation meets the definition of "superstation" contained in the Copyright Act, then the manner of delivery of such a signal shall not control. However, as discussed more fully below, the exception will only apply to delivery of such a superstation signal outside the local market of

²⁵⁵ 8 FCC Rcd at 2999.

²⁵⁶ Newhouse Petition at 2.

²⁵⁷ Senate Report at 37. The House Report does not discuss retransmission consent because the provision was not included in the House-passed bill.

²⁵⁸ Yankee Petition at 5-6.

²⁵⁹ See Section 623(b)(7)(A)(iii); 47 U.S.C. § 543(b)(7)(A)(iii).

²⁶⁰ NCTA Petition at 24.

²⁶¹ WSBK Comments at 2.

the station.

91. Rights of superstations within the local market. Section 614 defines a local commercial broadcast station as any full power commercial television broadcast station licensed by the Commission that is located in the same television market as the cable system. As long as the local commercial broadcast station delivers a good quality signal and agrees to indemnify the cable system for any additional copyright liability, the station is entitled to must-carry rights within the local market. Otherwise, that station has the right, pursuant to Section 325(b)(4)-(5), to elect retransmission consent. Section 325 states that the term "superstation" shall be defined according to Section 119(d) of Title 17 of the United States Code. Section 119(d) of Title 17 defines a superstation as "a television broadcast station other than a network station, licensed by the Federal Communications Commission that is secondarily transmitted by a satellite carrier."²⁶² Tribune Broadcasting Company, INTV, Chris-Craft, WSBK License, Inc. and Turner Broadcasting System, Inc. request that the Commission affirm that for purposes of electing between must-carry or retransmission consent, a superstation is a local commercial station for any cable system located in the same market, and that as such, these stations may elect either must-carry or retransmission consent status within the local market.²⁶³ Consequently, these parties argue that such a signal should not be retransmitted within the local market without consent (unless carried pursuant to must-carry), whether the retransmission occurs over-the-air or via satellite. The parties agree that outside the local market, the superstation may not assert retransmission consent for the receipt of its signal via satellite or other common carrier (such as microwave delivery). Alternatively, Time Warner asserts that no superstation has any rights in or out of its local market, as long as the signal is received via satellite. Time Warner would deny must-carry and retransmission consent to these stations as long as they meet the definition of a superstation.²⁶⁴

92. We believe that Congress intended for all local commercial broadcast stations to have the option to assert either must-carry or retransmission consent within their individual market. These local commercial broadcast stations do not become superstations until such time as they are retransmitted via satellite outside their market, an activity unrelated to their status as local commercial broadcast stations within their market. Therefore, such local commercial stations retain the right to elect between must-carry and retransmission consent within their market.

C. Must-Carry/Retransmission Consent Election and Implementation

²⁶² 17 U.S.C. § 119(d).

²⁶³ Tribune Petition at 2-3; INTV Petition at 10; Chris-Craft Comments at 1, 2-4; WSBK Comments at 3-4; Turner Petition.

²⁶⁴ Time Warner Opposition at 15.

93. Section 325(b)(3)(B) provides that television stations must make an election between must-carry and retransmission consent "within one year after the date of enactment" and every three years thereafter. In the *Report and Order* we established the implementation of these provisions indicating that the initial election for must-carry or retransmission consent must be made by June 17, 1993.²⁶⁵ We also provided that subsequent elections must be made by October 1, 1996, October 1, 1999, etc., and would become effective on January 1, 1997, January 1, 2000, etc.²⁶⁶ We determined that broadcasters were to send copies of their election to the cable operator and were to retain copies of such elections in their public files.²⁶⁷ We failed, however, to instruct television broadcast stations on the term of retention. Consistent with the requirements of the 1992 Cable Act and other record keeping provisions of Sections 73.3526 and 73.3527 of our rules, we will require television broadcast stations to retain election statements in their public files for the term of the three year-election period applicable to such election statements.²⁶⁸

94. In the *Report and Order* we noted that no party had commented on our proposal to require a new television station to make an initial must-carry/retransmission consent election within 30 days from the date that it commences regular broadcasts. We adopted that proposal, as well as an effective date of ninety (90) days following the election. In considering this provision further, we believe that such an election schedule could have a detrimental effect on a new television station which is entering the market. The Commission's rules provide that a television station which has completed construction may commence program tests prior to filing for a license with the Commission. These stations generally know in advance the date they plan to commence broadcasting. On our own motion, we therefore alter the initial election and effective date with respect to new television broadcast stations. A new television station shall elect between must-carry and retransmission consent sixty (60) days prior to commencing program tests, and shall notify the cable operator of that election. In the event that must-carry status is elected, the new station shall also include its channel position in the election statement to the cable operator. The election statement should be sent to the cable operator by certified mail, return receipt requested. The initial election of the broadcast station shall take effect ninety (90) days after it is made. This will provide the cable operator with sufficient time to notify subscribers of any change which may be required in the channel line-up of the system. The result will be that a new television broadcast station will have the opportunity to be carried on a cable system 30 days after it commences broadcasts over-the-air. We believe that such a result serves the public interest

²⁶⁵ 8 FCC Rcd 3001-3002.

²⁶⁶ *Id.* at 3002; 47 C.F.R. § 76.64(f)(1).

²⁶⁷ *Id.* at 3003; 47 C.F.R. § 76.64(h).

²⁶⁸ We will amend Sections 73.3526 and 73.3527 to indicate not only the need to include such information in the station's public file, but also the three-year retention period for such election statement.