

and provides new broadcast stations with appropriate access to enable them to effectively enter a market. Section 76.64(f)(4) of our rules is being revised to reflect this change.

95. In the *Report and Order* we failed to provide for the introduction of a new cable system in a market. Consistent with the purpose of the 1992 Cable Act, a new cable system will be required to notify all local commercial and noncommercial broadcast stations of its intent to commence service. The cable operator must send such notification, by certified mail, at least 60 days prior to commencing cable service. Commercial broadcast stations must notify the cable system within 30 days of the receipt of such notice of their election of either must-carry or retransmission consent with respect to such new cable system. If the commercial broadcast station elects must-carry, it must also indicate its channel position in its election statement to the cable system. Such election shall remain valid for the remainder of any three-year election interval, as established in section 76.64(f)(2). Noncommercial educational broadcast stations should notify the cable operator of their request for carriage and their channel position. The cable system must determine, in advance of commencing service on the system, whether a station is delivering a good quality signal and/or if a station will be required to indemnify for copyright purposes. The cable system must notify the broadcaster of any signal quality problems or copyright liability and must receive the station's response to such information prior to commencing carriage of the station's signal. These provisions are being added to our rules as Section 76.64(l).

#### **D. Retransmission Consent and Section 614**

96. In the *Report and Order* we rejected the tentative conclusion of the *Notice* that cable operators could negotiate with broadcasters to carry less than the entire program schedule of a retransmission consent station. We interpreted Section 614(b)(3)(B) and the legislative history as not permitting negotiation for carriage of partial broadcast signals. On October 5, 1993, at the request of various parties to this proceeding, we stayed the rule requiring carriage in the entirety for retransmission consent signals.<sup>269</sup> We stated in the *Stay Order* that we would resolve this issue in this *Memorandum Opinion and Order*.<sup>270</sup>

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<sup>269</sup> 8 FCC Rcd at 3003-04.

<sup>270</sup> 9 FCC Rcd 2681. Section 76.62(a) of the rules requires the carriage of the entire program schedule of any television station carried by a cable system. The rule applies to stations carried pursuant to Sections 614, 615 or 325. The only exception to this "carriage in its entirety" requirement is specific programming that is prohibited under Section 76.67 (sports blackout rule) or subpart F of Part 76 of our rules (network nonduplication and syndicated exclusivity). In the *Stay Order* we granted a stay, with respect to stations carried pursuant to Section 325 (retransmission consent stations), of the new Section 76.62(a). The stay was issued in response to a request by Media-Com, the licensee of a low power television station located in Akron, Ohio. Media-Com requested a waiver of the provision to permit it

97. NCTA, Newhouse, Columbia International ("Columbia") and Continental Cablevision of Western New England ("CCWNE") request reconsideration of the requirement for carriage in the entirety with respect to retransmission consent signals.<sup>271</sup> NCTA argues that the plain language of the 1992 Cable Act states that the provisions of Section 614, including the carriage in the entirety provision, do not apply to stations which elect retransmission consent pursuant to Section 325.<sup>272</sup> Newhouse specifically urges that we reconsider the carriage in the entirety requirement to permit the grant of consent for those programs for which a broadcaster possesses the requisite authority.<sup>273</sup> Newhouse notes that the Commission tentatively concluded in the *Notice* that cable operators can contract with broadcasters to carry less than the entirety of the program schedule of retransmission consent stations.<sup>274</sup> Newhouse contends that Section 325(b) gives an entirely new right to broadcasters which has nothing to do with must-carry and that there is no apparent public policy which mandates carriage in the entirety for retransmission consent signals. Newhouse asserts that retransmission consent is supposed to be the result of a voluntary bargain between the cable operator and the broadcaster and that "[t]o put constraints on retransmission consent without any clear statutory guidance is an arbitrary decision which does not serve the public policy which retransmission consent itself was designed to implement."<sup>275</sup> Newhouse agrees with the Commission's conclusion in the *Report and Order* that Congress made a clear distinction between television stations' rights in their signal and copyright holders' rights in the programming carried on that signal, and notes that the Commission stated that it intended to maintain that distinction.<sup>276</sup> Newhouse maintains that the Commission "engaged in an unfathomable leap of logic that the bargaining over retransmission consent rights must be for

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to continue part-time carriage on a Warner Cable system under a private agreement. We granted the stay in an effort to avoid an interim loss to the public of its present cable access while we considered petitions for reconsideration with respect to the carriage in the entirety issue.

<sup>271</sup> NCTA Petition at 16-20; Newhouse Petition at 4-8; Columbia Petition at 1-3; CCWNE Reply at 1-3. Media-Com filed comments in support of this request. Media-Com Comments at 1.

<sup>272</sup> NCTA Petition at 18; *see also* Section 325(b)(4); 47 U.S.C. § 325(b)(4).

<sup>273</sup> Newhouse Petition at 7 n.4. We note that Cox Cable Communications and Post-Newsweek Cable, Inc. support partial carriage based on existing partial carriage arrangements which have benefitted their systems. *See* Cox Cable Supplemental Comments; Post-Newsweek Cable Supplemental Comments.

<sup>274</sup> Newhouse Petition at 5.

<sup>275</sup> Newhouse Petition at 6.

<sup>276</sup> Newhouse Petition at 5 (citing 8 FCC Rcd at 3004-3005).

the entire signal since a station cannot bargain over the retransmission rights to individual programs."<sup>277</sup>

98. Columbia and CCWNE request, in the alternative, that the prohibition on partial carriage agreements not be enforced retroactively to existing agreements (*i.e.*, that they be grandfathered), or that the Commission entertain petitions for special relief or waivers to preserve the public interest benefits which agreements such as these provide.<sup>278</sup>

99. NCTA points out that Section 614 addresses only the carriage of local broadcast signals and therefore, even if applied to signals carried pursuant to Section 325, the requirement would not extend to distant, non-local, broadcast signals. NCTA explains that, under the current regulatory scheme, a cable system is unable to fill the void left by a network affiliate which has not cleared network programming in the local market, because the cable system is now prohibited from purchasing the programming from a distant affiliate. Both NCTA and Newhouse point to the prior provisions of our rules and 17 U.S.C. Section 111(f) of the copyright laws which specifically provide that a cable operator may purchase from a distant station a network program which has not been cleared by the local affiliate.<sup>279</sup> The copyright laws provide that the system need not pay additional royalties for distant

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<sup>277</sup> Newhouse Petition at 6.

<sup>278</sup> Columbia Petition at 4-6; CCWNE Petition at 4. Columbia and CCWNE have situations similar to that of Media-Com. Columbia operates a cable system which serves portions of Clark County, Washington, including the cities of Vancouver, Washington, and Portland, Oregon. Through a private agreement with stations located in Seattle and Tacoma, Washington, Columbia provides Washington residents with local news and programming, which is unavailable through other sources. The Washington residents served by Columbia's system are separated from the rest of the state by the Cascade Mountain Range, and hence, do not receive over-the-air signals from either Seattle or Tacoma. However, through the combined programming of both stations on one channel, Columbia is able to provide Washington residents with news and information of specific concern to those subscribers. Columbia states that it does not have the channel capacity to carry the full signal of both stations, and would be prohibited from doing so under the network non-duplication and syndicated exclusivity rights which those stations possess. Similarly, CCWNE, through private agreement with two Boston, Massachusetts stations, provides news from the state capital to its subscribers. CCWNE states that it carries only locally-produced programming from these two stations on its own "community" programming channel. CCWNE states that it cannot carry the signals in their entirety because the copyright royalty fees would be prohibitive, and even if affordable, it would still be prohibited from doing so under the network non-duplication and program exclusivity rules.

<sup>279</sup> NCTA Petition at 19-20; Newhouse Petition at 6-7.

programming which represents programming not cleared by a local affiliate.<sup>280</sup>

100. NAB and INTV oppose the request for a change in the carriage in the entirety rule.<sup>281</sup> NAB argues that this issue was correctly decided in the first instance and that all television broadcast signals must be carried in their entirety, regardless of whether the carriage is pursuant to Section 614, 615 or 325. In response to the concern expressed by NCTA and Newhouse regarding the inability to obtain network programming from distant affiliates, NAB states that Section 73.658 of our rules already provides a partial solution in that it allows another local (and presumably must-carry station) to carry that programming.<sup>282</sup> INTV indicates that full-time carriage provides broadcasters with necessary bargaining power against cable systems whose bargaining power in retransmission consent negotiations is much stronger.<sup>283</sup> Neither NAB nor INTV address the issues raised by Columbia and CCWNE with respect to the public interest benefits garnered by private agreements to provide local news and information through pre-existing partial carriage agreements.

101. First, we continue to believe that, with respect to stations which have elected must-carry status, Section 614(b)(3) requires cable operators to "carry the entirety of the program schedule of any television station carried on the cable system . . . ." As discussed in the *Report and Order*, the legislative history indicates that carriage in the entirety was intended for those local commercial broadcast signals entitled to must-carry status under Section 614. Indeed, the legislative history is replete with discussions relating to the must-carry provisions, the need for adequate carriage of local broadcast stations on cable systems and the controlling market power of cable systems. Congress was concerned that such market power not overwhelm the ability of local broadcast stations to obtain carriage, and that the terms of carriage not be unreasonable.<sup>284</sup> Congress indicated its strong belief that absent the must-carry provisions, local broadcast stations would not be readily available to cable subscribers. In the Senate Report, Congress stated that "it is for this reason that the

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<sup>280</sup> 17 U.S.C. § 111(f).

<sup>281</sup> NAB Opposition at 8; INTV Opposition at 6.

<sup>282</sup> NAB Opposition at ¶ 9. Section 73.658 prohibits anticompetitive behavior by network affiliates and provides that a non-affiliate station should be permitted to purchase network programming which the local affiliate has rejected. See 46 C.F.R. § 76.658.

<sup>283</sup> INTV Opposition at 6.

<sup>284</sup> The Conference Report states that "the must-carry and channel positioning provisions in the bill are the only means to protect the federal system of television allocations, and to promote competition in local markets . . . . Given the current economic condition of free, local over-the-air broadcasting, an affirmative must-carry requirement is the only effective mechanism to promote the overall public interest." H.R. Conf. Rep. No. 862, 102d Cong., 2d Sess. ("Conference Report") at 75. See also Senate Report at 41-46; House Report at 47-58.

legislation incorporates a special provision focusing just on the carriage of local broadcast signals. Moreover, this provision addresses both the primary concern of carriage and the secondary concerns of the terms of carriage.<sup>285</sup> Based on these concerns, we believe that all qualified local commercial broadcast stations should have the minimal protection afforded by Section 614. Further, we also continue to believe that any broadcast station that is eligible for must-carry status, although it may be carried pursuant to a retransmission consent agreement must, therefore, be carried in the entirety, unless carriage of specific programming is prohibited, pursuant to our rules relating to network nonduplication, syndicated exclusivity, sports programming or similar regulations.

102. *The Report and Order* concluded that Section 614(b)(3) requires carriage in the entirety of any broadcast station carried on the cable system. However, upon reconsideration, we believe that the ability of a broadcaster and cable system to negotiate and agree to carriage of less than the entire signal is permitted only where Section 614 is inapplicable. Specifically, as pointed out by NCTA, Section 614 applies only to qualified local commercial television signals (including qualified LPTV stations), and does not apply to either non-local or non-qualified local commercial broadcast signals. Therefore, where the broadcaster's signal is not eligible for must-carry rights, either by failure to meet the requisite definitions or because the broadcast station is outside the local market (ADI), and where, therefore Section 614 is inapplicable, the broadcaster's rights to freely negotiate for the carriage of that signal pursuant to retransmission consent includes the right to negotiate for partial carriage of the signal.

103. Section 325 states that no cable system or other multichannel video programming distributor shall without consent retransmit "the signal of a broadcasting station, or any part thereof, . . ." <sup>286</sup> In contrast, Section 614(b)(3)(B), the must-carry provision, states that the cable operator shall carry "the entirety of the program schedule . . ." Further, Section 325(b)(4) states that if a station elects retransmission consent, "the provisions of section 614 shall not apply to the carriage of the signal of such station by such cable system." While, at first blush, the statutory language appears to permit broadcasters to negotiate with cable operators for retransmission consent for any part of their signal (*i.e.*, any programs), we now believe that a more correct and harmonious reading of Section 614 and 325 together leads to an interpretation that Congress intended cable systems to carry all the programming of must-carry eligible stations regardless of whether the broadcast station opts for must-carry status or not. While it is clear under Section 325 that some negotiated partial carriage is permitted, Section 325 does not mandate the availability of partial carriage in all negotiations. Given this fact, and the congressional emphasis on full carriage for must-carry qualified stations (discussed above), we believe the statutory provisions read in concert suggest that qualified must-carry stations should, as a matter of policy, be carried in their entirety even if

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<sup>285</sup> Senate Report at 45.

<sup>286</sup> 47 U.S.C. § 325(b)(1) (emphasis added).

they are carried pursuant to retransmission consent.

104. This interpretation is bolstered by Congress' direction to the Commission in Section 325(b)(3)(A) to fashion "regulations to govern the exercise by television broadcast stations of the right to grant retransmission consent under this subsection and of the right to signal carriage under section 614." By including this provision in Section 325, we believe that Congress recognized the interplay between the two sections and gave the Commission authority to fill in regulatory gaps.<sup>287</sup> Thus, at the very least, the Commission has the flexibility to require carriage in the entirety for qualified must carry stations carried pursuant to retransmission consent to ensure that the basic underlying objectives of the 1992 Cable Act relating to local broadcast service would be fulfilled. Otherwise, the statutory goals at the heart of Sections 614 and 325 -- to place local broadcasters on a more even competitive level and thus help preserve local broadcast service to the public -- could easily be undermined.

105. The Senate Report confirms this interpretation by stating that the "rights granted to stations under section 325 and under sections 614 and 615 can be exercised harmoniously, and it anticipates that the FCC will undertake to promulgate regulations which will permit the fullest applications of whichever rights each television station elects to exercise."<sup>288</sup> We believe that our rules should provide the widest possible range of opportunity for both broadcast stations and cable operators, where the must-carry provisions are not applicable. Thus, any station which is eligible for must-carry status must be carried, if at all, in its entirety regardless of whether the station elects must-carry or retransmission consent. Similarly, any station which is not eligible for must-carry status under Section 614, because it is not a local commercial broadcast station, or does not qualify under the definitions of Section 614, may negotiate for partial carriage. Thus, we conclude, based upon a reading of both Sections 614 and 325, that broadcast stations whose signals are entitled to must-carry but are instead carried pursuant to retransmission consent are not permitted to negotiate for carriage of less than their entire signal.<sup>289</sup>

106. The 1992 Cable Act was specific in stating that "[c]able systems carrying the signals of broadcast stations, whether pursuant to an agreement with the station or pursuant to the provisions of [must-carry], will continue to have the authority to retransmit the programs carried on those signals under the section 111 compulsory license."<sup>290</sup> The Committee

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<sup>287</sup> Cf. *Chisholm v. FCC*, 538 F.2d 349, 357 (D.C. Cir. 1976).

<sup>288</sup> Senate Report at 38.

<sup>289</sup> We note that this interpretation of the statute is supported by the legislative history which notes that the retransmission consent provision was drafted in such a way as to promote the "established relationships between broadcasters and cable systems," and to "minimize unnecessary disruption to broadcasters and cable operators." Senate Report at 36.

<sup>290</sup> 47 U.S.C. § 325(b)(6).

emphasized that nothing in the 1992 Cable Act was "intended to abrogate or alter existing program licensing agreements between broadcaster and program suppliers, or to limit the terms of existing or future licensing agreements."<sup>291</sup>

107. We continue to interpret retransmission consent as a new right given to the broadcaster under the terms of the 1992 Cable Act and as a right separate from the right of the underlying copyright holder<sup>292</sup> and do not believe that our reconsideration decision in any way undermines the separate nature of these rights or creates a conflict between communications and copyright based policies. Congress indicated that it intended "to establish a marketplace for the disposition of the rights to retransmit broadcast signals."<sup>293</sup> As stated in the *Report and Order*, the right involved is one which may be freely bargained away in future programming contracts.<sup>294</sup> Although NAB and INTV argue that carriage in the entirety is required to ensure the continued validity of both the retransmission consent right and the current compulsory copyright, we do not see how providing broadcasters and cable operators with additional flexibility to negotiate retransmission agreements for signals not eligible for must-carry status alters the nature of the rights granted under Sections 325 and 614 in any way. Indeed, according this additional flexibility is consistent with interpreting the right in question as a new right subject to the control of the station licensee. To the extent these rights have been bargained away, the remaining rights that have not been disposed of still remain under the control of the station involved. As noted in paragraph 99, a contrary interpretation would not only deprive broadcasters and cable operators of the ability to negotiate mutually advantageous arrangements for the carriage of portions of distant signals but would negate the functioning of various portions of Section 111 of the Copyright Act and of the Commission's rules which specifically contemplate the possibility that portions of distant signals may be carried.<sup>295</sup> Accordingly, we interpret Section 325 to provide that broadcasters may bargain with cable operators for the right to carriage of any part of the broadcast signal provided that such station is not eligible under the provisions of Section 614, either because it is not a local commercial broadcast signal or it does not qualify for mandatory carriage. "Carriage in the entirety" remains a requirement with respect to signals eligible for mandatory carriage under the provisions of Section 614. Sections 76.62(a) and 76.64(k) are being revised to reflect this change.

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<sup>291</sup> Senate Report at 36.

<sup>292</sup> 8 FCC Rcd at 3004.

<sup>293</sup> Senate Report at 36.

<sup>294</sup> *Id.*

<sup>295</sup> See e.g., 17 U.S.C. Section 111(f)(providing for the carriage of network programs uncleared in the cable operator's market); 47 C.F.R. § 76.161 (providing for programs to be carried in place of programs deleted under the syndicated exclusivity rules).

## E. Retransmission Consent Contracts

108. In the *Report and Order* we specifically prohibited exclusive retransmission consent agreements between television broadcast stations and cable operators.<sup>296</sup> This provision forbids a television station from making an agreement with one MVPD for carriage, exclusive of other MVPDs. After reviewing the comments filed in response to the *Notice*,<sup>297</sup> we concluded that this prohibition is necessary in light of the concerns that led Congress to regulate program access and cable signal carriage agreements.<sup>298</sup> We then stated that we would revisit the issue in three years.

109. NCTA argues in its petition for reconsideration that prohibiting exclusive retransmission consent agreements is not warranted and is not supported by the 1992 Cable Act. NCTA claims that such a provision is "contrary to the Commission's belief that broadcasters should be entitled to obtain and exercise exclusivity, in the form of network non-duplication and syndex, against cable operators -- even if they have opted for retransmission consent."<sup>299</sup> NCTA also states that the prohibition is not necessary under the program access provisions of the 1992 Cable Act and that such agreements may be justified based on a public interest showing. In addition, NCTA claims that exclusive contracts between operators and program suppliers, such as any of the networks, are not within the scope of the Section 19 prohibitions. Therefore, NCTA argues that we should not uphold the ban on exclusive retransmission consent agreements.

110. WCA, Bell Atlantic and U.S. Telephone Association ("USTA") oppose the request filed by NCTA to reconsider this issue and request that we continue to prohibit such agreements. WCA notes that we did not suggest that the 1992 Cable Act requires the prohibition of such contracts, but simply that such a prohibition would further the purposes of the statute. WCA points out that Congress expressly provided that the Commission ensure that provisions adopted do not conflict with our obligation to ensure that rates are reasonable. Moreover, WCA points to the legislative history and the stated purpose to promote

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<sup>296</sup> 8 FCC Rcd at 3000.

<sup>297</sup> See WCA Comments at pages 19-24; National Private Cable Association at pages 6-13; U.S. Telephone Association at 2-6; Bell Atlantic at 1-2; and InterMedia Partners at 13-14. In particular, WCA points to the comments of InterMedia, one of the nation's larger cable systems, which joined its competitors in urging the prohibition of exclusive retransmission consent contracts of this nature.

<sup>298</sup> See *1st Report and Order*, MM Docket 92-265, 8 FCC Rcd 3359 (1993) (Program Access).

<sup>299</sup> NCTA Petition at 22-23.

competition in the multichannel video marketplace.<sup>300</sup> Bell Atlantic states that such a prohibition is within our authority to establish regulations to govern the exercise of retransmission consent, and that such a provision will promote competition and further congressional intent.<sup>301</sup> We do not believe that NCTA has raised a credible argument for revisiting this issue at this time. We are adding a new subsection (m) to Section 76.64 of our rules to reflect this decision. As we indicated in the *Report and Order*, we will consider the need for such a prohibition against exclusive retransmission consent agreements in three years.

## F. Other Matters

111. Retransmission Consent and Network Nonduplication Protection. In the *Report and Order*, we concluded that local television stations electing retransmission consent should continue to be entitled to invoke network nonduplication or syndicated exclusivity protection, whether or not they are carried by the cable system.<sup>302</sup> Commenters had sought to eliminate exclusivity rights for stations choosing retransmission consent.<sup>303</sup> We found, however, that the legislative history addressed this matter and that Congress intended for exclusivity protection to apply under its regulatory framework.<sup>304</sup>

112. Cable interests contend that stations electing retransmission consent should not be entitled to network nonduplication protection.<sup>305</sup> NCTA and Cablevision claim that the application of network nonduplication rights in conjunction with retransmission consent could result in the loss of network programming for cable subscribers. They observe that where a station and a cable operator cannot reach a retransmission consent agreement, the station can still assert its exclusivity rights against another network affiliate that agrees to carriage. The result, according to petitioners, will be that subscribers will be precluded from receiving any network programming. Petitioners also argue that the 1992 Cable Act does not require the Commission to retain this rule and, indeed, the result is contrary to the intent of the Act,

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<sup>300</sup> WCA Opposition at 6 (citing Senate Report at 18).

<sup>301</sup> Bell Atlantic Opposition at 2.

<sup>302</sup> 8 FCC Rcd at 3006.

<sup>303</sup> See Petition for Rulemaking of the National Cable Television Association, Inc., filed January 19, 1993; see also Opposition to Petition for Rulemaking of the National Cable Television Association, Inc. to Revise the Network Non-duplication Rules, filed February 8, 1993.

<sup>304</sup> Senate Report at 38.

<sup>305</sup> NCTA Petition at 20-22; Cablevision Systems Corporation Petition at 1-9; Time Warner Reply at 3-4.

which sought to provide consumers with access to the widest diversity of programming, including network programming.<sup>306</sup> Moreover, cable interests argue that retaining network nonduplication rights for stations electing retransmission consent provides broadcasters with an advantage over cable operators in their consent negotiations. They assert that they will have to accede to broadcasters' demands since the local station will be able to prevent them from providing network programming to their subscribers from distant stations.

113. Broadcasting interests support the Commission's decision to continue to permit stations choosing retransmission consent to enforce their nonduplication rights.<sup>307</sup> They assert that petitioners are simply rearguing issues rejected by the Commission in the *Report and Order*. NAB and NASA contend that the elimination of network nonduplication protection for stations choosing retransmission consent would undermine localism and the ability of networks to distribute their programming. In particular, NASA states that Congress determined that the long term survival of the over-the-air local broadcast system could be assured by providing broadcasters with the right to control the distribution of their signals and the concomitant right to be compensated for the retransmission of those signals. Cap Cities argues that cable operators have an unfair advantage in the negotiating process since they face virtually no competition. It also argues that, without exclusivity protection, broadcasters would be forced to choose the must-carry option since the cable operator would be able to import a distant station rather than negotiate with a station licensed to serve its local area. Finally, Cap Cities states that it is unreasonable to eliminate this regulatory structure which promotes local broadcasting and the network/affiliate distribution system based on predictions regarding negotiations that had not yet taken place.<sup>308</sup>

114. We affirm our decision to allow stations electing retransmission consent to assert network nonduplication or syndicated exclusivity protection as provided in the rules.<sup>309</sup> We observe that this issue was considered earlier in this proceeding in response to a petition from NCTA, which we denied in the *Report and Order*. Parties have provided no new arguments nor additional evidence to convince us that our decision conflicts with the intent of Congress. We also do not find that there is a conflict between retransmission consent rights and exclusivity rights. Network nonduplication and syndicated exclusivity rights protect the exclusivity that broadcasters have acquired from their program suppliers, including their network partners, while retransmission consent allows broadcasters to control the

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<sup>306</sup> 1992 Cable Act, Sections 2(b)(1) and (3).

<sup>307</sup> NAB Opposition at 6-8; Cap Cities Opposition at 1-7; NASA Opposition at 1-5.

<sup>308</sup> Cap Cities Opposition at 2-3.

<sup>309</sup> We note that we also considered whether to modify the geographic zone applicable to exclusivity protection to make it consistent with the definition of a local television market as the ADI, as specified in the 1992 Cable Act. We declined to make such a change. *See* 8 FCC Rcd at 2978-2979.

redistribution of their signals. Both policies promote the continued availability of the over-the-air television system, a substantial government interest in Congress' view.<sup>310</sup>

115. We also note that cable operators believe that broadcasters have an advantage in the negotiations for retransmission agreements due to their ability to assert their exclusivity rights, while broadcasters believe the reverse. Local broadcast stations are an important part of the service that cable operators offer and broadcasters rely on cable as a means to distribute their signals. Thus, we believe that there are incentives for both parties to come to mutually-beneficial arrangements. Moreover, the allegations that local stations electing retransmission consent would not be carried due to their inability to successfully negotiate agreements with cable operators and then assert their exclusivity rights and deprive subscribers of programming was speculative at the time the reconsideration petitions were filed. Now that the retransmission consent provisions are in effect, there is no evidence that subscribers are being deprived of network programming. We note that there are only limited situations where local stations are not carried.<sup>311</sup> Therefore, the dire consequences predicted do not exist and we continue to believe that stations should receive the exclusivity protection to which they are entitled.

#### **IV. ADMINISTRATIVE MATTERS**

##### **Regulatory Flexibility Analysis**

116. Pursuant to the Regulatory Flexibility Act of 1980, the Commission included a final analysis in the *Report and Order* detailing (i) the need for and purpose of the rules, (ii) the summary of issues raised by public comment in response to the initial regulatory flexibility analysis, Commission assessment, and changes made as a result, and (iii) significant alternatives considered and rejected. No substantive changes have occurred pertaining to the final analysis as a result of the petitions for reconsideration.

##### **Paperwork Reduction Act**

117. The proposal contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980 and found to impose a new or modified information collection requirement on the public. Implementation of any new or modified requirement will be subject to approval by the Office of Management and Budget as prescribed by the Act.

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<sup>310</sup> 1992 Cable Act, Section 2(a)(12).

<sup>311</sup> A joint survey conducted by NAB and the Television Bureau of Advertising on October 6, 1993, the effective date of the retransmission consent provisions, indicates that 92% of all television stations reach virtually all cable households in their ADIs and 97% of all stations reach at least 90% of such homes. See *TVB News*, Television Bureau of Advertising, Inc., October 7, 1993.

### Ordering Clauses

118. Accordingly, IT IS ORDERED that pursuant to the authority contained in Section 4(i) and (j), and 303 of the Communications Act of 1934, as amended, and the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, Parts 73 and 76 of the Commission Rules, 47 C.F.R. Part 73 and 76, are AMENDED as set forth in Appendix B.

119. IT IS FURTHER ORDERED that rule provisions of Part 76 of the rules set forth in Appendix B shall be effective 30 days after publication in the Federal Register. Rule provisions of Part 73 of the rules set forth in Appendix B shall be effective upon approval from OMB.

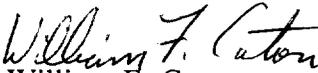
120. IT IS FURTHER ORDERED that sections 76.62 and 76.64 of the Commission's rules which were stayed by *Order* of the Commission on October 5, 1994 are revised as indicated in Appendix B and the *Stay Order* is lifted as of the effective date of these rules.

121. IT IS FURTHER ORDERED that the petitions for reconsideration filed by the parties listed in Appendix A are GRANTED IN PART and DENIED IN PART only to the extent indicated in this *Memorandum Opinion and Order*, except that the Petition for Reconsideration filed by Western Broadcasting of Puerto Rico is DISMISSED without prejudice.

### Additional Information

122. For further information on this proceeding, contact Elizabeth Beaty or Meryl S. Icove, Cable Services Bureau, (202) 416-0856.

FEDERAL COMMUNICATIONS COMMISSION

  
William F. Caton  
Acting Secretary

## APPENDIX A

### Petitions for Reconsideration

1. A.C. Nielsen Company
2. Anchor Media
3. Association of Independent Television Stations
4. Cablevision Systems Corporation
5. Colorado Christian University
6. Columbia International
7. Community Antenna Television Association
8. Cypress Broadcasting, Inc.
9. Moran Communications
10. National Association of Broadcasters
11. National Cable Television Association
12. Newhouse Broadcasting
13. Outlet Broadcasting Company
14. Press Broadcasting Company
15. Star Cable Associates
16. Tribune Broadcasting Company
17. WBNS-TV, Columbus, Ohio
18. Western Broadcasting Corporation of Puerto Rico
19. Wireless Cable Association International
20. WTTE, Columbus, Ohio
21. Yankee Microwave

### Comments in Support of Petitions for Reconsideration

1. Chris-Craft Industries, Inc.
2. Community Broadcasts Association
3. Cox Cable Communications, Inc.\*
4. Media-Com Television, Inc.
5. Midwest KAAL Corp.
6. Post-Newsweek Cable, Inc.\*
7. StarSight, Inc.\*
8. Turner Broadcasting System, Inc.
9. WSBK License, Inc.

### Oppositions to Petitions for Reconsideration

1. Bell Atlantic Telephone Companies
2. Capital Cities/ABC, Inc.
3. Granite Broadcasting Corporation
4. National Association of Broadcasters
5. National Cable Television Association
6. Network Affiliated Stations Alliance

7. San Jacinto Television Corporation (KTFH-TV)
8. Time Warner Entertainment Company, LP
9. United States Telephone Association
10. United Video, Inc.
11. Wireless Cable Association International

\* Indicates late filed.

Replies to Oppositions for Reconsideration

1. A.C. Nielsen Company
2. Association of Independent Television Stations
3. Colorado Christian University
4. Continental Cablevision of Western New England
5. Cypress Broadcasting, Inc.
6. National Association of Broadcasters
7. Time Warner Entertainment Company, LP
8. Tribune Broadcasting Company

## APPENDIX B

### Rules

Part 73 of Chapter I of Title 47 of the Code of Federal Regulation is amended as follows:

#### Part 73 BROADCAST RADIO SERVICES

1. The Authority Citation for Part 73 is revised to read as follows:

AUTHORITY: Secs. 303, 48 Stat., as amended 1082; 47 U.S.C. § 154, as amended.

2. Section 73.3526 is amended by adding paragraph (g) to read as follows:

73.3526 Local public inspection file of commercial stations.

\* \* \* \* \*

(g) Statements of a commercial television station's election with respect to either must-carry or retransmission consent as defined in section 76.64 of this chapter shall be retained in the public file of the television station for the duration of the three year election period to which the statement applies.

3. Section 73.3527 is amended by adding paragraph (g) to read as follows:

73.3527 Local public inspection file of noncommercial educational stations.

\* \* \* \* \*

(g) Noncommercial television stations requesting mandatory carriage on any cable system pursuant to Section 76.56 of this chapter shall place a copy of such request in its public file and shall retain both the request and relevant correspondence for the duration of any period to which the statement applies.

Part 76 of Chapter I of Title 47 of the Code of Federal Regulations is amended as follows:

#### PART 76 -- CABLE TELEVISION SERVICE

1. The Authority Citation for Part 76 is revised to read as follows:

AUTHORITY: Secs. 2, 3, 4, 301, 303, 307, 308, 309, 48 Stat., as amended, 1064, 1065, 1066, 1081, 1082, 1083, 1084, 1085, 1101; 47 U.S.C. §§ 152, 153, 154, 301, 303, 307, 308, 309; Secs. 612, 614-615, 623, 632 as amended, 106 Stat. 1460, 47 U.S.C. §532; Sec. 623, as amended, 106 Stat. 1460; 47 U.S.C. §§532, 533, 535, 543, 552.

2. Section 76.7(c)((4)(i),(ii), and (iii) are revised and a new paragraph (c)(4)(iv) is added to read as follows:

§ 76.7 Special relief and must-carry complaint procedures.

\* \* \* \* \*

(c) \* \* \*

(4)(i) Must-carry, complaints filed pursuant to Sec. 76.61(a) (Complaints regarding carriage of local commercial television stations) shall be accompanied by the notice from the complainant to the cable television system operator (Sec. 76.61(a)(1)), and the cable television system operator's response (Sec. 76.61(a)(2)), if any. If no timely response was received, the complaint should so state.

(ii) Must-carry complaints filed pursuant to Sec. 76.61(b) (Complaints regarding carriage of qualified local NCE television stations) should be accompanied by any relevant correspondence between the complainant and the cable television system operator.

(iii) No must-carry complaint filed pursuant to Sec. 76.61(a)(complaints regarding local commercial television stations) will be accepted by the Commission if filed more than sixty (60) days after the date of the specific event described in this paragraph. Must-carry complaints filed pursuant to Sec. 76.61(a) should affirmatively state the specific event upon which the complaint is based, and shall establish that the complaint is being filed within sixty (60) days of such specific event. With respect to such must-carry complaints, the specific event shall be

(A) The denial by a cable television system operator of a request for carriage or channel position contained in the notice required by Sec. 76.61(a)(1), or

(B) The failure to respond to such notice within the time period allowed by Sec. 76.61(a)(2).

(iv) With respect to must-carry complaints filed pursuant to Sec. 76.61(b), such complaints may be filed at any time the complainant believes that the cable television system operator has failed to comply with the applicable provisions of subpart D of this part.

\* \* \* \* \*

3. Section 76.55(a)(2) is revised to read as follows:

§ 76.55 Definitions applicable to the must-carry rules.

\* \* \* \* \*

(a) \* \* \*

(2) Is owned and operated by a municipality and transmits noncommercial programs for educational purposes, as defined in Section 73.621 of this chapter, for at least 50 percent of its broadcast week.

\* \* \* \* \*

4. Section 76.55 is amended by adding a note after paragraph (a)(3)(iii) to read as follows:

76.55 Definitions applicable to the must-carry rules.

\* \* \* \* \*

Note to paragraph (a): For the purposes of Section 76.55(a), "serving the franchise area" will be based on the predicted protected contour of the NCE translator.

\* \* \* \* \*

5. Section 76.55(b) is amended by adding paragraph (b)(3) to read as follows:

Section 76.55 Definitions applicable to the must-carry rules.

\* \* \* \* \*

(b) \* \* \*

(3) Notwithstanding the provisions of this section, a cable operator shall not be required to add the signal of a qualified local noncommercial educational television station not already carried under the provision of subsection 76.56(a)(5), where such signal would be considered a distant signal for copyright purposes unless such station agrees to indemnify the cable operator for any increased copyright liability resulting from carriage of such signal on the cable system.

\* \* \* \* \*

6. Section 76.55(d) is amended by adding a note after paragraph (d)(6) to read as follows

Section 76.55 Definitions applicable to the must-carry rules.

\* \* \* \* \*

(d) \* \* \*

(6) \* \* \*

Note: For the purposes of this section, a good quality signal shall mean a signal level of either -45 dBm for UHF signals or -49 dBm for VHF signals at the input terminals of the signal processing equipment, or a baseband video signal.

\* \* \* \* \*

7. Section 76.55 is amended by revising the note following paragraph (e)(3) to read as follows:

Section 76.55 Definitions applicable to the must-carry rules.

\* \* \* \* \*

(e) \* \* \*

(3) \* \* \*

Note: For the 1993 must-carry/retransmission consent election, the ADI assignments specified in the 1991-1992 Television Market Guide will apply.

\* \* \* \* \*

8. Section 76.56 is amended by revising paragraphs (a)(1)(iii), (a)(5) and (b)(1) to read as follows:

§ 76.56 Signal carriage obligations.

(a) \* \* \*

(1) \* \* \*

(iii) Systems with more than 36 usable activated channels shall be required to carry the signals of all qualified local NCE television stations requesting carriage, but in any event at least three such signals; however a cable system with more than 36 channels shall not be required to carry an additional qualified local NCE station whose programming substantially duplicates the programming of another qualified local NCE station being carried on the system.

\* \* \* \* \*

(5) Notwithstanding the requirements of paragraph (a)(1) of this section, all cable operators shall continue to provide carriage to all qualified local NCE television stations whose signals were carried on their systems as of March 29, 1990. In the case of a cable system that is required to import a distance qualified NCE signal, and such system imported the signal of a qualified NCE station as of March 29, 1990, such cable system shall continue to import such signal until such time as a qualified local NCE signal is available to the cable system. This requirement may be waived with respect to a particular cable operator and a particular NCE station, upon the written consent of the cable operator and the station.

(b) \* \* \*

(1) A cable system with 12 or fewer usable activated channels, as defined in Section 76.5(oo), shall carry the signals of at least three qualified local commercial television stations, except that if such system serves 300 or fewer subscribers it shall not be subject to these requirements as long as it does not delete from carriage the signal of a broadcast television station which was carried on that system on October 5, 1992.

\* \* \* \* \*

9. Section 76.57(a) is revised to read as follows:

Section 76.57 Channel positioning.

(a) At the election of the licensee of a local commercial broadcast television station, and for the purposes of this rule, a qualified low power television station, carried in fulfillment of the must-carry obligations, a cable operator shall carry such signal on the cable system channel number on which the local commercial television station is broadcast over the air, or on the channel on which it was carried on July 19, 1985, or on the channel on which it was carried on January 1, 1992.

\* \* \* \* \*

10. Section 76.60 is amended by adding a new paragraph (c) to read as follows:

§ 76.60 Compensation for carriage.

\* \* \* \* \*

(c) A cable operator may accept payments from stations pursuant to a retransmission consent agreement, even if such station will be counted towards the must-carry complement, as long as all other applicable rules are adhered to.

\* \* \* \* \*

11. Section 76.62(a) is revised to read as follows:

§ 76.62 Manner of carriage.

(a) Cable operators shall carry the entirety of the program schedule of any television station (including low power television stations) carried by the system unless carriage of specific programming is prohibited, and other programming authorized to be substituted, under section 76.67 or Subpart F of Part 76, or unless carriage is pursuant to a valid retransmission consent agreement for the entire signal or any portion thereof as provided in Section 76.64.

\* \* \* \* \*

12. Section 76.64 is amended by revising paragraphs (b)(2), (e), (f)(4) and (k) and by adding paragraphs (l), (m) and (n) to read as follows:

§76.64 Retransmission consent.

\* \* \* \* \*

(b) \* \* \*

(2) The multichannel video programming distributor obtains the signal of a superstation that is distributed by a satellite carrier and the originating station was a superstation on May 1, 1991, and the distribution is made only to areas outside the local market of the originating station; or

(e) The retransmission consent requirements of this section are not applicable to broadcast signals received by master antenna television facilities or by direct over-the-air reception in conjunction with the provision of service by a multichannel video program distributor provided that the multichannel video program distributor makes reception of such signals available without charge and at the subscribers option and provided further that the antenna facility used for the reception of such signals is under the control of the subscriber and is owned by or is available for purchase by the subscriber upon termination of service.

(f) \* \* \*

(4) New television stations shall make their initial election any time between 60 days prior to commencing broadcast and 30 days after commencing broadcast; such initial election shall take effect 90 days after they are made.

\* \* \* \* \*

(k) Retransmission consent agreements between a broadcast station and a multichannel

video programming distributor shall be in writing and shall specify the extent of the consent being granted, whether for the entire signal or any portion of the signal.

(l) A cable system commencing new operation is required to notify all local commercial and noncommercial broadcast stations of its intent to commence service. The cable operator must send such notification, by certified mail, at least 60 days prior to commencing cable service. Commercial broadcast stations must notify the cable system within 30 days of the receipt of such notice of their election for either must-carry or retransmission consent with respect to such new cable system. If the commercial broadcast station elects must-carry, it must also indicate its channel position in its election statement to the cable system. Such election shall remain valid for the remainder of any three-year election interval, as established in section 76.64(f)(2). Noncommercial educational broadcast stations should notify the cable operator of their request for carriage and their channel position. The new cable system must notify each station if its signal quality does not meet the standards for carriage and if any copyright liability would be incurred for the carriage of such signal. Pursuant to Section 76.57(e), a commercial broadcast station which fails to respond to such a notice shall be deemed to be a must-carry station for the remainder of the current three-year election period.

(m) Exclusive retransmission consent agreements are prohibited. No television broadcast station shall make an agreement with one multichannel distributor for carriage, to the exclusion of other multichannel distributors.

(n) A multichannel video programming distributor providing an all-band FM radio broadcast service (a service that does not involve the individual processing of specific broadcast signals) shall obtain retransmission consents from all FM radio broadcast stations that are included on the service that have transmitters located within 92 kilometers (57 miles) of the receiving antenna for such service. Stations outside of this 92 kilometer (57 miles) radius shall be presumed not to be carried in an all-band reception mode but may affirmatively assert retransmission consent rights by providing 30 days advance notice to the distributor.