

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

In the Matter of:	)	
	)	
TIME WARNER CABLE	)	
	)	CSR 5543-C
Emergency Petition of ABC, Inc.	)	
for Declaratory Ruling	)	
And Enforcement Order For Violation of	)	
Section 76.58 of the Commission's Rules,	)	
or in the Alternative For Immediate	)	
Injunctive Relief	)	

**MEMORANDUM OPINION AND ORDER**

**Adopted: May 3, 2000**

**Released: May 3, 2000**

By the Chief, Cable Services Bureau:

**I. INTRODUCTION**

1. On May 1, 2000, ABC, Inc. ("ABC") filed an Emergency Petition for Declaratory Ruling and Enforcement Order, or, in the Alternative, for Immediate Injunctive Relief ("Petition") seeking a Commission Order directing Time Warner Cable ("Time Warner") to immediately comply with the provisions of Section 76.58 of the Commission's rules which is based, in large part, on Section 614(b)(9) of the Communications Act of 1934, as amended ("Communications Act"). Time Warner filed an Opposition to ABC's petition.<sup>1</sup>

**II. BACKGROUND**

2. Section 614 of the Communications Act sets forth the mandatory carriage, or must-carry, obligations of cable operators. In pertinent part, Section 614(b)(9) provides that:

No deletion or repositioning of a local commercial television station shall occur during a period in which major television rating services measure the size of audiences of local television stations.<sup>2</sup>

<sup>1</sup>Pursuant to Section 1.1208 of the Commission's rules, this proceeding is classified as restricted for *ex parte* purposes. 47 C.F.R. § 1.1208.

<sup>2</sup>Communications Act § 614(b)(9), 47 U.S.C. § 534(b)(9).

The Commission adopted Section 76.58 of its rules to effectuate this provision.<sup>3</sup>

3. The May 2000 local station audience rating period ("sweeps period") began on April 26<sup>th</sup> and will end on the 24<sup>th</sup> of May. During sweeps periods Nielsen Media Research's local market measurement service collects demographic viewing data which is used by local television stations, cable systems, advertisers and their agencies to buy and sell commercial advertising as well as make programming decisions.<sup>4</sup>

4. ABC is the controlling parent company of the licensees of eight commercial television stations (the "ABC Stations").<sup>5</sup> Since 1993, Time Warner has carried the ABC Stations on its cable systems pursuant to a retransmission consent agreement entered into between Time Warner and ABC.<sup>6</sup> This agreement expired on December 31, 1999. Since the expiration of this agreement, Time Warner and ABC have entered into at least five extensions of varying duration of the original retransmission consent agreement to permit continued carriage of the ABC Stations on Time Warner's systems.<sup>7</sup> At the time ABC filed its petition, the last of these extensions had expired at midnight on April 30, 2000 and Time Warner had ceased carriage of the ABC Stations on its cable systems.<sup>8</sup>

### III. DISCUSSION

5. ABC asserts that, because its most recent retransmission consent extension with Time Warner expired on April 30, 2000 – four days after the commencement of the May 2000 sweeps period – Time Warner is expressly precluded by Section 76.58 from deleting the ABC Stations from its systems until the current sweeps period ends on May 24, 2000. For its part, Time Warner argues that where a station elects retransmission consent rather than must-carry, Section 325(b)(1)(A) of the Communications Act provides that no cable operator shall retransmit the signal of a television station except with the express authority of the originating station.<sup>9</sup> Time Warner contends that, without a further extension of the

<sup>3</sup>In pertinent part, Section 76.58 provides:

Note: No deletion or repositioning of a local commercial television station shall occur during a period in which major television rating services measure the size of audiences of local television stations. For this purpose, such periods are the four national four-week ratings periods – generally including February, May, July and November – commonly known as audience sweeps.

47 C.F.R. § 76.58.

<sup>4</sup>See <http://www.nielsenmedia.com>.

<sup>5</sup>KABC-TV (Channel 7) Los Angeles, California; KSFN-TV (Channel 30) Fresno California; KTRK-TV (Channel 13) Houston, Texas; WABC-TV (Channel 7) New York, New York; WTVD-TV (Channel 11) Durham, North Carolina; WLS-TV (Channel 7) Chicago, Illinois; WPVI-TV (Channel 6) Philadelphia, Pennsylvania; and WTVG-TV (Channel 13) Toledo, Ohio.

<sup>6</sup>ABC Petition at 4.

<sup>7</sup>*Id.*

<sup>8</sup>ABC informed the Commission on the afternoon of May 2, 2000 that ABC service was being restored to the Time Warner cable systems until July 15, 2000 pursuant to a retransmission consent agreement. As a consequence, we treat ABC's Petition as a declaratory ruling request and no longer as a request for injunctive relief.

<sup>9</sup>See Communications Act § 325(b)(1)(A), 47 U.S.C. § 325(b)(1)(A).

retransmission consent agreement, which did not occur prior to midnight April 30, 2000, Time Warner ceased to have any ability or obligation to carry the ABC Stations' signals and appropriately ceased carriage.<sup>10</sup> ABC responds that Section 76.58 affirmatively requires that Time Warner carry the ABC Stations through the end of the current sweeps period and that to the extent there is any question of the need for ABC's authorization to carry the signals it was resolved when ABC on three occasions provided written authorization to Time Warner to carry the ABC Stations through May 24, 2000. In fact, ABC argues, the last of these authorizations extended to Time Warner "unconditional and unequivocal consent to retransmit the broadcast signals [of the ABC Stations] through May 24, 2000, regardless of any extension of the retransmission consent agreement."<sup>11</sup>

6. In adopting rules to implement Sections 325 and 614 of the Communications Act, we believe the Commission addressed and effectively resolved the interpretative issue raised by ABC. In analyzing the impact of certain provisions of Section 614, particularly the obligation to "carry the entirety of the program schedule of any television station carried on the cable system,"<sup>12</sup> on the carriage of local television signals by cable operators through retransmission consent, the Commission concluded that the entire program schedule obligation had "applicability to more than just television signals carried pursuant to the must-carry rules."<sup>13</sup> The Commission stated:

We are persuaded by commenters that the plain language of Section 614(b)(3)(B), requiring cable operators to "carry the entirety of the program schedule of any television station carried on the cable system unless carriage of specific programming is prohibited, and other programming authorized to be substituted" applies to retransmission consent stations as well as must-carry stations.<sup>14</sup>

After reaching this conclusion, the Commission examined other similarly-worded provisions of Section 614 and, applying this same reasoning, found that the no deletion during sweeps period obligation of Section 614(b)(9) applies "to all local commercial television stations carried by a cable system, and not just to must-carry stations."<sup>15</sup> The Commission affirmed this reasoning on reconsideration of the *Broadcast Signals Order* albeit with the modification that the entire program schedule provision applied only to television stations "eligible for must-carry status."<sup>16</sup>

7. We believe that the dispute between ABC and Time Warner is resolved by the language of the *Broadcast Signals Order*, where the Commission stated that Section 614(b)(9) of the Communications Act applies equally to television stations carried under must-carry and television stations

<sup>10</sup>Time Warner Opposition at 13-14.

<sup>11</sup>ABC Petition, Exhibit 3.

<sup>12</sup>Communications Act § 325(b)(3)(B), 47 U.S.C. § 325(b)(3)(B).

<sup>13</sup>*Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Broadcast Carriage Issues*, Report and Order, 8 FCC Rcd 2965, 3004 ("Broadcast Signals Order")

<sup>14</sup>*Id.* at 3003.

<sup>15</sup>*Id.* at 3304.

<sup>16</sup>*Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Broadcast Carriage Issues*, Memorandum Opinion and Order, 9 FCC Rcd 6723, 6745-46 ("Broadcast Signals Reconsideration").

carried through retransmission consent. Section 614(b)(9) and Section 76.58 are clear and absolute in their terms – no deletion of a local commercial television station shall occur during a sweeps period. The language of Section 614(b)(9) and Section 76.58 do not distinguish between television stations that are carried pursuant to must-carry and television stations that are carried pursuant to retransmission consent. Given the Commission's conclusion that Section 614(b)(3) and 614(b)(9) were parallel provisions, the Commission's decision on reconsideration that the programming of stations that are eligible for must-carry be carried in their entirety even when carried pursuant to a retransmission consent agreement, leads to a parallel conclusion under Section 614(b)(9). Programming that is eligible for must-carry cannot be deleted during a current sweeps period even if the existing retransmission consent expires. Time Warner argues that absent retransmission consent, a cable operator would violate Section 325(b)(1)(B) of the Communications Act by continuing to carry such programming.<sup>17</sup> Time Warner is correct that, upon the expiration of retransmission consent, carriage of the affected programming is no longer authorized by Section 325(b)(1)(B). However, our analysis does not end here. Upon expiration of an existing retransmission consent during a sweeps period a cable operator is required to carry the signal of a local television station that is eligible for must carry under authorization provided by, and pursuant to, the requirements of Section 614 until the conclusion of the current sweeps period. For this reason, we reject Time Warner's arguments that carriage in this situation would be unworkable because neither party will know the terms of carriage and that such carriage exposes Time Warner to copyright liability.<sup>18</sup> As discussed, the must-carry provisions of Section 614 provide the legal authority and procedural rules applicable to such carriage until the end of the sweeps period.

8. Time Warner argues that Section 614(b)(9) should not be read so broadly, and that it was intended only to apply where existing retransmission consent is effective and the cable operator, under the terms of the retransmission consent, has the option to carry a television station, but not the obligation to do so.<sup>19</sup> In such situations, argues Time Warner, Section 614(b)(9) and Section 76.58 preclude a cable operator from exercising its option not to carry the programming until the current sweeps period ends.<sup>20</sup> We disagree with Time Warner's interpretation. No such intent is expressed or implied in Section 614(b)(9), Section 76.58, or the *Broadcast Signals Order* adopting that rule. These provisions make no reference to permissive or mandatory retransmission consent. To the contrary, Section 614(b)(9) and Section 76.58 absolutely require that no deletion of any local commercial television station shall occur during a sweeps period.

9. Portions of Time Warner's Opposition suggest that the requirement that a cable operator carry until the end of the sweeps period a television station for which retransmission consent has expired impinges upon its free speech rights under the First Amendment of the United States Constitution.<sup>21</sup> We believe that, in reviewing the constitutionality of the must-carry provisions, the United States Supreme Court in *Turner Broadcasting System, Inc., et al. v. FCC*<sup>22</sup> adequately addressed Time Warner's concerns. In *Turner*, the Supreme Court concluded that: (1) Congress' interests in preserving the benefits of free, over-the-air local broadcast television, promoting widespread dissemination of information from a

<sup>17</sup>Time Warner Opposition at 13-14.

<sup>18</sup>See Time Warner Opposition at 14-15, 21-22.

<sup>19</sup>Time Warner Opposition at 20.

<sup>20</sup>*Id.* at 22.

<sup>21</sup>Time Warner Opposition at 29-34.

<sup>22</sup>520 U.S. 180 (1997).

multiplicity of sources, and promoting fair competition in the market for television programming were important governmental interests for First Amendment purposes; (2) the must-carry requirements served governmental interests in a direct and effective way; and (3) the must-carry provisions did not burden substantially more speech than necessary to further Congress' substantial interests.<sup>23</sup> The prohibition on dropping a station during a sweeps period serves the same governmental interest in preserving local broadcast television that was upheld in *Turner*. The provision is narrowly-tailored to protect directly the integrity of the sweeps period, which is the basis for determining broadcast revenues.

10. Section 614(b)(9) requires that Time Warner carry the ABC Stations as must-carry programming until May 24, 2000 – the expiration of the current sweeps period. After that time, absent the retransmission consent agreement between Time Warner and ABC announced on May 2, 2000, Time Warner could have ceased carriage of the ABC Stations without further obligation until the parties reach a new retransmission consent agreement, or any or all of the ABC Stations elect must-carry status in the next election cycle. After the expiration of the current retransmission consent agreement and any extension thereto, Time Warner may cease carriage of the ABC Stations, except that Time Warner may not do so during a future sweeps period. We will consider separately what enforcement action is warranted as a consequence of Time Warner's conduct.

### III. ORDERING CLAUSES

11. Accordingly, we find that the removal of the ABC Stations' signals from its systems by Time Warner Cable was in violation of Section 614(b)(9) of the Communications Act and Section 76.58 of the Commission's rules.

12. **IT IS ORDERED** that the Emergency Petition for Declaratory Ruling and Enforcement Order, or, in the alternative, for Immediate Injunctive Relief filed by ABC, Inc. **IS GRANTED** to the extent indicated herein.

13. This action is taken pursuant to delegated authority under Section 0.321 of the Commission's rules.<sup>24</sup>

FEDERAL COMMUNICATIONS COMMISSION

Deborah A. Lathen  
Chief, Cable Services Bureau

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<sup>23</sup>*Id.*

<sup>24</sup>47 C.F.R. § 0.321.