

other elements of the Commission as warranted, for long-range plans, new or revised policies and standards, and rules and regulations, with respect to its program activities. The Office's major functions include: administration of the information resources management program under the Paperwork Reduction Act; management studies and surveys; data telecommunications/database management and application development; records management; IRM contract administration; development of Paperwork Reduction Act clearances for submission to the Office of Management and Budget; computer security; and forms management. The Director of the Office serves as Senior IRM Manager, Forms Control Officer, Computer Security Officer, Records Management Officer, and ADP Coordinator for the Committee on Automated Data Processing.

(k) Under the direction and management of the Bureau Director, the *Bureau of Administration* is responsible for the administration and coordination of the Offices of: Administrative Services; Budget and Financial Management; and Personnel. The Bureau provides administrative support to the program operations of the Commission. The Bureau interprets governmental policies and programs and administers these in a manner consistent with Federal guidelines, including those involving procurement, financial management and personnel. The Bureau initiates recommendations, collaborating with other elements of the Commission as warranted, for long-range plans, new or revised policies and standards, and rules and regulations, with respect to its program activities.

Subpart C—Delegation and Redefinition of Authorities

4. In § 501.25, the section heading and introductory paragraph are revised and new paragraphs (c) and (d) are added as follows:

§ 501.25 Delegation to and redelegation by the Managing Director.

Except where specifically redelegated in this section, the authorities listed in this section are delegated to the Managing Director.

(c) (1) Authority under part 514 of this chapter, after consultation with the Bureau of Tariffs, Certification and Licensing, to issue letters notifying applicants for certification of ATFI batch filing capability that their

applications have or have not been granted.

(2) The authority under this paragraph is redelegated to the Director, Office of Information Resources Management.

(d) (1) Authority under § 514.21(m)(2) of this chapter, after consultation with the Bureau of Tariffs, Certification and Licensing, to evaluate and approve or disapprove by letter the accounting or charging system the applicant intends to use for charging users and remitting to the Commission indirect (subsequent) access user fees under 46 U.S.C. app. 1107a(d)(1)(B)(ii), and by letter to deny access to ATFI data tapes for failure to operate under an approved accounting or charging system or for failure to remit user fees to the Commission.

(2) The authority under this paragraph is redelegated to the Director, Office of Information Resources Management.

§ 501.30 [Amended]

5. In § 501.30, paragraphs (a) and (b) are removed, and paragraphs (c) and (d) are redesignated as (a) and (b) respectively.

By the Commission.

Joseph C. Polking,
Secretary.

[FR Doc. 94-29741 Filed 12-2-94; 8:45 am]

BILLING CODE 6730-01-P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 73 and 76

[MM Docket No. 92-259; FCC 94-251]

Cable Act of 1992—Must-Carry and Retransmission Consent Provisions

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: In response to petitions for reconsideration, and in order to complete the implementation of the must-carry and retransmission consent provisions of the Cable Television Consumer Protection and Competition Act of 1992 and to clarify the obligations of cable operators and broadcasters, this Memorandum Opinion and Order amends the Commission's rules regarding must-carry and retransmission consent.

EFFECTIVE DATE: The stay of § 76.62(a) and § 76.64(e) is lifted and the revisions of those paragraphs is effective January 4, 1995. Other rule provisions of Part 76 are effective January 4, 1995. Rule provisions of Part 73 shall be effective upon approval from OMB. We will issue a notice at a later date stating that such approval has been granted.

FOR FURTHER INFORMATION CONTACT: Elizabeth W. Beaty or Meryl S. Icove, Cable Services Bureau, (202) 416-0800.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Memorandum Opinion and Order in MM Docket 92-259, FCC 94-251, adopted September 28, 1994, and released November 4, 1994. The complete text of this document is available for inspection and copying during normal business hours in the FCC Reference Center, 1919 M St., N.W., Washington, D.C., and also may be purchased from the Commission's copy contractor, International Transcription Service, (ITS), at 2100 M St., N.W., Washington, D.C. 20037, (202) 857-3800.

Synopsis of the Memorandum Opinion and Order

I. Introduction

1. This Memorandum Opinion and Order addresses issues raised in petitions for reconsideration of our Report and Order adopted March 11, 1993, 58 FR 17350 (4/2/93) which established rules to implement the mandatory television broadcast signal carriage ("must-carry") and retransmission consent provisions of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act"). In a Clarification Order adopted on May 28, 1993, 58 FR 32449 (6/10/93), we addressed specific concerns raised in these petitions relating to signal quality, copyright indemnification and translator ownership. In an Order adopted on July 15, 1993, 58 FR 40366 (7/28/93), we addressed additional concerns relating to carriage rights, to the failure of broadcast stations to elect either must-carry or retransmission consent status, and to the channel position for such stations. On October 5, 1993, we adopted a Stay Order, 58 FR 53429 (10/15/93), which stayed two provisions of the retransmission consent rules, with respect to VHF/UHF antenna ownership and carriage in the entirety of broadcast signals, pending our resolution of those issues in this proceeding. In this Memorandum Opinion and Order we will address all remaining issues raised in the petitions for reconsideration, as well as the outstanding issues from the Stay Order. We will also take this opportunity, on our own motion, to clarify certain other issues raised in the Report and Order.

2. We note that the constitutionality of the must-carry provisions of the 1992 Cable Act were challenged before the Supreme Court. In *Turner Broadcasting Systems, Inc. v. FCC*, a special three-

judge panel of the District Court found the must-carry provisions constitutional. On appeal, the Supreme Court vacated the decision and remanded the case back to the three-judge panel for further proceedings. While the case is pending, the must-carry provisions of the 1992 Cable Act remain in effect, as do the Commission's must-carry rules.

II. Must-Carry Regulations

A. Carriage of Local Noncommercial Educational Television Stations

1. Definition of a Qualified Noncommercial Station.

3. Section 615(l)(1) provides that a local noncommercial educational television ("NCE") station qualifies for must-carry rights if it is licensed by the Commission as an NCE station and if it is owned and operated by a public agency, nonprofit foundation, or corporation or association that is eligible to receive a community service grant from the Corporation for Public Broadcasting.¹ An NCE station is also considered qualified if it is owned and operated by a municipality and transmits predominantly noncommercial programs for educational purposes.² For purposes of must-carry rights, an NCE station is considered local if its community of license is within 50 miles of, or its signal places a Grade B contour over, the principal headend of the cable system. This definition includes the translator of any NCE station with five watts or higher power serving the franchise area, a full-service station or translator licensed to a channel reserved for noncommercial educational use, and such stations and translators operating on channels not so reserved as the Commission determines are qualified NCE stations.

4. The staff has received informal inquiries requesting clarification as to when a translator is "serving the franchise area" of the cable system. Because the service area of a translator differs from that of a full power broadcast station, we believe that guidance should be provided to assist interested parties in determining whether a translator serves the franchise area of the cable system. We believe it appropriate to adopt a standard based on coverage and contour, which has been used in the past and which should

be easily identifiable. Therefore, for purposes of a translator serving the cable system's franchise area, the coverage area of such translator shall be its predicted protected contour as specified in § 74.707 of our rules.

2. Signal Carriage Obligations.

5. In the Report and Order, we indicated that Section 615(b) requires cable systems to carry any qualified local NCE television station requesting carriage. Systems with 12 or fewer activated channels must carry the signal of one qualified local NCE station. Systems with 13 to 36 activated channels must carry at least one qualified local NCE station, but need not carry more than three such stations. Cable systems with more than 36 activated channels are generally required to carry all NCE stations requesting carriage. If a system with fewer than 36 activated channels operates beyond the presence of a qualified local NCE station, it is required to import and carry a qualified NCE station. In addition, cable systems must continue to provide carriage to all qualified local NCE television stations whose signals were carried on their systems as of March 29, 1990, regardless of the proximity of those stations to the system's principal headend.

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

7. Second, we emphasize that the requirement in Section 615(c) to continue carriage of stations carried as of March 29, 1990 applies only to qualified local NCE television stations

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

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

B. Carriage of Local Commercial Television Stations

1. General Signal Carriage Requirements.

9. *Small System Exception.* Section 614(a) requires carriage of local commercial television stations and qualified low power television stations. Section 614(b) establishes the number of signals which must be carried by cable systems based on their channel capacity. In particular, it provides that a cable system with 12 or fewer usable activated channels must carry the signals of at least three local commercial television stations. Such a system is exempt from any requirements of Section 614, however, if it serves 300 or fewer subscribers, as long as it does not delete from carriage the signal of any broadcast television station. In the

¹ All references to Section 614, Section 615 and Section 325 are references to those sections of the Communications Act of 1934, as amended by the 1992 Cable Act, Sections 4, 5 and 6.

² In defining a qualified noncommercial educational television station, § 76.55(a)(2) incorrectly refers to § 73.612 rather than § 73.621. We are revising § 76.55(a)(2) to refer to § 73.621.

Report and Order, the Commission concluded that, under this exception, a system must not delete any station it carried on October 5, 1992.

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

11. *Definition of Local Commercial Television Station.* Section 614(h)(1)(A) defines a local commercial television station for the purpose of the must-carry rules as "any full power television broadcast station, other than a qualified noncommercial television station within the meaning of Section 615(l)(1), licensed and operating on a channel regularly assigned to its community by the Commission that, with respect to a particular cable system, is within the same television market as the cable system." In the Report and Order, we inadvertently defined local commercial television station as "any full power commercial television station * * *", which had the unintended effect of excluding non-qualified noncommercial stations from the definition. A non-qualified NCE station is any NCE station which does not meet the qualification criteria established in Section 615(g). Such a station is not entitled to must-carry rights under that section. We believe that the definition of local commercial television station contained in the 1992 Cable Act clearly includes non-qualified NCE stations; the definition includes all stations other than "qualified NCE stations." Consistent with the language of the 1992 Cable Act, we determine that NCE stations which are not "qualified" NCE stations for must-carry purposes may assert must-carry rights under Section 614 within their local market, just like any other broadcast station.³

12. *Availability and Identification of Must-Carry Signals.* Section 614(b)(7) provides that all must-carry signals shall be provided to every subscriber of a cable system and shall be viewable via cable on all television receivers of a

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

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

14. It is our understanding that the on-channel carriage of some UHF signals has resulted in situations where a converter box supplied by a cable operator does not contain the necessary channel capacity to permit a subscriber to access a UHF must-carry signal through the converter. For example, a converter may supply channels 2-36 while the must-carry station is on channel 55. Where a cable operator chooses to provide subscribers with signals of must-carry stations through the use of converter boxes supplied by the cable operator, the converter boxes must be capable of passing through all of the signals entitled to carriage on the basic service tier of the cable system, not just some of them. In addition, any converter boxes provided for this purpose must be provided at rates in accordance with Section 623(b)(3). Therefore, in a situation where the subscriber's converter is supplied by the cable operator, and is incapable of receiving all signals as required by Section 614(b)(7), the cable operator must make provision for a converter which is capable of providing these signals.⁴ If it is necessary to replace the

converter, the subscriber must not be required to pay additional sums nor to pay for the installation.⁵ As discussed below, we have provided a mechanism for relief for cable systems which cannot meet the on-channel requests of must-carry stations. A decision not to seek such relief may not be used to contravene the directives of the 1992 Cable Act.

2. Definition of a Television Market.

15. *Use of ADI Markets and the Home County Exception.* Under the 1992 Cable Act, a local commercial television station is entitled to must-carry status on all cable systems located in the same television market as the cable system. The 1992 Cable Act states that the television market shall be determined pursuant to § 73.3555(d)(3)(i) of our rules, which in turn defines a television market in terms of the Area of Dominant Influence ("ADI"), as defined by Arbitron.⁶ In the Report and Order, the Commission noted that each county in the contiguous United States is assigned by Arbitron exclusively to one ADI, and that each broadcast station licensed to a community located in an ADI is considered local throughout that ADI. The Commission established one exception to that rule, determining that each broadcast station will also be considered a must-carry station in its home county, even if that station is assigned to a different ADI from that of its home county (the "home county exception").

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

basic tier, and required Cablevision, because it was in the midst of an upgrade of its system, to switch station WLIG to a channel receivable by all subscribers, without the necessity of an additional converter box, during the rebuilding of its system.

⁵ We note that where the cable operator authorizes subscribers to install additional receiver connections, but does not provide the subscriber with such connections, or with the equipment and materials for such connections, the operator must notify such subscribers of all broadcast stations carried on the cable system which cannot be viewed via cable without a converter box and the operator must offer to sell or lease such a converter box to such subscribers at rates in accordance with section 623(b)(3).

⁶ We note that Arbitron has cancelled its television ratings service. However, the decision will not have an impact on the use of Arbitron-designated ADIs until the next must-carry/retransmission consent election which must take place by October 1, 1996. We will address this issue sufficiently before that date.

³ We interpret local commercial television station to include stations operating under a valid construction permit.

⁴ See Memorandum Opinion and Order (CSR-3903-M) (Complaint of WLIG-TV, Inc. against Cablevision Systems Corporation), DA-93-1365 (released November 10, 1993), in which the Mass Media Bureau noted that converter boxes provided by the cable system must be capable of transmitting all the signals entitled to mandatory carriage on the

17. The Notice, 57 FR 56298 (11/27/92), set forth the 1992 Cable Act's direction that such markets would be determined primarily in the manner provided in § 73.3555(d)(3)(i) of the Commission's rules, (which section uses Arbitron-defined ADIs), and specifically sought comment from the public concerning the Congressionally recognized need for adjustments to or modifications of television markets.⁷ The Commission specifically stated that "it may determine that particular communities are part of more than one television market," and further explained that it would act upon written requests to add or delete communities to a station's market "to better reflect market realities and effectuate the purposes of this Act." We believe that it was apparent that the Commission was likely to receive comments and suggestions regarding methods to assure that television stations' must-carry markets, both generally and in individual cases, best reflect market realities and the objective of localism underlying broadcast signal carriage obligations. While the Notice did not specifically seek comment on the home county exception, we believe that the home county exception is a "logical outgrowth" of the Notice.

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

19. *Modification of ADI Markets.* As noted in the Report and Order, the 1992 Cable Act permits the Commission to add or subtract communities from a television station's market to better reflect marketplace conditions or to

promote the goal of localism underlying the signal carriage provisions. In its petition, INTV requests that the Commission add or subtract a community for all stations in the market, not for an individual station. INTV suggests that upon the addition of a community to a market, every station in the community would attain must-carry rights in that market.

20. The Commission has already addressed this subject in the Report and Order in response to parties' contentions that ADI modification should be made on a community, rather than on a station, basis. Both the 1992 Cable Act and our rules require, for each broadcast station, an evidentiary showing from an interested party, with opportunity for comment. INTV's request would not meet this requirement and therefore must be rejected. We reiterate our statement in the Report and Order that we will accept joint filings by a group of stations or a single request from a cable operator for changes for more than one station licensed to the same community, so long as the submitted information demonstrates that each station is entitled to have its market modified. The relief procedures will ensure that the 1992 Cable Act's objectives of promoting localism and reflecting market realities are achieved.⁸

21. As noted above, Section 614(h)(1)(C) directs the Commission, when considering ADI modification requests, to promote localism by taking into account the four factors listed in that section. Press Broadcasting Company, Inc. ("Press"), the licensee of WKCF (TV), Clermont, Florida, seeks clarification or partial reconsideration of the types of evidence the Commission has indicated that it will consider in assessing proposed changes in a station's must-carry market.

22. We clarify that the two factors mentioned in the Report and Order are merely examples of the types of evidence that might be considered in a request to modify an ADI. The Commission purposely did not restrict the types of evidence that may be used to demonstrate that a station's must-carry market should be modified. The Commission declined to prejudge the importance of any of the factors set forth in the statute, noting that each case will be unique. Accordingly, we note that the factors suggested by Press may be employed by parties to show the appropriateness of altering a station's must-carry market, although the

importance of such factors may differ from one situation to the next.⁹

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

24. A number of broadcast television licensees in Columbus, Ohio filed petitions for reconsideration respecting the addition of Chillicothe to the Columbus, Ohio television market. These petitioners allege that the Commission's action was taken without sufficient notice to interested parties and was therefore based on an inadequate factual record.

25. As noted above, the APA requires an agency, when issuing a general notice of proposed rule making, to provide the public with "either the terms or the substance of a proposed rule or a description of the subject and issues involved," but "does not require an agency to publish in advance every precise proposal which it may ultimately adopt as a rule." In the Notice, the Commission specifically requested that interested parties "comment on what modifications to the television markets specified in § 76.51

⁷ Section 614(h)(1)(C)(i) states that a broadcasting station's market shall be determined in the manner provided in § 73.3555(d)(3)(i) of the Commission's rules, except that the Commission may include or exclude additional communities to better effectuate the purposes of Section 614. 47 U.S.C. 534(h)(1)(C)(i).

⁸ The same logic applies to a single station requesting the addition of multiple communities.

⁹ We note that, in stating that a station may demonstrate that it is located close to the community in terms of mileage, a station may present evidence, as suggested by Press, regarding the distance between the cable community and the station's community of license, transmitter, or other aspect of the station's operation.

of our rules is needed to ensure that it reflects current market realities." In so doing, the Commission observed that this proceeding necessarily overlaps with an ongoing proceeding involving, *inter alia*, the makeup of the § 76.51 market list in relation to the Commission's program exclusivity rules.¹⁰ Therefore, the Commission explicitly stated that Docket 87-24 would be reopened for further comment in the context of this rulemaking in order to facilitate coordination of the overlapping aspects of the two proceedings.¹¹

26. In light of the nature of this proceeding, the statutory instruction to amend, as necessary, § 76.51, and the incorporation by reference of the issues in Docket 87-24, we conclude that the Notice amply alerted the public that potential amendments to that rule section could be made in the context of this specific proceeding.¹² The

¹⁰ Further, the pendency of Triplett's request to modify the Columbus, Ohio television market is referenced in Docket No. 87-24, 3 FCC 2d at 6176 n. 15, which was incorporated into the instant proceeding.

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

¹² Neither the APA nor the Commission's rules specifically required that the petitioners receive personal service of the particular market change proposals tendered in comments filed in this proceeding. Moreover, we observe that at least one petitioner, Outlet, notes that the filing of Triplett's submission was referenced in a public notice of comments received in this docket. However, we do not agree that the Commission was somehow obligated to indicate the nature of Triplett's comments, and the petitioners offer no support for that particular proposition. To the extent that Triplett incorporated by reference its previous

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

27. We disagree with the petitioners' contentions that amendment of the Columbus market first required the issuance of an independent notice of proposed rulemaking. The fact that we said in the Notice that we may consider further revisions to § 76.51 on an *ad hoc* basis did not preclude the Commission's taking specific action on particular modifications consistent with the guidance provided by the 1992 Cable Act where the record indicated that such changes were warranted.¹³

3. Selection of Signals.

28. **Definition of Substantial Duplication.** Section 614(b)(5) provides that a cable operator is not required to carry the signal of any local commercial television station that substantially duplicates the signal of another local commercial television station which is carried on its cable system, or to carry the signals of more than one local commercial television station affiliated with a particular broadcast network.¹⁴

request regarding Chillicothe, which was also noted in Docket 87-24, we do not believe that obviated the responsibility of interested parties to assess the nature of comments received in response to the general rulemaking issues specifically raised in the Notice.

¹³ We do not agree that the action taken with respect to a proposal to include Athens in the Atlanta market indicates that the Commission could only act in independent and separate rulemaking proceedings. The Georgia Public Television Commission ("GPTC"), licensee of noncommercial educational television station WGTW-TV, Athens, Georgia, sought to include Athens as a designated community in the Atlanta market essentially to increase the station's visibility and fund raising in the market. GPTC's proposal was not submitted in the instant proceeding directly or incorporated by reference, but rather in comments supporting the requested action in MM Docket 92-295, which specifically addressed the Rome proposal. Parties commenting on MM Docket 92-295 had no opportunity to comment upon the Athens proposal in the context of that proceeding. Moreover, GPTC's proposal differs significantly from the competition and carriage issues vis-à-vis commercial stations raised in either the instant proceeding or in MM Docket 92-295 (relating specifically to Rome). In light of the action taken in the *Report and Order*, the Commission appropriately terminated MM Docket 92-295, and invited GPTC to refile its proposal for consideration in an independent proceeding.

¹⁴ Western Broadcasting Corporation of Puerto Rico, licensee of Station WOLE, Aguadilla, requests

In the Report and Order, based on the legislative history of this section of the 1992 Cable Act, we decided that two stations "substantially duplicate" each other "if they simultaneously broadcast identical programming for more than 50 percent of the broadcast week." For purposes of this definition, identical programming means the identical episode of the same program series.¹⁵

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

4. Low Power Television Stations.

30. **Qualified Low Power Television Station.** Section 614(h)(2) contains the statutory requirements a low power television station (LPTV) must meet before it will be considered "qualified" for must-carry purposes. Section 614(h)(2) provides that an LPTV station must broadcast for at least the minimum number of hours the Commission requires of commercial broadcast stations. The station must adhere to certain Commission requirements regarding non-entertainment programming and employment. The station must address local news and informational needs that full power stations are not adequately serving

that the Commission reconsider its rules with respect to their application to WOLE, "given the unique situation in Puerto Rico." We note that such a request is more appropriately made as a petition for special relief rather than as part of a general rulemaking proceeding.

¹⁵ We also consider programming to be duplicative where the stations involved are located in contiguous time zones and the hour of broadcast differs by one hour.

because the full power stations are distant from the LPTV station's community of license. The station must comply with the Commission's LPTV interference regulations. The station must be within 35 miles of the cable headend and deliver a good quality over-the-air signal to the headend. The station's community of license and the cable system's franchise area both must have been located outside of the largest 160 Metropolitan Statistical Areas (MSA's) on June 30, 1990, and the population of the LPTV station's community of license must not have exceeded 35,000 on that date. Lastly, there cannot be any full power television station licensed to any community within the county or other political subdivision served by the cable system. As we stated in the Report and Order, a low power television station must meet all of the statutory requirements to be "qualified" for must-carry status. Cable systems are required to carry a qualified LPTV station only if there are not sufficient full power local commercial television stations to fulfill the cable operator's must-carry obligations under Section 614(b).

31. Moran Communications ("Moran") and the Community Broadcaster Association ("CBA") request a revision to the requirement in Section 614(h)(2)(F) that, in order for an LPTV station to be qualified, there cannot be any full power station licensed to any community within the county or political subdivision served by the cable system. Under this exception, Moran and CBA explain, an LPTV station would qualify for must-carry rights if it meets all the requirements of subsections 614(h)(2), except for subsection F, and if none of the full power stations in the county or political subdivision served by the cable system offers local news or informational programming. They contend that when a satellite station is repeating another station's signal and not broadcasting any local news or informational programming to meet the needs of the local community, the satellite station should not be considered a full power station for the purposes of Section 614(h)(2)(F). CBA also argues that a satellite station is a "passive repeater," and because Section 614(h)(1)(b)(1) specifically excludes passive repeaters from the definition of a local commercial television station, it follows that Congress intentionally gave less to repeaters than to originating stations in terms of must-carry rights. Therefore, argues CBA, "[t]he Congressional recognition of the lesser value of the repeaters must be

incorporated into the must-carry rule * * *." In opposition, NCTA argues that the Commission cannot rewrite the statute, which defines qualified LPTV stations and governs the must-carry rights of LPTV stations.

32. We agree with NCTA that the provisions of the 1992 Cable Act may not be amended by the Commission through the rule making process. Further, contrary to CBA's interpretation of Section 614(h), satellite stations meet the definition of a local commercial television station, are full power stations pursuant to Section 614(h)(2)(F), and are generally not simply passive repeaters. We disagree with CBA's contention that Congress intended satellite stations to be treated differently from other full power stations when reviewing the statutory requirements an LPTV station must meet to gain must-carry status. Moran and CBA request that we codify the exception in footnote 217 to the qualification requirements of an LPTV station. While the Report and Order had suggested the possibility of additional circumstances in which LPTV carriage might be warranted, it now appears that this is an area where the specific statutory provisions and the balancing incorporated therein must necessarily guide our enforcement of the mandatory carriage provisions for LPTV stations.

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

1. Content To Be Carried.

33. Section 614(b)(3)(A) and Section 615(g)(1) require cable operators to carry the primary video, accompanying audio, and line 21 closed caption transmission, in its entirety, of both qualified local commercial and NCE stations when fulfilling their must-carry obligations. With respect to qualified local commercial stations, cable operators also are required, to the extent technically feasible, to retransmit program-related material carried in the vertical blanking interval (VBI) or on subcarriers. Retransmission of other material in the VBI or other non-program-related material (including teletext and other subscription and advertiser-supported information services) is at the discretion of the operator. With respect to local qualified NCE stations, cable operators are required to transmit, to the extent technically feasible, program-related material carried in the VBI, or on subcarriers, that may be necessary for receipt of programming by handicapped persons or for educational or language purposes. Retransmission of other material in the VBI or on subcarriers is

at the discretion of the operator. Cable operators may, where technically feasible and appropriate, remove ghost-carrying information carried in a station's VBI if the cable operator applies an adequate alternative methodology at the headend.

34. In the Report and Order, we decided that the factors enumerated in *WGN Continental Broadcasting, Co. vs. United Video Inc.* ("WGN"), provide useful guidance for what constitutes program-related material.¹⁶ We declined to further define "program-related," noting that carriage of information in the VBI is rapidly evolving. As a result of our reliance on the approach followed in WGN for guidance, we rejected a proposal by A.C. Nielsen Company ("Nielsen") to require program identification codes to be carried by a cable system.

35. The WGN case addressed the extent to which the copyright on a television program also included program material in the VBI of the signal. The WGN court set out three factors for making a copyright determination. First, the broadcaster must intend for the information in the VBI to be seen by the same viewers who are watching the video signal. Second, the VBI information must be available during the same interval of time as the video signal. Third, the VBI information must be an integral part of the program. The court 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. 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.¹⁷

36. We continue to believe that the factors articulated in WGN provide the

¹⁶In the Report and Order, we used a cite of 685 F.2d 218 (7th Cir. 1982), which was the original citation for the case, prior to rehearing. Upon rehearing, the court affirmed the factors on which we are relying.

¹⁷In an ex parte presentation, StarSight requested that the Commission determine that its product, which is transmitted in the VBI, meets the WGN test. 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.

best guidance for determining whether material in the VBI is program-related and, therefore, must be carried by the cable system. 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. This interpretation is consistent with previous Commission decisions in which SID codes were found to be program-related in other contexts. 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.

37. 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. 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-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. Alternatively, the 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.

38. 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. 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. 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." 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.

39. 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. 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." Although the footnote to that sentence correctly stated that the station licensee makes the election, the text incorrectly stated "at the system's discretion." 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. The Order also determined that, in the event of a conflict, the station making an affirmative election has priority over the default station. 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. Section 76.57 of our rules was amended to reflect the channel positioning options discussed and adopted in the Order.

40. 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. 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 UHF, in addition to VHF, stations. As noted there, cable operators must comply with the channel positioning requirements absent a compelling technical reason.¹⁸ 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. 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

41. In the Report and Order and the Clarification Order 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, but Section 615(g)(4) states that the Commission may define a "signal of good quality" for noncommercial stations. We do so now, on our own motion.

42. We note that in a Memorandum Opinion and Order (Independence Public Media of Philadelphia, Inc.

¹⁸ 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.

against Suburban Cable TV Co., Inc.) CSR-3806-M), 8 FCC Rcd 6319 (1993), 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. The Mass Media Bureau has relied 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.

43. 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. 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.

44. 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.

D. Procedural Requirements

1. Compensation for Carriage.

45. *Copyright Liability.*¹⁹ Under the 1992 Cable Act, a cable operator is

generally not required to carry a station that would otherwise qualify for must-carry status if the station would be considered distant for copyright purposes, unless the station indemnifies the cable operator for its copyright liability.²⁰ 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. 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.²¹ 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.

46. On May 28, 1993, the Commission adopted a Clarification Order ("Clarification") that, among other things, addressed certain copyright issues. We stated that we would require a cable operator to provide a broadcast

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 § 76.55(e) of title 47, Code of Federal Regulations (as in effect on September 18, 1993), or any modifications to such television market made, on or after September 18, 1993, pursuant to § 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.

²⁰ 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. 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.

²¹ 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.

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.²² 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.

47. 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.²³ 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

²² 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. 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.

²³ 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.

¹⁹ We note that the Satellite Home Viewer Act of 1994, P.L. 103-369, 108 Stat. 3477, which was

it satisfies the conditions for must-carry status.

48. In a related matter, 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. 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. 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.

49. *Calculation of station liability.* INTV and NAB request clarification regarding the method for determining the incremental copyright liability attributable to a particular station. 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." 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. 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. 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. 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.

50. 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 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.

51. The Commission's must-carry requirements became effective on June 2, 1993, during a Copyright Office accounting period.²⁴ 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 semiannual 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.

52. INTV seeks to establish a rebuttable presumption that all stations are significantly viewed throughout their ADIs. 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.

2. Remedies

53. 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. 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.

54. 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." We

²⁴ The Copyright Office divides the year into two accounting periods—January 1 to June 30 and July 1 to December 31.

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. 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. 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 § 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

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

56. In the Report and Order we found that "local broadcast signals provided by MATV facilities or by 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." 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. This exception to retransmission consent was added to the Commission's rules as § 76.64(e). That section 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 resident's 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 § 76.64(e), pending our resolution of this issue. The determining factor used in the rule relates to antenna ownership, not the provision of the service free-of-charge.

57. We note 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. 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 the building owner; or (2) under the control and available for purchase by the subscriber or building owner upon termination of service. We believe that this

interpretation upholds Congressional intent without causing undue disruption to subscribers. We will amend § 76.64(e) of our rules to reflect this change.

B. The Scope of Retransmission Consent

1. Radio

58. In the Report and Order we concluded that Congress intended to provide retransmission consent to all broadcast signals, including those retransmitted by radio. 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. 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. 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.

59. 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. Section 325(b)(2) expressly exempts certain broadcast stations from the consent provision, and radio stations are not included in these exceptions. However, with respect to the difficulty of obtaining consent for all stations carried in an all-band method, we believe that cable system 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). 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). 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. 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. 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

60. 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 broadcast stations." We incorrectly stated, however, that a low power station meets the definition of television broadcast station in § 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

61. 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. Petitions for

reconsideration have been filed regarding the interpretation of the fourth exception.

62. On May 26, 1993, the Commission adopted an Order, 58 FR 32452 (6/10/93), denying a Request for Stay submitted by Yankee Microwave, Inc. ("Yankee"). 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 provisions of § 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. 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. We now address the requests and oppositions raised by parties to this proceeding.

63. In the Report and Order we rejected arguments that the retransmission consent requirement should not apply to superstation signals delivered via terrestrial means such as microwave. 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. 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 the station.

64. *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."

65. 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

66. 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. 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. 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. We failed, however, to instruct television broadcast stations on the term of retention. Consistent with the requirements of the 1992 Cable Act and other recordkeeping provisions of §§ 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. We will amend

§§ 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.

67. 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 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.

68. 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 § 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 § 76.64(l).

D. Retransmission Consent and Section 614

69. 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 or 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. 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 § 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 § 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 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. We stated in the Stay Order that we would resolve this issue in this Memorandum Opinion and Order. Petitioners request reconsideration of the requirement for carriage in the entirety with respect to retransmission consent signals.

70. 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.²⁵ 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 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. 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,

²⁵ 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."

sports programming or similar regulations.

71. 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.

72. 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, * * *". 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 they are

carried pursuant to retransmission consent.

73. 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. 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.

74. The Senate Report confirms this interpretation by stating that the "rights granted to stations under section 325 and under section 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." 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. 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."

75. 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." The Committee 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."

76. 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 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." As stated in the Report and Order, the right involved is one which may be freely bargained away in future programming contracts. 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. 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.

E. Retransmission Consent Contracts

77. In the Report and Order we specifically prohibited exclusive retransmission consent agreements between television broadcast stations and cable operators. 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, we concluded that this prohibition is necessary in light of the concerns that led Congress to regulate program access and cable signal carriage agreements. We then stated that we would revisit the issue in three years. We reject petitioners arguments that prohibiting exclusive retransmission consent agreements is not warranted and is not supported by the 1992 Cable Act. We are adding a new paragraph (m) to § 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

78. *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. Commenters had sought to eliminate exclusivity rights for stations choosing retransmission consent. We found, however, that the legislative history addressed this matter and that Congress intended for exclusivity protection to apply under its regulatory framework.

79. We affirm our decision to allow stations electing retransmission consent to assert network nonduplication or syndicated exclusivity protection as provided in the rules.²⁶ 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 redistribution of their signals. Both policies promote the continued availability of the over-the-air television system, a substantial government interest in Congress' view.

80. 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. 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

81. 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

82. 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.

Ordering Clauses

83. Accordingly, *it is ordered*, That pursuant to the authority contained in Sections 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. 102-385, Parts 73 and 76 of the Commission Rules, 47 CFR Parts 73 and 76 are amended as set forth below.

84. *It is further ordered*, That rule provisions of Part 76 of the rules set forth below shall be effective 30 days after publication in the **Federal Register**. Rule provisions of Part 73 of the rules set forth below shall be effective upon approval from OMB.

85. *It is further ordered*, That §§ 76.62 and 76.64 of the Commission's rules which were stayed by Order of the Commission on October 5, 1993 are revised as indicated below and the Stay Order is lifted as of the effective date of these rules.

86. *It is further ordered*, That the petitions for reconsideration 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.

List of Subjects

47 CFR Part 73

Radio broadcasting.

47 CFR Part 76

Cable television.

Federal Communications Commission.

William F. Caton,

Acting Secretary.

Amendatory Text

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

²⁶ 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.

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 § 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 § 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 of 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 § 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 (§ 76.61(a)(1)), and the cable television system operator's response (§ 76.61(a)(2)), if any. If no

timely response was received, the complaint should so state.

(ii) Must-carry complaints filed pursuant to § 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 § 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 § 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 request for carriage or channel position contained in the notice required by § 76.61(a)(1), or

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

(iv) With respect to must-carry complaints filed pursuant to § 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 is amended by revising paragraph (a)(2), adding a note after paragraph (a)(3)(iii), adding new paragraph (b)(3), a note following paragraph (d)(6), and revising the note following paragraph (e)(3), 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 for educational purposes, as defined in § 73.621 of this chapter, for at least 50 percent of its broadcast week.

(3) * * *

(iii) * * *

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

(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 § 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.

(d) * * *
(6) * * *

Note to paragraph (d): 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.

(e) * * *
(3) * * *

Note to paragraph (e): For the 1993 must-carry/retransmission consent election, the ADI assignments specified in the 1991–1992 *Television Market Guide* will apply.

4. 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 distant 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 requirements 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 § 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.

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

§ 76.57 Channel positioning.

(a) At the election of the licensee of a local commercial broadcast television station, and for the purpose of this section, 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.

6. 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.

7. 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 § 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 § 76.64.

8. 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 either owned by the subscriber or the building owner; or under the control and available for purchase by the subscriber or the building owner 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 § 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 § 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.

[FR Doc. 94-29443 Filed 12-2-94; 8:45 am]
BILLING CODE 6712-01-M

OFFICE OF PERSONNEL MANAGEMENT

48 CFR Chapter 16

RIN 3206-AG35

Federal Employees Health Benefits Program; Interest Assessment on Audit Findings

AGENCY: Office of Personnel
Management.

ACTION: Interim regulations with request
for comments.

SUMMARY: The Office of Personnel Management (OPM) is issuing interim regulations to clarify its intentions concerning the assessment of interest on monies due the Federal Employees Health Benefits (FEHB) Program when a comprehensive medical plan (CMP) submits defective cost or pricing data to support its community rate. This clarification is necessary because a few FEHB Program carriers are misinterpreting OPM's current regulations.

DATES: Interim regulations are effective January 4, 1995. Comments must be received on or before February 3, 1995.

ADDRESSES: Written comments may be sent to Lucretia F. Myers, Assistant Director for Insurance programs, Retirement and Insurance Group, Office of Personnel Management, P.O. Box 57, Washington, DC 20044; delivered to OPM, Room 4351, 1900 E Street NW., Washington, DC; or FAXed to (202) 606-0633.

FOR FURTHER INFORMATION CONTACT: Mary Ann Mercer, (202) 606-0191.

SUPPLEMENTARY INFORMATION: Recent final audit reports on community-rated plans issued by OPM's Office of Inspector General include monetary findings based on interest income lost to the FEHB Program because of FEHB Program carrier overcharges. A few carriers have questioned the period covered by the interest charges assessed by OPM. Specifically, they question OPM's policy of charging interest on the overcharges from the date the Government pays the inflated rate to the date of the carrier's full repayment to the Government. They believe that, in the absence of a specific contractual provision, OPM should charge interest not from the date of the overpayment by the Government, but from 30 days after its first written demand, as provided in the Federal Acquisition Regulation (FAR) general interest clause at 52.232-17. Because the monetary findings are significant in value, OPM is issuing these regulations to clarify its policy.

In FEHB Program contracts with CMP's using community rates, premiums and subscription income are determined on the basis of community rating. A community rate is deemed the equivalent of the FAR's description of an established catalog or market price. Each CMP certifies to the accuracy of its pricing; or, if granted an exemption by OPM, represents that all the statements made on or attached to its SF 1412, Claim for Exemption from Submission of Certified Cost or Pricing Data, are correct. If, upon audit, it is determined that the rates are not correct and the carrier has overcharged the FEHB Program, OPM assesses an interest charge in accordance with FAR 52.215-23, Price Reduction for Defective Cost or Pricing Data—Modifications. This provision allows the contracting officer to charge simple interest on the amount of the overpayment computed from the date the overpayment is made to the contractor to the date the Government is repaid by the contractor.

FAR 52.215-23 applies to contract modifications involving a price

adjustment exceeding \$100,000, but does not apply to modifications for which the price is (1) based on adequate price competition; (2) based on established catalog or market prices of commercial items sold in substantial quantities to the general public; or (3) set by law or regulation. OPM applies this clause as follows: A community rate is deemed the equivalent of an established catalog or market price; however, the defective community rates constitute that part of the quoted rate that does not fall within the catalog or market part of the price. Had the carrier priced the FEHB contract correctly according to the catalog or market price, this clause would not become operative. The defective portion of the rate is not a market or catalog price; that is, the defective portion is a modification to the catalog or market price. Since the carrier did not comply with the terms of its submission, it is responsible for correcting the price so that it is the catalog or market price and for making the government whole by paying interest from the date the government was overcharged.

By restating this interest provision in a specific clause in the FEHB Program acquisition regulations at FEHBA 1652.215-70, OPM makes it clear that its policy is to charge interest from the date it pays the carrier the higher rate to the date the full repayment is made to OPM.

Waiver of Notice of Proposed Rulemaking

Pursuant to section 553(b)(3)(A) of title 5 of the U.S. Code, I find that good cause exists for waiving the general notice of proposed rulemaking. The notice is being waived because the regulations simply interpret rules and clarify OPM's current policy with respect to the assessment of interest on amounts that become payable by the contractor to the FEHB Fund.

E.O. 12866, Regulatory Review

This rule has been reviewed by OMB in accordance with E.O. 12866.

Regulatory Flexibility Act

I certify that this regulation will not have a significant economic impact on a substantial number of small entities because it merely reiterates and clarifies OPM's existing policy.

List of Subjects in 48 CFR Part 1652

Administrative practice and procedure, Government employees, Health facilities, Health insurance, Health professions, Hostages, Reporting and recordkeeping requirements, Retirement.

U.S. Office of Personnel Management.
Lorraine A. Green,
Deputy Director.

Accordingly, OPM is amending Chapter 16 of Title 48, Code of Federal Regulations, as follows:

Chapter 16—Office of Personnel Management Federal Employees Health Benefits Acquisition Regulation

PART 1601—FEDERAL ACQUISITION REGULATIONS SYSTEM

1. The authority citation for 48 CFR part 1652 continues to read as follows:

Authority: 5 U.S.C. 8913; 40 U.S.C. 486(c); 48 CFR 1.301.

2. In the clause under section 1652.215-70, the heading is revised and two sentences are added to the end to read as follows:

§ 1652.215-70 Rate Reduction for Defective Pricing or Defective Cost or Pricing Data.

* * * * *

Rate Reduction for Defective Pricing or Defective Cost or Pricing Data (Oct 1994)

* * * When the Contracting Office determines that the Carrier did not charge a market price and the Government is entitled to a refund, the refund shall bear simple interest from the date the overcharge was paid by the Government to the Carrier until the date the overcharge is liquidated. In calculating the amount of interest due, the quarterly rate determinations by the Secretary of the Treasury under the authority of 26 U.S.C. 6621(a)(2) applicable to the periods the overcharge was retained by the Carrier shall be used.

(End of Clause)

[FR Doc. 94-29810 Filed 12-2-94; 8:45 am]

BILLING CODE 6325-01-M

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

RIN 1018-AB97

Endangered and Threatened Wildlife and Plants; Endangered Status for Three Hawaiian Plant Species of the Genus *Melicope*

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule.

SUMMARY: The U.S. Fish and Wildlife Service (Service) designates endangered status pursuant to the Endangered Species Act of 1973, as amended (Act), for three plants in the genus *Melicope* (alani): *M. adscendens*, *M. balloui*, and *M. ovalis*. All three species are endemic

to the slopes of Haleakala on the island of Maui, Hawaiian Islands. The three plant species and their habitats have been variously affected or are currently threatened by habitat degradation and damage to plants by feral and domestic animals (cattle and/or pigs), and/or by competition for space, light, water, and nutrients by naturalized, introduced vegetation. Due to the small number of existing individuals and their very narrow distributions, these species and their populations are vulnerable to reduced reproductive vigor and/or an increased likelihood of extinction from stochastic events. This final rule implements the Federal protection and recovery provisions provided by the Act.

EFFECTIVE DATE: January 4, 1995.

ADDRESSES: The complete file for this final rule is available for public inspection, by appointment, during normal business hours, at the U.S. Fish and Wildlife Service, Pacific Islands Office, 300 Ala Moana Boulevard, Room 6307, P.O. Box 50167, Honolulu, Hawaii 96850.

FOR FURTHER INFORMATION CONTACT:

Robert P. Smith, Field Supervisor, at the above address (808/541-2749).

SUPPLEMENTARY INFORMATION:

Background

Melicope adscendens, *M. balloui*, and *M. ovalis*, members of the citrus family (Rutaceae), are endemic to the slopes of Haleakala on the island of Maui, Hawaiian Islands. The island of Maui comprises remnants of two large shield volcanoes, the older West Maui Volcano on the west and the larger and much younger Haleakala Volcano on the east. These two volcanoes and the connecting isthmus formed by lava flows make up an island 1,888 square kilometers (sq km) (729 sq miles (mi)) in area. Haleakala, on East Maui, erupted just 200 years ago and has an elevation of 3,055 meters (m) (10,023 feet (ft)). Haleakala still retains its classic shield shape and has somewhat less diverse vegetation than the older and more eroded West Maui Mountains. Rainfall on Haleakala averages about 890 centimeters (cm) (350 inches (in)) per year, with the mountain's windward (northeastern) slope receiving the most precipitation. However, Haleakala's inner crater is a dry cinder desert because it is above the level at which precipitation develops and is sheltered from moisture-laden winds (Gagne and Cuddihy 1990).

Melicope adscendens occurs in *Nestegis sandwicensis* (Olopuia) Lowland Mesic Forest. This vegetation type, which includes co-dominant

Pleomele auwahiensis (hala pepe), now exists as scattered patches, much of the original area having been converted to pasture land. This forest occurs between the elevations of 30 and 1,600 m (100 and 5,250 ft). Rain falls mostly from October to March, and substrates are well-drained. *Melicope balloui* and *M. ovalis* occur in *Acacia koa*/Metrosideros polymorpha (Koa/Ohi'a) Montane Wet Forest. This plant community occurs between the elevations of 1,200 and 2,200 m (3,900 and 7,200 ft). Annual rainfall is over 2,500 millimeters (mm) (98 in) and is evenly distributed throughout the year. The climate is warm, and frequent afternoon fog often results in fog drip. Substrates are volcanic with well developed soil. This is a highly stratified community, comprising, in order of canopy height: koa (up to 40 m tall); 'ohi'a (up to 30 m tall); several native tree species (10 to 20 m tall); *Cibotium* (hapu'u) (understory canopy); and shrubs, herbs, ferns, and mosses (shade-tolerant understory) (Gagne and Cuddihy 1990; Hawaii Heritage Program (HHP) 1992a, 1992c, 1992d, 1992f).

The only known extant population of *Melicope adscendens* and one of two populations of *M. balloui* are located on privately owned land. The only known extant population of *M. ovalis* and the second population of *M. balloui* are in Haleakala National Park, which is owned by the Federal Government (HHP 1992a, 1992c, 1992d, 1992f).

Discussion of the Three Species

Melicope adscendens was first collected by Charles Noyes Forbes at Auwahi on the southwestern slopes of Haleakala in 1920. Harold St. John and Edward P. Hume (St. John 1944) later named and described the species as *Pelea adscendens*, choosing the specific epithet to describe the habit of the plant. Thomas G. Hartley and Benjamin C. Stone (1989, Stone et al. 1990, Wagner et al. 1990) synonymized the genus *Pelea* with *Melicope*, resulting in *M. adscendens*, the current name for this species.

Melicope adscendens is a sprawling shrub with long, slender branches covered with gray hairs when young and becoming hairless when older. New growth is covered with many fine, yellowish to golden brown hairs. The opposite, widely spaced, leathery to papery, elliptic leaves measure 1.5 to 6.5 cm (0.6 to 2.6 in) long and 1 to 4 cm (0.4 to 1.6 in) wide and have petioles 0.6 to 1.6 cm (0.2 to 0.6 in) long. Both upper and lower surfaces of mature leaves are hairless. Each flower cluster is on a main stalk 13 to 17 mm (0.5 to 0.7 in) long and comprises one to three

flowers on individual stalks usually 4 to 8 mm (0.2 to 0.3 in) long. Only female flowers have been observed, and each consists of four sepals about 3.5 mm (0.1 in) long, four petals about 5 mm (0.2 in) long, an eight-lobed nectary disk, eight reduced and nonfunctional stamens, and a hairless four-celled ovary. The 14 to 15 mm (0.6 in) wide fruit is made up of 4 distinct follicles (dry fruits splitting along one side) 7 to 7.5 mm (0.3 in) long. Sepals and petals remain attached to the mature fruit. The endocarp (inner fruit wall) and the wrinkled exocarp (outer fruit wall) are both hairless. *Melicope adscendens* is distinguished from other species of the genus by its habit, the distinct follicles of its fruit, and the persistent (remaining attached) sepals and petals (Stone 1969, Stone et al. 1990).

Melicope adscendens has been found only on the island of Maui on the southwestern slope of Haleakala. Two plants, separated by an unspecified distance, were found by Forbes in 1920. Today, one of these plants is still known to exist near Puu Ouli on privately owned land; the other plant has not been relocated. This species typically grows in Olopuia Lowland Mesic Forest with hala pepe as a co-dominant at elevations between 914 and 1,200 m (3,000 and 3,900 ft). Associated taxa include *Chamaesyce celastroides* var. *lorifolia* ('akoko), *Dodonaea viscosa* (a'ali'i), *Pouteria sandwicensis* ('ala'a), and *Styphelia tameiameia* (pukiawe). The plant grows next to a water pipeline on land used as a cattle (*Bos taurus*) ranch. Major threats are habitat damage and trampling by cattle, competition with the alien plant species *Lantana camara* (lantana) and *Pennisetum clandestinum* (Kikuyu grass), and reduced reproductive vigor and/or extinction from stochastic events due to the existence of only one known population with one individual. Potential threats include habitat degradation and damage to plants by feral axis deer (*Axis axis*), goats (*Capra hircus*), feral pigs (*Sus scrofa*), black twig borer (*Xylosandrus compactus*), fire, and ranch activities (such as water pipeline maintenance) (HHP 1992a; Art Medeiros, Haleakala National Park, Robert Hobdy, Hawaii Department of Land and Natural Resources, and Steve Perlman, Hawaii Plant Conservation Center, pers. comms., 1992).

Melicope balloui was first collected by Horace Mann, Jr., and William Tufts Brigham in 1864 or 1865. When Wilhelm Hillebrand (1888) named this plant *Pelea mannii*, he cited this specimen as well as a specimen which is now thought to be *P. peduncularis*. If Mann and Brigham's specimen is

chosen as the type of *P. mannii*, the correct name for the taxon will be *M. mannii*, and *M. balloui* will become a synonym (Stone *et al.* 1990). When naming *P. balloui*, Rock (1913) based his name on a specimen he had collected in 1910. Rock chose the specific epithet to honor Howard M. Ballou, who corrected the proof sheets of his landmark book on Hawaiian indigenous trees (Rock 1913). The specimen St. John cited as the type when he named and described *P. ukuleleensis* actually comprised material of both *P. balloui* and *P. clusiaefolia*, both previously validly published names (Stone 1963). Following the transfer of the genus *Pelea* to *Melicope* (Hartley and Stone 1989, Wagner *et al.* 1990), authors of the current treatment of the Hawaiian members of the genus (Stone *et al.* 1990) now consider *P. balloui* and *P. ukuleleensis* to be synonyms of *M. balloui*.

Melicope balloui is a small tree or shrub, the new growth of which has yellowish brown woolly hairs and waxy scales. Plant parts later become nearly hairless. Leaves are opposite, leathery, inversely ovate to elliptic, 5 to 10 cm (2.0 to 3.9 in) long, 3 to 7 cm (1.2 to 2.8 in) wide, and have petioles 1.0 to 2.6 cm (0.4 to 1.0 in) long. The upper and lower surfaces of mature leaves are hairless except along the midrib of the lower surface. Each flower cluster is on a main stalk 3 to 16 mm (0.1 to 0.6 in) long and comprises five to nine flowers on individual stalks about 5 mm (0.2 in) long. Only female flowers have been observed, and each consists of four sepals about 3 mm (0.1 in) long, four petals about 4 mm (0.2 in) long, an eight-lobed nectary disk, eight reduced and nonfunctional stamens, and a four-celled ovary with many short, fine hairs. The fruit, a four-lobed capsule 2.5 to 2.7 cm (1.0 to 1.1 in) wide, consists of 1.2 to 1.3 cm (0.5 in) long carpels fused about a quarter of their length. Sepals and petals usually remain attached to the mature fruit. One or two glossy black seeds about 7 mm (0.3 in) long are found in each fertile carpel. The exocarp and endocarp are covered with fine, short hairs. *Melicope balloui* is distinguished from other species of the genus by the partially fused carpels of its four-lobed capsule and the usually persistent sepals and petals (Stone *et al.* 1990).

Melicope balloui has been found only on the island of Maui on the northern and southeastern slopes of Haleakala. There are two known extant populations, located approximately 4.0 km (2.5 mi) apart near Puu o Kakae on privately owned land and in Kipahulu Valley on federally owned land within

Haleakala National Park. The two populations are comprised of an estimated total of no more than 10 individuals. This species typically grows in koa- and 'ohi'a-dominated Montane Wet Forests at elevations between 760 and 1,520 m (2,500 and 5,000 ft). Associated taxa include *Coprosma* sp. (pilo), *Dicranopteris linearis* (uluhe), *Joinvillea ascendens* ssp. *ascendens* ('ohe), and *Peperomia subpetiolata* ('ala'ala wai nui). Major threats are habitat degradation and damage to plants by feral pigs and reduced reproductive vigor and/or extinction from stochastic events due to the small number of existing populations and individuals. Potential threats include competition with alien plant taxa, such as *Paspalum conjugatum* (Hilo grass) and *Psidium cattleianum* (strawberry guava), susceptibility to black twig borer, and habitat degradation and damage to plants by feral goats and axis deer (HHP 1992c, 1992d; Linda Cuddihy, Hawaii Volcanoes National Park, and A. Medeiros, pers. comms., 1992).

Based on a specimen collected by Forbes in the mountains above Hana, East Maui, St. John (1944) described and named *Pelea ovalis*, choosing the specific epithet to refer to the shape of the leaves of the species. Hartley and Stone (1989) synonymized the genus *Pelea* with *Melicope*, resulting in the combination *M. ovalis*.

Melicope ovalis is a tree up to 5 m (16 ft) tall. New growth has fine, short, brownish hairs and soon becomes hairless. Leaves are opposite, leathery, broadly elliptic, 8 to 16 cm (3.1 to 6.3 in) long, 4 to 10 cm (1.6 to 3.9 in) wide, and have petioles 3 to 4 cm (1.2 to 1.6 in) long. The upper and lower surfaces of the leaves are hairless, and bruised foliage has an anise odor similar to that of *M. anisata* (mokiha). Each flower cluster is on a main stalk 3 to 12 mm (0.1 to 0.5 in) long and comprises three to seven flowers on individual stalks 10 to 13 mm (0.4 to 0.5 in) long. Further details of the flowers are unknown. The fruit, a capsule about 1 cm (0.4 in) long and 1.2 to 1.4 cm (0.5 to 0.6 in) wide, has carpels that are fused along almost their entire length. Each fertile carpel contains one or two glossy black seeds about 5 mm (0.2 in) long. The exocarp and endocarp are both hairless.

Melicope ovalis is distinguished from other species of the genus by the almost entirely fused carpels of its capsule, its nonpersistent sepals and petals, and its well-developed petioles (Stone *et al.* 1990).

Melicope ovalis has been found only on the island of Maui on the eastern and southeastern slopes of Haleakala. There

is one known extant population, located in Kipahulu Valley in Haleakala National Park. This species typically grows in koa- and 'ohi'a-dominated Montane Wet Forests at elevations between 850 and 1,430 m (2,800 and 4,700 ft). Associated taxa include *Broussaisia arguta* (kanawao), *Cheirodendron trigynum* ('olapa), and *Perrottetia sandwicensis* (olomea). Major threats are habitat degradation and damage to plants by feral pigs and reduced reproductive vigor and/or extinction from stochastic events due to the existence of only one population and one known individual. Competition with alien introduced plants such as Hilo grass and strawberry guava, susceptibility to black twig borer, and habitat degradation and damage to plants by feral goats and axis deer are potential threats (HHP 1992e, 1992f; L. Cuddihy and A. Medeiros, pers. comms., 1992).

Previous Federal Action

Federal action on these plants began as a result of section 12 of the Act, which directed the Secretary of the Smithsonian Institution to prepare a report on plants considered to be endangered, threatened, or extinct in the United States. This report, designated as House Document No. 94-51, was presented to Congress on January 9, 1975. In that document, *Melicope balloui* (as *Pelea balloui*) and *M. ovalis* (as *P. ovalis*) were considered to be endangered. On July 1, 1975, the Service published a notice in the *Federal Register* (40 FR 27823) of its acceptance of the Smithsonian report as a petition within the context of section 4(c)(2) (now section 4(b)(3)) of the Act, and giving notice of its intention to review the status of the plant taxa named therein. As a result of that review, on June 16, 1976, the Service published a proposed rule in the *Federal Register* (41 FR 24523) to determine endangered status pursuant to section 4 of the Act for approximately 1,700 vascular plant species, including *M. balloui* (as *P. balloui*) and *M. ovalis* (as *P. ovalis*). The list of 1,700 plant taxa was assembled on the basis of comments and data received by the Smithsonian Institution and the Service in response to House Document No. 94-51 and the July 1, 1975, *Federal Register* publication. General comments received in response to the 1976 proposal are summarized in an April 26, 1978, *Federal Register* publication (43 FR 17909). In 1978, amendments to the Act required that all proposals over 2 years old be withdrawn. A 1-year grace period was given to proposals already over 2 years old. On December 10, 1979, the Service

published a notice in the **Federal Register** (44 FR 70796) withdrawing the portion of the June 16, 1976, proposal that had not been made final, along with four other proposals that had expired. The Service published an updated notice of review for plants on December 15, 1980 (45 FR 82479), in which *M. balloui* (as *P. balloui*) and *M. ovalis* (as *P. ovalis*) were considered to be Category 1 candidates for Federal listing. Category 1 species are those for which the Service has on file substantial information on biological vulnerability and threats to support preparation of listing proposals. In an updated notice of review published on September 27, 1985 (50 FR 39525), *M. balloui* (as *P. balloui*) was considered to be a Category 1 species, and *M. ovalis* (as *P. ovalis*) a Category 1* species. Category 1* taxa are those that are possibly extinct. In a notice of review published February 21, 1990 (55 FR 6183), *M. adscendens* was treated as a Category 3A species and *M. balloui* and *M. ovalis* as Category 1* species. Category 3A species are those for which the Service has persuasive evidence of extinction. Because specimens collected in the past few years were recently verified as being these three species, they are confirmed extant and are being listed as endangered.

For petitions presenting substantial information that listing may be

warranted, section 4(b)(3)(B) of the Act requires the Secretary to make a finding on whether the petitioned action is warranted within 12 months of receipt of the petition. Section 2(b)(1) of the 1982 amendments further requires all petitions pending on October 13, 1982, be treated as having been newly submitted on that date. On October 13, 1983, the Service found that the petitioned listing of these species was warranted but precluded by other pending listing actions, in accordance with section 4(b)(3)(B)(iii) of the Act. Notification of this finding was published in the **Federal Register** on January 20, 1984 (49 FR 2485). Such a finding requires the petition to be recycled pursuant to section 4(b)(3)(C)(i) of the Act. The finding was reviewed in October of 1984, 1985, 1986, 1987, 1988, 1989, 1990, and 1991. Publication of the proposed rule constituted the final one-year finding for these species.

On May 11, 1993, the Service published in the **Federal Register** (58 FR 18073) a proposal to list the plants *Melicope adscendens*, *M. balloui*, and *M. ovalis* as endangered. This proposal was based primarily on information supplied by the Hawaii Heritage Program and observations by botanists and naturalists. The Service now determines these three species of *Melicope* to be endangered with the publication of this rule.

Summary of Comments and Recommendations

In the May 11, 1993, proposed rule and associated notifications, all interested parties were requested to submit factual reports or information that might contribute to the development of a final listing decision. The public comment period ended July 12, 1993. Appropriate State agencies, county governments, Federal agencies, scientific organizations, and other interested parties were contacted and requested to comment. A newspaper notice inviting public comment was published in "The Honolulu Advertiser" on June 2, 1993, and "The Maui News" on June 1, 1993. No letters of comment were received.

Summary of Factors Affecting the Species

Section 4 of the Endangered Species Act (16 U.S.C. 1533) and regulations (50 CFR Part 424) promulgated to implement the Act set forth the procedures for adding species to the Federal endangered and threatened species lists. A species may be determined to be an endangered species due to one or more of the five factors described in section 4(a)(1). The threats facing these three species are summarized in Table 1.

TABLE 1.—SUMMARY OF THREATS

Species	Alien mammals				Insects	Alien plants	Fire	Human impacts	Limited numbers*
	Cattle	Deer	Goats	Pigs					
<i>Melicope adscendens</i>	X	P	P	P	P	X	P	P	X
<i>Melicope balloui</i>		P	P	X	P	P			X
<i>Melicope ovalis</i>		P	P	X	P	P			X

KEY:

X=Immediate and significant threat.

P=Potential threat.

*=No more than 10 known individuals and no more than 2 known populations.

These factors and their application to *Melicope adscendens* (St. John and E. Hume) T. Hartley and B. Stone (alani), *M. balloui* (Rock) T. Hartley and B. Stone (alani), and *M. ovalis* (St. John) T. Hartley and B. Stone (alani) are as follows:

A. *The present or threatened destruction, modification, or curtailment of its habitat or range.* The native vegetation of East Maui has undergone extreme alterations because of past and present land management practices, including deliberate alien plant and animal introductions and agricultural development (Scott *et al.* 1986). Degradation of habitat by feral animals and competition with alien

plants are considered to be the major threats to the three species.

Cattle, introduced to Maui in the early 1800s, were permitted to range freely and subsequently became quite numerous. Cattle have converted large tracts of forest to open pasture on southern and northwestern Haleakala. Feral cattle consume native vegetation, trample roots and seedlings, accelerate erosion, and promote the invasion of alien plants (Cuddihy and Stone 1990, Stone 1985). Along with goats, cattle are considered one of the two most damaging alien vertebrates to Hawaii's native ecosystems. The long history of cattle grazing has so altered the southern slope of Haleakala that only

pockets of native vegetation remain (Scott *et al.* 1986). The single known individual of *Melicope adscendens* grows in an area used for grazing, and cattle are considered an immediate threat to the species (A. Medeiros, pers. comm., 1992).

Goats were introduced to Maui by the early 1800s and are now a serious threat to the integrity of Maui's forests. The impact of goats on the native vegetation is similar to that described for cattle (Cuddihy and Stone 1990, Stone 1985). Although they have now been removed, feral goats entered Kipahulu Valley in the past and could become a threat to *Melicope balloui* and *M. ovalis* if they return. Goats also occur near M

adscendens in Auwahi and are a potential threat to that species as well (A. Medeiros, pers. comm., 1992).

Axis deer cause habitat degradation by trampling, consuming, and overgrazing vegetation. This process removes ground cover and often results in soil erosion. Alien plant taxa are then able to exploit the newly disturbed areas (Cuddihy and Stone 1990). Axis deer have become established at low elevation slopes of western and southern Haleakala and may become a threat to mesic and wet native forests on Haleakala. They are a potential threat to all three endangered species of *Melicope* (R. Hobdy and A. Medeiros, pers. comm., 1992).

In contrast to goats and cattle, pigs typically occupy the wetter regions of Hawaii's forests and are one of the major current modifiers of wet forest habitats. Pigs damage native vegetation by their rooting and trampling activities. This process encourages the ingress of alien plants, which are able to exploit newly disturbed soil better than native taxa. In addition, these animals disseminate alien plant taxa through their feces and on their bodies (Cuddihy and Stone 1990, Stone 1985). Pigs have severely damaged fragile and limited communities, such as that of *Argyroxiphium virescens* (greensword) (Stone 1985). This species of greensword was found at an historic site of *Melicope balloui*, which has not been relocated since 1920, and it is possible that pig damage caused the destruction of the habitat (HHP 1992g). Although *M. balloui* and *M. ovalis* grow in areas of Kipahulu Valley that are fenced to exclude pigs, the areas are not yet pig-free, so trampling of seedlings by pigs remains a threat to these two species (HHP 1992b, 1992d, 1992f; L. Cuddihy and R. Hobdy, pers. comm., 1992). Pigs are also present in Auwahi and constitute a potential threat to *M. adscendens* (S. Perlman, pers. comm., 1992).

B. *Overutilization for commercial, recreational, scientific, or educational purposes.* Unrestricted collecting for scientific or horticultural purposes and excessive visits by individuals interested in seeing rare plants could result from increased publicity. This is a potential threat to all three of the proposed species, none of which has more than a total of two populations or 10 known individuals. Collection of whole plants or reproductive parts of these species could cause an adverse impact on the gene pool and threaten the survival of the species.

C. *Disease or predation.* The black twig borer is a small beetle about 1.6 mm (0.06 in) in length that burrows into

branches, introduces a pathogenic fungus as food for its larvae, and lays its eggs. Twigs, branches, and even an entire plant can be killed from such an infestation. In the Hawaiian Islands, black twig borer has many hosts and is widespread. It is known to attack species of *Melicope* and is a potential threat to all three proposed species (Hara and Beardsley 1979).

D. *The inadequacy of existing regulatory mechanisms.* *Melicope ovalis* occurs exclusively on Federal land (Haleakala National Park) but feral pigs still pose a threat in this area. *Melicope adscendens* is found exclusively on private land. One of the two known extant populations of *M. balloui* occurs on privately owned land within a State conservation district.

Conservation district lands are regarded, among other purposes, as necessary for the protection of endemic biological resources and the maintenance or enhancement of the conservation of natural resources. Requests for amendments to district boundaries or variances within existing classifications can be made by government agencies and private landowners (HRS, sect. 205-4). The Hawaii Department of Land and Natural Resources is mandated to initiate changes in conservation district boundaries to include "the habitat of rare native species of flora and fauna within the conservation district" (HRS, sect. 195D-5.1). Hawaii environmental policy, and thus approval of land use, is required by law to safeguard "the State's unique natural environmental characteristics" (HRS, sect. 344-3(1)) and includes guidelines to "Protect endangered species of individual plants and animals" (HRS, sect. 344-4(3)(A)). However, none of the three species in this rule is presently protected under the State's endangered species act, and, despite provisions for conserving endemic resources, individual rare species may be overlooked during consideration of other land use priorities. Even if all other threats were removed by virtue of occurrence and protection on Federal land or in conservation districts, these species are still in danger of extinction due to their low numbers.

E. *Other natural or manmade factors affecting its continued existence.* The small numbers of individuals and populations of these three species of *Melicope* increase the potential for extinction from stochastic events. The limited gene pool may depress reproductive vigor, or a single human-caused or natural environmental disturbance could destroy a significant

percentage of the individuals or an entire population, potentially causing the extinction of the species. Only one individual of *M. adscendens* is known to exist, the two populations of *M. balloui* contain a total of less than 10 known individuals, and only one individual of *M. ovalis* has been definitely identified.

The only known individual of *Melicope adscendens* is located directly adjacent to a water pipeline used in ranching activities. Maintenance performed on the pipeline in the vicinity of the plant could damage or destroy the plant. In addition, cattle walking along the pipeline could easily trample the plant (A. Medeiros, pers. comm., 1992).

Competition with one or more alien plant taxa threatens one of the endangered *Melicope* species and constitutes a potential threat to the other two species. Lantana, brought to Hawaii as an ornamental plant, is an aggressive, thicket-forming shrub that can now be found on all of the main islands in mesic forests, dry shrublands, and other dry, disturbed habitats (Wagner *et al.* 1990). Lantana threatens *Melicope adscendens* (A. Medeiros, pers. comm., 1992). Kikuyu grass, an aggressive, perennial grass introduced to Hawaii as a pasture grass, withstands trampling and grazing and produces thick mats that choke out other plants and prevent their seedlings from establishing. The species has been declared a noxious weed by the U.S. Department of Agriculture (7 CFR 360) and threatens *M. adscendens* (O'Connor 1990; Smith 1985; A. Medeiros, pers. comm., 1992). The perennial Hilo grass, naturalized in moist to wet, disturbed areas on most Hawaiian Islands, produces a dense ground cover, even on poor soil, and is a potential threat to *M. balloui* and *M. ovalis* (O'Connor 1990; L. Cuddihy, pers. comm., 1992). Strawberry guava, widely naturalized in mesic and wet Hawaiian forests, develops into stands in which few other plants grow and physically displaces natural vegetation. Pigs depend on strawberry guava for food and in turn disperse the plant's seeds through the forests (Smith 1985, Wagner *et al.* 1990). Strawberry guava, considered to be the greatest weed problem in Hawaiian wet forests, is invading Kipahulu Valley and is a potential threat to *M. balloui* and *M. ovalis* (L. Cuddihy, pers. comm., 1992).

Stochastic events such as human-set fires and wildfires destroy native Hawaiian vegetation and usually favor fire-resistant alien plants (Cuddihy and Stone 1990). Fire is a potential threat to *Melicope adscendens* (A. Medeiros, pers. comm., 1992).

The Service has carefully assessed the best scientific and commercial information available regarding the past, present, and future threats faced by these species in issuing this rule. Based on this evaluation, the preferred action is to list these three species as endangered. The species consist of only 1 or 2 populations each and 1 to approximately 10 known individual plants. They are threatened by habitat degradation and damage to plants by feral or domestic animals and by competition from alien plants. Small population size and limited distribution make these species particularly vulnerable to reduced reproductive vigor and/or extinction from stochastic events. Because these three species are in danger of extinction throughout all or a significant portion of their ranges, they fit the definition of endangered as defined in the Act.

Critical habitat is not being designated for the three species included in this rule for reasons discussed in the "Critical Habitat" section of this final rule.

Critical Habitat

Section 4(a)(3) of the Act, as amended, requires that, to the maximum extent prudent and determinable, the Secretary propose critical habitat at the time the species is proposed to be endangered. The Service finds that designation of critical habitat is not presently prudent for these species. All three species have extremely low total populations and face anthropogenic threats. The listing of these species as endangered publicizes the rarity of the plants and, thus, can make the species attractive to researchers, curiosity seekers, or collectors of rare plants. The publication of precise maps and descriptions of critical habitat in the *Federal Register* and local newspapers as required in a designation of critical habitat would increase the species' vulnerability to take or vandalism and, therefore, could contribute to their decline and increase enforcement problems. Protection of the species' habitat will be addressed through the recovery process and through the section 7 consultation process. All involved parties and the landowners have been notified of the importance of protecting the habitat of these species. Two of the three species are found in Haleakala National Park where Federal law protects all plants from damage or removal. It is highly unlikely that Federal activities in the National Park would directly affect the continued existence of these two species. Therefore, the Service finds that designation of critical habitat for these

species is not prudent at this time because such designation would increase the species' vulnerability to vandalism, collecting, or other human activities and because it is unlikely to aid in the conservation of the species.

Available Conservation Measures

Conservation measures provided to species listed as endangered under the Endangered Species Act include recognition, recovery actions, requirements for Federal protection, and prohibitions against certain activities. Recognition through listing encourages and results in conservation actions by Federal, State, and local agencies, private organizations, and individuals. The Act provides for possible land acquisition and cooperation with the State and requires that recovery actions be carried out for all listed species. The protection required of Federal agencies and the prohibitions against certain activities involving listed plants are discussed, in part, below.

Section 7(a) of the Act, as amended, requires Federal agencies to evaluate their actions with respect to any species that is proposed or listed as endangered and with respect to its critical habitat, if any is being designated. Regulations implementing this interagency cooperation provision of the Act are codified at 50 CFR part 402. Section 7(a)(2) requires Federal agencies to ensure that activities they authorize, fund, or carry out are not likely to jeopardize the continued existence of an endangered species or to destroy or adversely modify its critical habitat. If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency must enter into formal consultation with the Service. One species (*Melicope ovalis*) is located only in Haleakala National Park. One population of another species (*M. balloui*) is also found in this park. Laws relating to national parks prohibit damage or removal of any plants growing in the parks. There are no Federal activities that are known to occur within the present known habitat of these three plant species.

The Act and implementing regulations found at 50 CFR 17.61, 17.62, and 17.63 set forth a series of general prohibitions and exceptions that apply to all endangered plant species. With respect to the three *Melicope* species listed as endangered by this rule, all prohibitions of section 9(a)(2) of the Act, implemented by 50 CFR 17.61, would apply. These prohibitions, in part, make it illegal for any person subject to the jurisdiction of the United States to import or export such species to/from the United States; transport

such species in interstate or foreign commerce in the course of a commercial activity; sell or offer for sale such species in interstate or foreign commerce; remove and reduce to possession such species from areas under Federal jurisdiction; maliciously damage or destroy any such species on any area under Federal jurisdiction; or remove, cut, dig up, damage, or destroy any such species on any other area in knowing violation of any State law or regulation or in the course of any violation of a State criminal trespass law. Certain exceptions apply to agents of the Service and State conservation agencies. Section 10 of the Act and 50 CFR 17.62 provide for the issuance of permits under certain circumstances to carry out activities involving endangered plants that are otherwise prohibited by section 9.

It is the policy of the Service (59 FR 34272) to identify to the maximum extent practicable at the time a species is listed those activities that would or would not be likely to constitute a violation of section 9 of the Act. Such information is intended to clarify the potential impacts of a species' listing on proposed and ongoing activities within the species' range. Two of the species occur on National Park Service lands. Collection, damage or destruction of these species on Federal lands is prohibited without a Federal endangered species permit. Such activities on non-Federal lands would constitute a violation of section 9 if conducted in knowing violation of Hawaii State law or regulations or in violation of a State criminal trespass law (see Hawaii State Law section below). The Service is not aware of any trade in these species or of any activities currently being conducted by the public that will be affected by this listing and result in a violation of section 9. Requests for copies of the regulations concerning listed plants and general inquiries regarding prohibitions and permits may be addressed to the U.S. Fish and Wildlife Service, Ecological Services, Endangered Species Permits, 911 N.E. 11th Avenue, Portland, Oregon 97232-4181 (503/231-2063; FAX 503/231-6243). Questions regarding whether specific activities will constitute a violation of section 9 should be directed to the Field Supervisor of the Service's Pacific Islands Office (see ADDRESSES section).

Hawaii State Law

Federal listing will automatically invoke listing under the State's endangered species legislation. Hawaii's Endangered Species Act states, "Any species of aquatic life, wildlife, or land

plant that has been determined to be an endangered species pursuant to the [Federal] Endangered Species Act shall be deemed to be an endangered species under the provisions of this chapter * * * (HRS, sect. 195D-4(a)). The State law prohibits cutting, collecting, uprooting, destroying, injuring, or possessing any listed species of plant, or attempting to engage in any such conduct. State law also encourages conservation by State agencies. Laws relating to the conservation of biological resources allow for the acquisition of land as well as the development and implementation of programs concerning the conservation of biological resources (HRS, sect. 195D-5(a)).

National Environmental Policy Act

The Fish and Wildlife Service has determined that an Environmental Assessment or Environmental Impact Statement, as defined under the authority of the National Environmental

Policy Act of 1969, need not be prepared in connection with regulations adopted pursuant to section 4(a) of the Endangered Species Act of 1973, as amended. A notice outlining the Service's reasons for this determination was published in the **Federal Register** on October 25, 1983 (48 FR 49244).

References Cited

A complete list of all references cited herein, as well as others, is available upon request from the Pacific Islands Office, see **ADDRESSES** above.

Author

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List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Reporting and

recordkeeping requirements, and Transportation.

Regulation Promulgation

Accordingly, part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, is amended as set forth below:

PART 17—[AMENDED]

1. The authority citation for part 17 continues to read as follows:

Authority: 16 U.S.C. 1361-1407; 16 U.S.C. 1531-1544; 16 U.S.C. 4201-4245; Pub. L. 99-625, 100 Stat. 3500; unless otherwise noted.

2. Section 17.12(h) is amended by adding the following, in alphabetical order under **FLOWERING PLANTS**, to the List of Endangered and Threatened Plants to read as follows:

§ 17.12 Endangered and threatened plants.
* * * * *
(h) * * *

Species		Historic range	Family	Status	When listed	Critical habitat	Special rules
Scientific name	Common name						
FLOWERING PLANTS							
<i>Melicope</i> (= <i>Pelea</i>) <i>adscendens</i>.	Alani	U.S.A. (HI)	Rutaceae	E	565	NA	NA
<i>Melicope</i> (= <i>Pelea</i>) <i>balloui</i>.	Alani	U.S.A. (HI)	Rutaceae	E	565	NA	NA
<i>Melicope</i> (= <i>Pelea</i>) <i>ovalis</i>.	Alani	U.S.A. (HI)	Rutaceae	E	565	NA	NA

Dated: November 8, 1994.

Mollie H. Beattie,

Director, Fish and Wildlife Service.

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