

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC

In the Matter of )  
 )  
Petition for Declaratory Ruling Regarding )  
Mandatory Satellite Carriage of Qualified LPTV )  
 )

Docket No. \_\_\_\_\_

**PETITION FOR DECLARATORY RULING AND DEMAND FOR CARRIAGE**

Submitted by,

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By counsel,

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Dated this 7<sup>th</sup> day of September 2018.

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**PETITION FOR DECLARATORY RULING and DEMAND FOR COVERAGE**

COMES NOW Michael Karr, owner and operator of WVUX-LD, and respectfully petitions pursuant to Rule 1.2 that this Federal Communications Commission ("Commission") issue a declaratory ruling that confirms and clarifies the key aspects of the federal code and regulatory regime requiring mandatory carriage of qualified Low Power Television stations by satellite providers who choose to carry local television. For the reasons set forth herein, Petitioner urges this Commission to grant this Petition.

**I. INTRODUCTION**

Petitioner owns and operates WVUX-LD, a television station in the community of Fairmont, West Virginia and in the Clarksburg/Weston-DMA. Petitioner's station is a qualified low power television station as defined in 47 USC §534(h)(2). Petitioner has successfully exercised its must-carry rights with the cable provider located within thirty-five miles of its transmission site.

The satellite carriers in Petitioner's area are DIRECTV and DISH Network. Petitioner notified both carriers of his election and demand for carriage in the



Clarksburg-DMA as a must-carry election. Both satellite providers have denied carriage on the basis that they are not required to carry *any* low power television stations – not even *qualified* low power television stations.

In the 1992 Cable Act, Congress gave LPTVs must-carry rights on cable systems provided they offered local broadcasting and programs. (See 47 USC 534(c)(1) and (h)(2)(B)). Likewise, Congress imposed the must-carry mandate upon satellite carriers in 1999 when it passed the Satellite Home Viewer Improvement Act (“SHVIA”). Section 338 of SHVIA required satellite carriers to carry on request all qualified local television broadcast stations’ signals in local markets in which the satellite carries at least one local television broadcast signal pursuant to the statutory copyright license. This Commission adopted rules to implement those provisions in November 2000.

Under the Commission’s broadcast signal carriage rules, each satellite carrier providing local-into-local service pursuant to the statutory copyright license is generally obligated to carry any qualified local television station in the particular DMA except for those which provide duplicative programming. The procedure for those qualified stations that provide over-the-air service for the first time after June 30, 2001 and thus are considered “new” as is WVUX-LD, is to exercise their right to be carried by notifying the satellite carrier. If the station meets all the requirements of Section 338, then the satellite carrier must commence carriage within ninety (90) days of receipt of the request. (See 47 CFR 76.66(d)(3)).

If the satellite carrier refuses or fails to meet its obligations under Section 338, the station must first notify the carrier, in writing, of the alleged failure and identify its reasons for believing that the satellite carrier has failed to comply with its obligations



and the satellite carrier must respond in writing within thirty (30) days with its reasons for believing that it is in compliance. (See 47 USC 338(f)(1); see also 47 CFR 76.66(m)(1) and (2)). Then the station may file a complaint with the Commission within sixty (60) days following the satellite carrier's final rejection of the carriage request. (See 47 CFR 76.66(m)(6)).

In this matter, the Petitioner mailed final notice on January 16, 2018 to both Directv and Dish that it believed the satellite carriers were incorrect in their judgment that Section 338 does not to apply to "qualified LPTVs". By letter dated February 5, 2018 from Directv and letter dated February 8, 2018 from Dish, the satellite carriers responded by denying that WVUX-LD is entitled to must-carry rights because they opine that no low power station is entitled to must carry rights – not even qualified LPTVs.

Petitioner then filed this action for declaratory ruling by mailing the original to the Secretary of the FCC on March 27, 2018, which was received on April 2, 2018. On August 30 2018, counsel for Petitioner received a telephone message and email directing that this document be electronically filed with the FCC.

## II. DISCUSSION

Both satellite carriers argue that qualified LPTVs are not entitled to "must carry" status on the basis that 47 USC §§ 534-535 apply to cable operators and not satellite carriers. They argue that 47 USC §338(a)(3) makes carriage of all LPTVs merely discretionary by satellite carriers – even qualified LPTVs. They argue that FCC Rule §76.66(a)(4) explicitly excludes all LPTVs, including qualified LPTVs, from the "television broadcast station". Petitioner disagrees.



Subsection (k)(5) of 47 USC §338 defines "low power television station" to mean one "as defined under section 74.701(f) of title 47, Code of Federal Regulations, as in effect on June 1, 2004" and includes "a low power television station that has been accorded primary status as a Class A television licensee under section 73.6001(a) of title 47, Code of Federal Regulations." Subsection (a)(3) of 47 USC §338 states, "No low power television stations whose signals are provided under section 119(a)(14) of Title 17 shall be entitled to insist on carriage under this section, regardless of whether the satellite carrier provides secondary transmission of the primary transmissions of other stations in the same local market pursuant to section 122 of such title nor shall any such carriage be considered in connection with the requirements of subsection (c) of this section."

Section 74.701(f) of Title 47 of the Code of Federal Regulations provides the definition of "low power TV station" as "[a] station authorized under the provisions of this subpart that may retransmit the programs and signals of a TV broadcast station and that may originate programming in any amount greater than 30 seconds per hour and/or operates a subscription service (citations omitted)."

Title 47 Section 338 is the section that Directv and Dish have relied upon to deny Petitioner must-carry rights. However, neither subsections apply to Petitioner because Petitioner's *qualified* low power television station is not a Class A nor does it duplicate the transmission of any other station in its broadcast area.

Rather, Petitioner operates a "qualified low power television" station as defined in 47 USC §534(h)(2) which means that (1) it conforms to the rules established for LPTVs in part 47 CFR §74; (2) broadcasts a minimum number of hours as required in 47 CFR §73 and meets the requirements therein with respect to certain programming and equal



employment opportunity; (3) complies with interference regulations consistent with its secondary status; (4) is located no more than 35 miles from the headend site; (5) delivers to the principal headend an over-the-air signal of good quality; (6) has a community of license located outside the largest 160 Metropolitan Statistical Areas, ranked by population as determined by the OMB on June 30, 1990, and the population of said community then did not exceed 35,000; and (7) has no full power television broadcast station in its county or political subdivision. By virtue of the definition, only those LPTVs in the smallest markets – meaning the bottom 50 markets whose population in the county or city is less than 35,001 – have the possibility of meeting the criteria of a qualified low power television station. It does not serve any governmental interest to further limit these qualified low power television stations by denying carriage via satellite. There is no separate definition of “qualified low power television” in Section 338 of Title 47.

Specifically, Petitioner cites the United States General Accounting Office (“GAO”) report to Congress as persuasive authority to support this Petition. In December 2016, the GAO cited 47 USC §§ 534 and 535, explaining to Congress, “Federal law requires cable and satellite operators to carry the signal of qualified LPTV stations serving their markets. 47 U.S.C. § §534 and 535” (Footnote 17, *in part*, GAO-17-135, Dec. 2016). Thus, Congress has been advised and likely has the understanding that qualified low power television stations are must-carry on both cable and satellite.

Petitioner further argues that there is no legitimate reason to treat cable providers and satellite carriers differently. Section 534 of Title 47 of the United States Code sets forth certain requirements of cable operators. Subsection (c) mandates that cable



operators carry low power stations that meet certain criteria as defined in Subsection (h)(2). Section 338 of Title 47 of the United States Code sets forth carriage obligations of satellite providers.

Moreover, if the must-carry rule does not apply to satellite carriers, then the options of public viewers who subscribe to the satellite provider are further limited. For example, if a qualified low power television station is an affiliate network for some out-of-state network, then the network cannot be seen in that qualified LPTV's political subdivision pursuant to typical contractual agreements networks enter into with affiliates. There is demonstrable dearth of full-power stations in Petitioner's Clarksburg/Weston-DMA where the nation's top four networks are affiliated with only three television stations.

Lastly, if the must-carry rule does not apply to satellite carriers, then the DBS industry will decide the criteria instead of this Commission and the law will require amendment to meet constitutional requirements. In Petitioner's State of West Virginia, the Charleston/Huntington/Parkersburg DMA was expanded to include Parkersburg, West Virginia for WSAZ, WCHS, WOWK and WVAH. In 2011 Gray Television purchased low power television stations WOVA and WIYE that were not qualified LPTVs. Yet within months, both LPTVs were carried by direct broadcast satellite operators – without the LPTVs becoming qualified LPTVs or even Class A television stations. These same satellite providers have denied must-carry coverage to Petitioner. Thus, Petitioner argues that no change in the law is necessary and that this Commission simply must clarify the must-carry right of qualified low power television stations to satellite carriers.



### III. DECLARATORY RULING IS APPROPRIATE

A broadcast station may file a complaint with the Commission within sixty (60) days after the satellite carrier submits a final rejection of the station's carriage request. (See 47 CFR 76.66(m)(6)). In this matter, the Petitioner was denied his must carry rights for WVUX-LD, a qualified low power television station, by Directv as recently as February 6, 2018 and by Dish on February 12, 2018.

This Petition does not seek a new rule or revision thereto; it merely requests that this Commission declare that 47 USC §338(a)(3) does not apply to qualified LPTVs, and that satellite providers must carry qualified low power televisions that meet the criteria of 47 USC §§534-535 so that they are treated equally with cable providers.

Section 1.2 grants the FCC the power to issue declaratory rulings to remove uncertainty or resolve controversy. The United States Supreme Court has also recognized the inherent power of administrative agencies such as the FCC to clarify issues without making a new rule. (See *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974)).

In this matter, the Petitioner is not seeking a new rule or amendment thereof. All that is required to resolve this matter to clarify whether qualified LPTVs are entitled to insist on mandatory carriage by satellite providers or whether the carriage is optional under 47 USC §338(a)(3).

It is generally known that LPTVs have less capital resources than full power stations and therefore are less likely to formally dispute a large corporation's denial of satellite carriage. Therefore, this Commission should hear this matter to clarify that qualified



LPTVs enjoy the same must-carry rights with regard to satellite carriers as they do with cable carriers.

#### IV. DEMAND FOR CARRIAGE IS APPROPRIATE

A broadcast station may file a complaint with the Commission within sixty (60) days after the satellite carrier submits a final rejection of the station's carriage request. (See 47 CFR 76.66(m)(6)). In this matter, the Petitioner was denied his must carry rights for WVUX-LD, a qualified low power television station, by Directv as recently as February 6, 2018 and by Dish on February 12, 2018.

This Petition does not seek a new rule or revision thereto; it merely requests that this Commission order DIRECTV and DISH Network to carry Petitioner's qualified LPTV, finding that 47 USC §338(a)(3) does not apply to qualified LPTVs, and that satellite providers must carry qualified low power televisions that meet the criteria of 47 USC §§534-535 so that they are treated equally with cable providers.

This Commission is empowered in 47 USC §338(f) to order satellite companies to carry qualified LPTVs. In this matter, the Petitioner is not seeking a new rule or amendment thereof. All that is required to resolve this matter to clarify whether qualified LPTVs are entitled to insist on mandatory carriage by satellite providers or whether the carriage is optional under 47 USC §338(a)(3).

It is generally known that LPTVs have less capital resources than full power stations and therefore are less likely to formally dispute a large corporation's denial of satellite carriage. Therefore, this Commission should hear this matter to clarify that qualified LPTVs enjoy the same must-carry rights with regard to satellite carriers as they do with



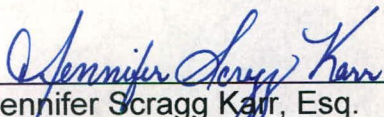
cable carriers and order that DIRECTV and DISH Network must carry Petitioner's qualified low power television station.

V. CONCLUSION

Respectfully, this Petitioner urges the FCC to act upon the question of whether qualified low power television stations have mandatory carriage rights with regard to satellite carriers and to order satellite carriage of Petitioner's qualified LPTV. A brief clarification of the present rules is all that is necessary to guarantee those rights and to equalize the treatment of satellite carriers with cable providers. No amendment or new rule is required to make this declaration. Thus, the Petitioner requests that the FCC grant this Petition, issue a Declaratory Ruling as requested herein and order satellite carriage of Petitioner's qualified low power television station.

Respectfully submitted,

Michael Karr d/b/a WVUX-LD  
By counsel,

  
\_\_\_\_\_  
Jennifer Scragg Karr, Esq.  
Attorney at Law  
4810 Browns Creek Road  
Saint Albans, WV 25177  
(304)389-9795

Dated: September 7, 2018

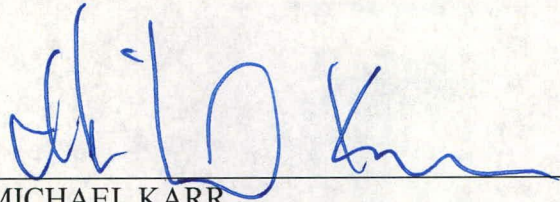


**VERIFICATION**

STATE OF WEST VIRGINIA,

COUNTY OF PUTNAM, To Wit:

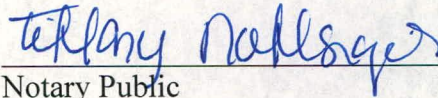
I, Michael Karr, being duly sworn, state that I have read the foregoing "Petition for Declaratory Ruling and Demand for Coverage" and it is true to the best of my knowledge and belief.



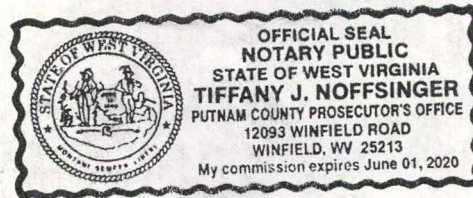
MICHAEL KARR  
WVUX-LD Owner/Petitioner

Subscribed and sworn to before me this 6<sup>th</sup> day of September 2018.

My Commission expires: June 1 2020.



Notary Public



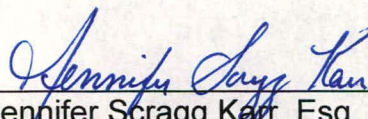


**CERTIFICATE OF SERVICE**

I, Jennifer Scragg Karr, Esq., counsel for Petitioner Michael Karr, do hereby certify that I have this 7<sup>th</sup> day of September 2018, served the foregoing "Petition for Declaratory Ruling and Demand for Coverage" by depositing a true copy thereof in the US Mail, First-Class postage paid, upon interested parties, Directv and Dish Network, addressed as follows:

DIRECTV  
Attn: Ms. Cathy Carpino, Esq.  
Asst. Vice Pres. – Sr. Legal Counsel  
AT&T Services, Inc.  
1120 20<sup>th</sup> Street NW, Suite 1000  
Washington, DC 20036

DISH Network  
DISH Network Programming, Locals Operations  
9601 S. Meridian Blvd.,  
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