

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC

In the Matter of)	
)	
Application for Review of)	
Memorandum Opinion and Order)	Docket No. 18-274
Denying Petition for Declaratory Ruling and)	
Demand for Coverage)	

**APPLICATION FOR REVIEW OF MEMORANDUM OPINION AND ORDER
DENYING PETITION FOR DECLARATORY RULING AND DEMAND FOR COVERAGE**

Submitted by,

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Dated this 22nd day of November 2019.

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COMES NOW Michael Karr, owner and operator of WVUX-LD, ("Petitioner") and respectfully files this Application for Review pursuant to 47 CFR §§ 1.104 and 1.115 requesting review of action that denied the Petition for Declaratory Ruling and Demand for Coverage of Michael Karr for mandatory satellite carriage of a qualified low power station, to wit: WVUX-LP in the Clarksburg-Weston Designated Market Area.

Petitioner maintains its request for this Federal Communications Commission ("Commission") to 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 stations" by satellite providers who choose to carry local television. For the reasons set forth herein, Petitioner urges this Commission to grant the review and Petition.

I. QUESTIONS PRESENTED:

(1) Whether Satellite Providers Must Carry Qualified Low Power Stations; and

(2) Whether Satellite Providers are Entitled to Treat Must Carry Qualified Low Power Stations Differently Than Cable Providers Must Treat Them

II. FACTOR(S) WHICH WARRANT COMMISSION CONSIDERATION:

On October 24, 2019, the FCC released the "Memorandum Opinion and Order" authored and decided by the Deputy Chief of the Policy Division within the Media Bureau of this Commission which denied the Petition for Declaratory Ruling and Demand for Coverage filed by Michael Karr d/b/a WVUX-LP, a qualified low power station. The Order is in conflict with the statutes, rules and Commission policy and seeks to resolve a question of law and policy which has not previously been resolved by the Commission.

The effect of the Order empowers satellite providers to deny qualified low power stations from being carried in the same smallest fifty markets with county or city populations less than 35,001, and where cable providers must carry qualified low power stations. It does not serve any governmental interest to allow the direct broadcast satellite ("DBS") industry to govern itself while this Commission requires cable providers to carry qualified low power stations.

It is Petitioner's understanding that Nielsen recently decided to utilize DIRECTV viewers' ratings while abandoning the former surveys, with a small exception of Comcast subscribers in some areas, which will dramatically increase the importance of being carried by satellite providers. This increase in the DBS's industry power and the simultaneous decrease of the Commission's authority will weaken the smallest local communities' voices and diminish local options for DBS subscribers.

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 low power stations 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 station.

III. DEPUTY CHIEF'S OPINION AND ORDER SHOULD BE REVERSED:

A. 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 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 and sought to do the same with regard to the satellite carriers in its area, to wit: DIRECTV and DISH Network.

Thus, Petitioner notified both carriers of his election and demand for carriage in the Clarksburg-DMA as a must-carry election. Both satellite providers denied carriage arguing that they are not required to carry *any* low power station – not even *qualified* low power stations.

In the 1992 Cable Act, Congress gave certain 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 for qualified stations 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 low power stations.

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, which was subsequently completed. Opposition and a reply were filed. On October 24, 2019, the “Memorandum Opinion and Order” was released by Steven A. Broeckaert, Senior Deputy Chief of the Policy Division, denying the Petition for Declaratory Ruling and also Demand for Carriage.

B. DISCUSSION

DISH and DIRECTV want the DBS industry to decide the criteria in adding must-carry stations instead of the FCC. Both satellite carriers argue that qualified low power stations 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 low power stations merely discretionary by satellite carriers – even qualified low power stations – even though these are two entirely different classes of

television licenses as defined by the FCC. The leading DBS providers argue that FCC Rule §76.66(a)(4) explicitly excludes all LPTVs and qualified low power stations from the “television broadcast station”.

The fact that qualified low power stations are not mentioned in Section 338 must be a deliberate omission given that there are only three classifications of low power television licenses, to wit: LPTVs, qualified low power stations and Class A. In their “Joint Opposition”, the satellite carriers argued that the distinction between low power television stations and qualified low power stations like WVUX-LD “is of no consequence to DBS providers in terms of their mandatory carriage obligations.” Petitioner adamantly 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 subsection applies to Petitioner because Petitioner’s *qualified* low power 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” 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 head-end site; (5) delivers to the principal head-end 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 station. The rules further limit the number to two stations per market so that at no time would more than one hundred low power stations be deemed “qualified” and able to avail themselves of the “must carry” rule. It does not serve any governmental interest to further limit these qualified low power stations by

denying carriage via satellite. There is no separate definition of “qualified low power” stations 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, reporting 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 has the understanding that qualified low power stations are must-carry on both cable and satellite.

There are serious repercussions for accountants worldwide who “mistakenly” do something and there has been no redressing by Congress which indicates that the GAO was not mistaken in its report to Congress. Satellite carriers must carry qualified low power stations. At the very minimum, Petitioner has shown that confusion exists in interpreting the statutes. Thus, a ruling by this body is necessary to clarify the rights of qualified low power stations to DBS providers.

Furthermore, there is no legitimate reason to treat cable providers and satellite carriers differently with regard to qualified low power stations that could pass constitutional muster. 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. Both entities are provided feasibility protection.

Moreover, if the must-carry rule does not apply to satellite carriers, then local options for public viewers who subscribe to the satellite provider are further limited. For example, if a qualified low power station is an affiliate network for an out-of-state network, then the network cannot be seen in that qualified low power station'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 five networks (ABC, CBS, NBC, FOX and CW) 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 demands. In Petitioner's State of West Virginia, Gray Television purchased low power television stations WOVA and WIYE that were not qualified low power stations in 2011. Yet within months, both LPTVs were carried by direct broadcast satellite operators – without the LPTVs becoming qualified low power stations or even Class A television stations. These same satellite providers have denied must-carry coverage to Petitioner.

C. THERE ARE MINIMAL TECHNICAL LIMITATIONS

Recent additions of orphaned counties to the Clarksburg-DMA as ordered by this Commission released February 7, 2018 show that any technical limitations of satellite carriers in adding stations in WVUX's area are minimal. In the Matter of Monongalia Co., WV and Preston Co., WV, MB Docket No. 17-274, CSR No. 8941-A and Petitions for Modification of the Satellite Television Markets of WDTV, Weston, WV and WBOY-

TV and WVFX, Clarksburg, WV, MB Docket No. 17-275, CSR No. 8942-A, both DISH and DIRECTV filed Feasibility Certifications that there is no “spot beam infeasibility” in adding stations of the Clarksburg, West Virginia, Monongalia County, West Virginia and Preston County, West Virginia area. This Commission went further and found that there was also no economic infeasibility to the satellite carriers in adding local stations to the Clarksburg-DMA. (Id., DA 18-113, p. 8).

IV. RELIEF SOUGHT:

Respectfully, this Petitioner urges the FCC to accept this Application for Review and act upon the question of whether qualified low power stations have mandatory carriage rights with regard to satellite carriers and to order satellite carriage of Petitioner’s qualified low power station. The Petition does not seek a new rule or amendment thereto. Petitioner merely seeks a brief clarification of the present rules to guarantee qualified low power stations’ rights and to equalize the treatment of rural America by satellite carriers. No amendment or new rule is required to make this declaration. This Commission is empowered in 47 USC §338(f) to order satellite companies to carry qualified low power stations. Hence, the Petition and relief sought are appropriate.

A. DECLARATORY RULING AND DEMAND FOR CARRIAGE ARE 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 station, by Directv as recently as February 6, 2018 and by Dish on February 12, 2018. Petitioner subsequently filed a Petition for Demand for Carriage which was denied by FCC staff by Order released October 24, 2019.

The 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 low power stations, and that satellite providers must carry qualified low power stations 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)).

This Commission is empowered in 47 USC §338(f) to order satellite companies to carry qualified low power stations. If qualified low power stations are entitled to insist on mandatory carriage by satellite providers, then this Commission should find that Petitioner is a qualified low power station that must be carried by Directv and Dish.


B. CONCLUSION

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 low power stations are entitled to insist on mandatory carriage by satellite providers or whether they are at the whim of the DBS industry.

Thus, the Petitioner requests that the FCC grant this Application, reverse the staff decision and grant the Petition by issuing a Declaratory Ruling as requested therein and order satellite carriage of Petitioner's qualified low power station, or at minimum, hold a hearing thereon where Petitioner can be heard by this Commission in person.

Respectfully submitted,

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Dated: November 22, 2019

CERTIFICATE OF SERVICE

I, Jennifer Scragg Karr, Esq., counsel for Petitioner Michael Karr, do hereby certify that I have this 22nd day of November 2019, served the foregoing "Application for Review" by depositing a true copy thereof in the US Mail, First-Class postage paid, upon interested parties, Directv and Dish Network, addressed as follows:

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