

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

In the Matter of: )  
)  
Carriage Complaint Against )  
)  
Service Electric Cablevision, Inc. and ) Docket No. 13-14  
Service Electric Cable TV Inc. ) File No. CSR-8757-M  
)  
by )  
)  
Western Pacific Broadcast, LLC )  
)  
With Respect to Carriage Within the )  
Philadelphia, PA Designated Market Area, )  
of Local Commercial Television Station WACP, )  
Licensed to Atlantic City, New Jersey )

Directed to: The Chief, Media Bureau

**REPLY TO OPPOSITION AND MOTION TO DISMISS  
CLARIFICATION, SUPPLEMENT AND CORRECTION OF RECORD TO  
PETITION FOR SPECIAL RELIEF  
BY ORDER OF CARRIAGE**

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### *Summary*

Service Electric Cable TV Inc. (“SE Cable TV”) opposes Western Pacific Broadcast LLC’s (“Western Pacific”) Petition for Special Relief by Order of Carriage (the “PSR”), Western Pacific’s Clarification, Supplement and Correction of the Record (the “Clarification”), and the Bureau’s January 31, 2013 letter order in the above-captioned proceeding. The PSR was filed by Western Pacific for the purpose of obtaining an order of carriage of local commercial television station WACP-DT within the Philadelphia, PA DMA (the “DMA”). SE Cable TV urges that the PSR was filed late, that the WACP signal is not of good quality and that WACP duplicates another station’s signal.

SE Cable TV argues that its October 1, 2012 letter to Western Pacific clearly denied Western Pacific’s carriage request, thus rendering the December 19, 2012 PSR beyond the 60-day filing period. This argument is not correct, as that letter did not provide a clear denial.

SE Cable TV argues in the alternative that the PSR is late because it did not name SE Cable TV until after the date that is 60 days after the last date for SE Cable TV to dispute WACP’s entitlement to carriage. What SE Cable TV does not say is that (1) its cable system and its CUIDs were clearly listed in the PSR as a cable system and community units for which an order of carriage is requested, (2) its October 1, 2012 letter was submitted as part of the PSR, (3) SE Cable TV had been served with a notice of WACP’s must carry election and with WACP’s carriage demand letter, (4) SE Cable TV’s affiliate had sent Western Pacific a letter that caused Western Electric to believe that Western Pacific was dealing with SE Cable TV by dealing with this affiliate, and (5) Western Pacific told SE Cable TV that it was a target of the PSR 2 days after the PSR was filed, which is a date that is 33 days before the PSR appeared on public notice and 53 days before SE Cable TV’s opposition was due. There was no prejudice to SE Cable TV’s due process rights. Moreover, the parties negotiated over carriage arrangements after the

PSR was filed, and SE Cable TV has sought to admit signal tests that were conducted after the PSR was placed on public notice.

SE Cable TV also argues that Western Pacific's Clarification should not be accepted. In doing so, it cites cases that do not support its position, but tend instead to support Western Pacific's position given the facts of this case, including the fact that the Clarification was filed before the pleading cycle was set by the public notice and did not either deprive SE Cable TV of the ability to respond to Western Pacific or delay the conclusion of the pleading cycle.

SE Cable attempts to rely upon late signal tests to urge that it has no duty to carry WACP but those tests, aside from being late, do not meet the Commission's requirements.

Finally, SE Cable TV has not shown that WACP substantially duplicates any other TV station carried by SE Cable TV in the DMA.

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Western Pacific Broadcast, LLC (“Western Pacific”) hereby respectfully submits its reply to the Opposition (the “Opposition”) submitted by Service Electric Cable TV Inc. (“SE Cable TV”) to Western Pacific’s Petition for Special Relief by Order of Carriage (the “PSR”), Western Pacific’s Clarification, Supplement and Correction of the Record (the “Clarification”), and the Bureau’s January 31, 2013 letter order in the above-captioned proceeding. The PSR was filed by Western Pacific for the purpose of obtaining an order of carriage of local commercial television station WACP-DT within the Philadelphia, PA DMA (the “DMA”).

As explained below, the PSR was timely filed against SE Cable TV, and should be considered on the merits. In addition, SE Cable TV has failed to meet its burden of demonstrating that a good quality signal is not present at SE Cable TV’s principal headend.

Accordingly, the Bureau should order SE Cable TV to carry the signal of WACP on its cable system within the DMA

***I. Western Pacific's PSR Was Timely Filed Against SE Cable TV***

SE Cable TV offers two alternative arguments for its claim that Western Pacific missed the 60 day period for filing its PSR against SE Cable TV. These alternative arguments are that either the 60 day period ended 60 days after Western Pacific received SE Cable TV's of October 1, 2012, or the 60 day period ended 60 days after the last day that SE Cable TV had under Rule 76.61(a)(5) for responding to Western Pacific's carriage demand letter. As explained below, neither argument has merit whether considered solely in the context of the interactions between SE Cable TV and Western Pacific or considered in the full context of facts which include Western Pacific's interactions with the company SE Cable TV openly touts as its "affiliate," Service Electric Cablevision Inc. ("SE Cablevision"). Notably, the Opposition completely ignores Western Pacific's interactions with this affiliate, even though the Opposition states that it is a response to the Clarification and those interactions were a central part of the Clarification.

***(a) SE Cable TV's October 1, 2012 Signal Letter Was Not Notice That SE Cable TV Was Denying Western Pacific's Carriage Request***

SE Cable TV's first alternative argument is that its October 1, 2012 letter to Western Pacific (the "Signal Letter") was, to quote the Opposition, a "rejection" or a "clear refusal" of carriage that started the 60 day clock for filing the PSR against SE Cable TV.<sup>1</sup> Under Rule 76.61(a)(5)(i), the "denial by a cable television system operator of request for carriage" would start the 60-day clock for Western Pacific to file its carriage demand complaint.<sup>2</sup> If SE Cable TV were correct in that view of the facts, then Western Pacific's PSR would have been late, as it was

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<sup>1</sup> Opposition, at 3. Copies of the Signal Letter appear as Exhibit 5 of the PSR and Exhibit 1 of the Opposition.

<sup>2</sup> 47 CFR 76.61(a)(5)(i).

filed on December 14, 2012 while the date that is 60 days from Western Pacific's receipt of the Signal Letter is December 3, 2012.

SE Cable TV's argument is not supported by either a common sense view of the facts or by the case law. The Signal Letter is not, in the language of Rule 76.61(a)(5)(i), a "denial." Totally absent from the Signal Letter are the words "denial," "rejection" or "refusal," or any variant of any of those words or any other words synonymous with or even close in meaning to those words. The essence of a "denial" is a flat "no" that is far from what the Signal Letter says either directly or by implication. The Signal Letter couples a statement that SE Cable TV made some attempt to receive a signal – an attempt of unknown formality, unknown effort and unknown compliance (if any) with FCC measurement requirements – with (1) its resulting opinion that it is unlikely that a good quality signal can be received, and (2) its invitation to Western Pacific to contact SE Cable TV to discuss carriage arrangements.

It is important to recognize that the Signal Letter does not say that a good quality signal cannot be received at the principal headend; rather it stops short of that conclusion by opining as to the likelihood that it can be received. The letter's focus on the unlikelihood of being able to receive a good quality signal expresses that the chances of receiving a good quality signal have not been foreclosed and, accordingly, it is irrational to equate SE Cable TV's statement of relative unlikelihood as an implied denial of carriage for lack of a good quality signal. To the reader, this short letter also appears perfunctory and preliminary because it reports no information about the attempt to receive the signal as required by Rule 76.61(a)(2),<sup>3</sup> while the

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<sup>3</sup> While Rule 76.61(a)(3) specifically requires the cable operator who questions signal strength to provide the broadcaster with a detailed information on the measurements, the Signal Letter provided no information on the measurements, other than dates of measurement. Missing were such important and basic facts as the reception antenna used, the height of the antenna above ground, and the compass orientation of the antenna.

writer must have been aware of that reporting requirement as he cited to Rule 76.55(c)(3) in the Signal Letter and he discussed in the Signal Letter the regulatory difference between a carriage election and a carriage demand.

A body of case law exists on the issue of when a broadcaster should understand that a cable operator's response to a carriage demand is a "denial" of the demand for carriage. The Opposition devotes no more than a terse dismissal to the one case applying Rule 76.61(a)(5)(i) that is most relevant to the instant case. This case, *Complaint Against Cablevision Systems Corp.*,<sup>4</sup> supports Western Pacific's position that the Signal Letter was not a "denial" under that rule. *Complaint Against Cablevision Systems Corp.* interprets the word "denial" in Rule 76.61(a)(5)(i) to require "a clear refusal to carry the signal...."<sup>5</sup> In *Complaint Against Cablevision Systems Corp.*, the Commission found confirmation of its ruling concerning the absence of a "clear refusal" by the fact that the letter containing the alleged denial also "encouraged the station to provide information concerning means whereby the station's signal could be delivered in a good quality condition to Cablevision's principal headend."<sup>6</sup> This is what SE Cable TV said in the Signal Letter.<sup>7</sup>

The Opposition, provides little discussion of the case law, relegating this discussion to a short footnote which offers a brief discussion of three cases that do not support SE Cable TV's argument on the message the Signal Letter conveys in the eyes of the reader: (1) *Compliant of*

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<sup>4</sup> 11 FCC Rcd 2362 (1996).

<sup>5</sup> 11 FCC Rcd 2362, 2366 ¶20.

<sup>6</sup> *Id.*

<sup>7</sup> To quote the Signal Letter, "we would be happy to discuss your payment of the cost to deliver a signal consistent with Section 76.55(c)(3).... We look forward to hearing from Matthew Bray or the station's engineers."

(00489614-1)

*Friendly Bible Church, Inc. Against Viacom Cable Community Television, (2) Complaint Against Inter Media* and (3) *KM Television of Flagstaff, L.L.C. v. Cable One, Inc.*<sup>8</sup>

The first case cited in the Opposition, *Compliant of Friendly Bible Church, Inc. Against Viacom Cable*,<sup>9</sup> dealt with a refusal of carriage for an entirely different reason than signal quality, and involved a letter that clearly and explicitly denied carriage with the words “we are unable to provide your station carriage....”<sup>10</sup> Thus, unlike the case faced here by Western Pacific, there was no need for the broadcaster to guess at the cable operator’s message. Moreover, in *Friendly Bible Church*, the Commission relied upon and emphasized the fact that the *broadcaster understood* those words as a denial because the broadcaster had asked the cable operator to “*reconsider*” the cable operator’s refusal to carry the station.<sup>11</sup> Western Pacific made no such request of SE Cable TV, which makes sense as Western Pacific did not think it had been denied.

In the second case cited in the Opposition, *Community Television Complaint Against Inter Media*, the cable operator twice actually measured the signal as required by FCC rules and good engineering practices and twice provided the broadcaster with “signal test results showing that [the TV station] failed to provide a good quality signal to the headends....”<sup>12</sup> In contrast, SE Cable TV’s Signal Letter provided no “results” (and to this day Western Pacific has been provided with no information concerning purported tests), did not claim that the attempt to receive the signal complied with the FCC measurement requirements (which include using good engineering practices), and left open the possibility that a good quality signal may be present and

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<sup>8</sup> Opposition, at 3 n.9.

<sup>9</sup> 11 FCC Rcd 17115 (1996).

<sup>10</sup> *Id.* at 17119 ¶6.

<sup>11</sup> *Id.* at 17119 ¶7. The emphasis was added by the Commission to make its point.

<sup>12</sup> 14 FCC Rcd 2063, 2065 ¶6 (1999) (emphasis added).

that its signal reception attempt was preliminary by going only so far as saying that the presence of a good quality signal was “unlikely” and inviting Western Pacific to interact with SE Cable TV on the issue. Another important distinguishing fact is that the broadcaster in *Community Television Complaint Against Inter Media* had “recognized” that the signal test showed that the signal strength was below the good quality threshold,<sup>13</sup> while in this case Western Pacific has not seen the test results and accordingly has never been in a position to determine whether or not the results prove or disprove a good quality signal.

The third case cited in the Opposition, *KM television of Flagstaff, L.L.C. v. Cable One, Inc.*,<sup>14</sup> has nothing to do with the issue, as the Bureau found that the carriage complaint was timely filed and the Bureau never reached the issue of whether the cable operator’s denial of carriage (which was direct, outright and unequivocal) rendered the complaint time barred.<sup>15</sup> In summary, SE Cable TV cites to no case that supports its position.

There is no reason that Western Pacific should be judged, in hindsight and as a matter of law, to have failed to discern in the Signal Letter an unstated and implied “clear refusal” of SE Cable TV to carry the WACP signal when (1) no such refusal was made in the Signal Letter, (2) the Signal Letter left open the possibility that there may be a good quality signal, and (3) the Signal Letter invited interaction between the parties on the subject. Those regulated by the FCC are entitled, as a matter of law, to clear notice of what is required of them, *Satellite Broadcasting v. FCC*, 824 F.2d 1, 4 (D.C. Cir.1987)(“The Commission through its regulatory power cannot, in effect, punish a member of the regulated class for reasonably interpreting Commission rules.”),

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<sup>13</sup> *Id.* at 2066-67 ¶10.

<sup>14</sup> Opposition at 3 n.9.

<sup>15</sup> 18 FCC Rcd 153, 154-55 ¶¶4-5 (2003).

and the Signal Letter cannot be viewed as putting Western Pacific on notice of an unstated carriage denial.

Moreover, as explained in the Clarification, circumstances occurring immediately after the delivery of the Signal Letter certainly reinforced Western Pacific's view that Signal Letter did not represent a clear refusal of carriage.

In that regard, as the Bureau is well aware, there are two Service Electric companies which refer openly to one another as "affiliates" but as we now know are virtually identical twins. They are Service Electric Cable TV Inc., who is the subject of this pleading, and Service Electric Cablevision Inc. ("SE Cablevision"). As discussed in the Clarification, these two Service Electric companies serve contiguous Pennsylvania counties, refer to one another in their websites as "affiliates," and have main offices very close to one another in the same, small city.

This commonality between these two Service Electric twins is relevant because, less than 2 weeks after Western Pacific received the Signal Letter, a date that was well before the end of the 30 day period SE Cable TV had to respond to Western Pacific's carriage demand letter, Western Pacific received a formal response from an attorney, whose letter states in its first sentence that he was writing in his capacity as counsel for Service Electric Cablevision "and its subsidiaries."<sup>16</sup> The only possible cable operator "subsidiary" of SE Cablevision would be SE Cable TV, its claimed "affiliate." While this counsel's letter was written expressly in response to and specifically addresses Western Pacific's carriage demand letter, counsel's letter did not inform Western Pacific that Western Pacific's carriage demand letter incorrectly attributed SE Cable TV's PSID and its CUIDs to Service Electric Cablevision and did not tell Western Pacific

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<sup>16</sup> This letter is described in the PSR and attached to it as Exhibit 6.  
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that SE Cable TV existed as a separate legal entity. In fact, counsel's letter made no mention of SE Cable TV.

Moreover, the reference line of counsel's letter referred to Western Pacific's demand for carriage "on Service Electric Cablevision, Inc. Counties of Berks, Bucks, Chester, Lehigh and Northampton, Pennsylvania." This list of counties is significant because it is a complete list of counties in Western Pacific's demand letter and, of the 5 counties listed, two of them, Lehigh and Northampton, are not served by SE Cablevision at all but are served only by SE Cable TV.<sup>17</sup>

This letter led Western Pacific to believe that the one headend listed in counsel's letter was the "principal headend" for both PSIDs, and Western Pacific proceeded to deal exclusively with this counsel to determine the issue of whether there is a "good quality signal" at the listed principal headend. Not until after the PSR was filed was it revealed to Western Pacific that SE Cable TV and SE Cablevision were not one company, but identical twins operating in the same geographic area.

***(b) The PSR Was Timely Filed Against SE Cable TV, and Is Adequate to Require the Bureau to Order SE Cable TV to Carry WACP, Regardless of Whether the Bureau Considers the Clarification***

The Opposition's alternative argument on the timeliness of the PSR assumes that the 60 day period for filing the PSR began to run the day after the last day available to SE Cable TV for resisting Western Pacific's carriage demand letter.<sup>18</sup> According to this alternative argument, the PSR was due by December 19, 2012 and, because the PSR did not actually name SE Cable TV in it until the Clarification was filed shortly thereafter, the PSR is late as to SE Cable TV.<sup>19</sup>

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<sup>17</sup> See Exhibit 1 to the PSR.

<sup>18</sup> Opposition, at 3.

<sup>19</sup> *Id.*

This argument elevates form of substance. SE Cable TV knew it was the target of the PSR. It had received Western Pacific's must carry election letter and its subsequent carriage demand letter, and the Signal Letter was a direct response by SE Cable TV to the carriage demand letter. The PSR contains a list of CUIDs and PSIDs for which an order of carriage is sought, including SE Cable TV's PSID and each of its CUIDs in the DMA. In addition, the PSR, as required, contained copies of all communications between SE Cable TV and Western Pacific to the date of filing, including the must carry election letter, the carriage demand letter and the Signal Letter. As shown in the Clarification, SE Cablevision's counsel (who also regularly represents SE Cable TV) only informed Western Pacific that SE Cable TV was a different company late in the evening after the close of business on December 19, 2012. Shortly thereafter, Western Pacific sent SE Cable TV the PSR by email on the December 21, 2012, which is an acceptable means of service<sup>20</sup> and one which would place the PSR in SE Cable TV's hands more rapidly than if the PSR were mailed on December 19, 2012. This email explained quite clearly that SE Cable TV was a target of the PSR, something SE Cable TV would quickly learn when it read the PSR and saw that an order for carriage on its PSID and its CUIDs was requested. This email also included a link to the electronic filing of the PSR on the Commissions Electronic Comment Filing System.

Frequently, the Commission receives pleadings and requests targeting by name the regulated facilities, rather than the owner of the facilities. Thus, for example, a complaint may be lodged against radio station WXXX and not even name the owner of radio station WXXX. The Commission is in the business of promoting the public interest, and the fact that the facility rather than the owner of the facility is named does not stand as a practical or legal barrier to

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<sup>20</sup> Rule 1.4(h). "For purposes of this paragraph, service by facsimile or by electronic means shall be equivalent to hand delivery."

considering the pleading, request or complaint on the merits.<sup>21</sup> The situation is no different here. The PSR specifically asks for an order of carriage on SE Cable TV's PSUID and CUIDs in the DMA. There can be no question as to what Western Pacific is seeking.

That SE Cable TV may have been served on the 21<sup>st</sup>, rather than service through mailing made on the 19<sup>th</sup> (and delivered on Friday the 21<sup>st</sup> or thereafter), is inconsequential in this case and, because late service did not impair SE Cable TV's due process rights, it is no reason not to rule on the merits of the PSR against SE Cable TV.<sup>22</sup> In this case, SE Cable TV had a copy of the PSR, as well as a hyperlink to the location of the PSR on the Commission's ECFS within 2 days after the last day for filing the PSR. By January 18, 2013, counsel for SE Cable TV and Western Pacific were conducting negotiations over the PSR.<sup>23</sup> Late service is not a reason to dismiss a pleading or request, especially in this case in which the service was as fast if not faster than mail service would have been and there is no prejudice to SE Cable TV.<sup>24</sup> The filing and service of the PSR did not start the running of any time period for SE Cable TV to oppose the PSR. What started that clock was the issuance of a public notice of the filing of the PSR on January 22, 2013, which is more than 30 days after the filing of the PSR and its service on SE Cable TV and also after the time when negotiations over the PSR between SE Cable TV and Western Pacific had begun.

**(c) *The Parties Have Conducted Substantive Negotiations, Which, Even Considered in Isolation of Other Facts, Justify Extending the***

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<sup>21</sup> One example is *Mobile Relay Associates, Inc.*, DA 99-2116 (rel. Oct. 8, 1999), in which a pleading used the call sign and not the applicant's name.

<sup>22</sup> The Bureau has the authority to waive the service rule. When the late service of a document does not harm the other party's due process rights, a waiver is appropriate. *ADF Communications, Inc.*, 17 CR 1030, 1033 (Wireless Bur. 1999).

<sup>23</sup> See email from Mark Palchick, counsel for SE Cable TV, to M. Scott Johnson of January 18, 2013, attached hereto as Exhibit [].

<sup>24</sup> *KSAY Broadcasting Co.*, 29 RR2d 908 (1974)(A few days delay in serving a petition did not render it procedurally defective as untimely.)

### *60-Day Due Date for the PSR*

As explained above, Western Pacific believes that the PSR is timely as to SE Cable TV and should be considered on its merits. While Western Pacific believes in the adequacy of its position, it is worth noting in addition that the Commission has waived the 60 day filing period for must carry complaints where there is no clear denial or carriage and the parties have conducted negotiations.<sup>25</sup> That is what has happened in this case.

Western Pacific's December 21, 2012 email to SE Cable TV told SE Cable TV that Western Pacific desired to negotiate with SE Cable TV over carriage arrangements.<sup>26</sup> It was followed by two phone messages placed by Mr. Dougherty for Mr. Macus of SE Cable TV, and another email. Mr. Johnson conducted a series of telephonic negotiations with counsel for SE Cable TV, Mr. Palchick, as a result of a telephone message placed January 17. Mr. Palchick sent Mr. Johnson an email on January 18, 2013, in which he told Mr. Johnson he would call him that day.<sup>27</sup> Telephonic negotiations occurred on January 18, during which the discussion included whether Western Pacific would be willing to accept digital-only carriage. On January 23, these counsel spoke again, with Mr. Johnson conveying that digital-only carriage may be acceptable for Western Pacific. Mr. Palchick sent Mr. Johnson an email on January 24 discussing having each side's engineers communicate with one another. These counsel again negotiated by

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<sup>25</sup> See, e.g., *Complaint of Telecinco, Inc. Against TCI Cablevision of Puerto Rico*, 12 FCC Rcd 17493, 17495 ¶7 (1997); *Complaint Against Cablevision Systems*, 11 FCC Rcd 2362 (permitted filing of complaint more than two years after initial request for carriage where the cable operator never clearly denied carriage and continued to deal with the broadcaster); *Compliant of Reading Broadcasting, Inc. Against Comcast Cablevision of Gloucester County*, 13 FCC Rcd 22587, 22589-90 (1998) (complaint filed more than 60 days after cable operator's failure to respond to carriage demand accepted when negotiations occurred between the parties after the end of that 60 day period).

<sup>26</sup> A copy of this email appears as Exhibit 4 to the Clarification.

<sup>27</sup> Copies of 5 emails from Mr. Palchick to Mr. Johnson appear in **Exhibit 2** to this pleading.

telephone on February 5, and by emails sent on February 5 and 7. On February 5, at SE Cable TV's request, Western Pacific sent a witness to view a signal test that SE Cable TV had decided to conduct.

As explained in this pleading, Western Pacific has provided several reasons why its PSR is timely as to SE Cable TV, as well as its Clarification. Assuming for argument that no one or more of those reasons is sufficient, then Western Pacific submits that the Bureau's precedent justifies a waiver of the 60 day filing period in this case.

***(d) It Is Unfair and Procedurally Improper for the Commission to Consider Signal Measurements of WACP Made by SE Cable TV 53 Days After the PSR Was Filed, But to Consider the PSR Untimely as to SE Cable TV***

SE Cable TV wants to have its cake and eat it too. As explained in more detail below, SE Cable TV alleges that it attempted to receive the WACP signal both in June and September 2012 (although Opposition Exhibit 2 refers only to a mystery October 2012 test date). Yet, SE Cable TV has never provided the Commission or Western Pacific with any information on these supposed tests. SE Cable TV knows that it has the burden of proving that a good quality signal cannot be received at its headend,<sup>28</sup> and simply saying that tests were made is not enough to meet this burden.

Western Pacific would think that SE Cable TV would simply provide the test information required by Rule 76.61 for the tests it claims to have conducted in June and September of 2012, but it has not and it is entirely reliant upon its February 5, 2013 measurements. SE Cable TV cannot be heard to complain that that the PSR is late when SE Cable TV asks the Bureau to consider facts essential to its argument that it could have and should have developed by October

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<sup>28</sup> *Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Broadcast Signal Carriage Issues*, 8 FCC Rcd 2965, 2990 ¶102 (1993).

2012, but did not develop until at date that is 53 days after the PSR was filed and 14 days after the public notice of the PSR.

As stated above, the Bureau has the discretion to waive the 60 day filing deadline and has, upon appropriate occasion, done so.<sup>29</sup> If the Bureau believes that a waiver is necessary, then the facts of this case certainly justify it.

## ***II. Western Pacific's Clarification Is Proper and Should Be Considered***

The Opposition once again complains that Western Pacific is not following procedural requirements, in this instance that the Clarification does not meet the procedural requirements of Rule 76.7(d). Before disputing that claim, it is worth observing that SE Cable TV has not abided by the procedural requirements of Rule 76.61(a)(2) (notice of signal test did not include required information) and has not abided by the procedural requirements of Rule 76.7 (by submitting its Opposition without the affidavit required by Rule 76.7(b)(1)).<sup>30</sup>

That said, the Opposition is correct that Rule 76.7(d) requires a showing of extraordinary circumstances for an additional filing. But the Opposition is incorrect in its failure to recognize that Western Pacific has pled those circumstances. The Opposition relies upon case law on extraordinary circumstances to support its allegation that extraordinary circumstances rarely exist, when that very case law finds those circumstances present in circumstances when (unlike the case here) the additional pleading in dispute is filed after the end of the pleading cycle and will therefore delay resolution of the case.

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<sup>29</sup> See, e.g., *Complaint of Telecinco, Inc. Against TCI Cablevision of Puerto Rico*, 12 FCC Rcd 17493, 17495 ¶7 (1997); *Complaint Against Cablevision Systems*, 11 FCC Rcd 2362 (1995); *Complaint of Reading Broadcasting, Inc. Against Comcast Cablevision of Gloucester County*, 13 FCC Rcd 22587, 22589-90 (1998).

<sup>30</sup> The opposition also fails to abide by the procedural requirements of Rule 1.49, which requires double spacing.

In considering the Clarification in its January 31, 2013 order, the Bureau recognized that filings made in this proceeding had the understandable effect of disguising that SE Cable TV and SE Cablevision were separate legal entities. Even without the Clarification, it is clear as explained above that the PSR asks for carriage on SE Cable TV's PSID and CUID and that the failure of the PSR to actually name SE Cable TV as a party when it was filed was inconsequential. In fact, SE Cable TV knew the PSR applied to it by December 21, 2012, if not sooner, and the public notice establishing the procedural dates was not released until a month later.

What the Clarification did was make sure that the Commission understood that the PSR named and sought carriage on SE Cable TV's PSID and CUIDs (as well as those of SE Cablevision), which it would have in any event when SE Cable TV opposed the PSR. The Clarification also explained the circumstances. What is in the Clarification would be properly raised in this reply, and certainly would be fully set out in this reply if it had not been raised in the Clarification. Thus, the Clarification did not raise new issues, did not raise new facts concerning the merits and did not name new parties. It simply dispelled some confusion which otherwise would make this whole process more difficult, and time confusing.

The Opposition has provided SE Cable TV with a vehicle to fully address what is said in the Clarification, and the opposition does just that. And it is worth mentioning that SE Cable TV has previously responded to the Clarification. So, SE Cable TV's due process rights have not been impaired in the least.

The cases cited by the Opposition are presented as though the test of extraordinary circumstances were a virtually impossible hurdle. Far from it.

In *Reynolds v. TCA Partners*,<sup>31</sup> the Bureau would not accept a surreply filed after the close of the pleading cycle, when the surreply provided just “speculative and conclusory” information and the filer did not show that the issue could not have been addressed in the normal pleading cycle. In contrast, Western Pacific’s Clarification is not “speculative and conclusory” and it was filed *before* the end of the formal pleading cycle, in fact, before the *start* of the pleading cycle.

In *Family Stations, Inc. v. EchoStar Satellite Corporation*,<sup>32</sup> a party filed a surreply *after* the close of the pleading cycle, and that pleading did not reveal the reasons it should be accepted. Indeed, all it provided was a description of US Post Office procedures and the filer could have known of the benefit of filing this description when it filed its opposition. Western Pacific’s Clarification deals with what Western Pacific first came to know on December 20, 2012 and it was filed *before* the end of the formal pleading cycle.

In *Petition of the City of Boston, Massachusetts*,<sup>33</sup> the filing of a surreply *after* the close of the pleading cycle was allowed because the other party made some new arguments for the first time in its reply. Once again, Western Pacific’s Clarification was filed *before* the end of the formal pleading cycle.

In *Bloomberg v. Comcast Communications*,<sup>34</sup> the filing of a surreply *after* the close of the pleading cycle was allowed because the other party had filed a very long reply and the surreply was short. Once again, Western Pacific’s Clarification was filed *before* the end of the formal pleading cycle.

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<sup>31</sup> 18 FCC Rcd 26693 (2003).

<sup>32</sup> 17 FCC Rcd 982, 983 n.4 (2002).

<sup>33</sup> 27 FCC Rcd 3763, 3763 n.7 (2012).

<sup>34</sup> 27 FCC Rcd 4891, n. 21 (2012).

These cases simply do not support the Opposition's claim that the Clarification should not be accepted and considered. Each of these cases involved a surreply filed after the close of the formal pleading cycle, while the Clarification was filed before the *start* of the formal pleading cycle. The Clarification could not cause protraction of the litigation, like those surreplies could. There is no reason not to accept and consider the Clarification and, in an abundance of caution, Western Pacific has attached it to this pleading as **Exhibit 1**.

***III. SE Cable TV Has Not Submitted Signal Tests Showing that the WACP Signal Is Not a Good Quality Signal***

The Opposition refers the reader to Exhibit 2 to support its claim that:

“[s]ignal tests were conducted on July 18, 2012, September 25, 2012, and February 5, 2013. At no time was a discernible signal detected.”<sup>35</sup>

Yet, Exhibit 2 says nothing about any July or September 2012 tests, but only addresses a single test conducted on February 5, 2013 and makes a reference to some never-before mentioned test in October 2012. Nowhere in anything SE Cable TV has sent to Western Pacific or filed with the Commission is any hint of how or who conducted the “signal tests” supposedly conducted on July 18 or September 25, 2012. Were any “measurements” made? Was the receiver antenna mounted at an appropriate height on the headend tower? Were the tests conducted, as required, in accordance with good engineering practices? It is impossible to answer these questions based upon what SE Cable TV has provided, even though it is SE Cable TV's burden to prove the absence of a good quality signal if SE Cable TV wants to shift the burden of paying for the reception system to Western Pacific.

And the February 5, 2013 tests do not meet that burden. The Commission has made it clear that signal measurements must be conducted at appropriate heights on the tower,<sup>36</sup> which,

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<sup>35</sup> Opposition, at 6.

at a minimum must be comparable to the heights used on the tower for other TV receivers.<sup>37</sup>

Contained within **Exhibit 3** of this pleading are pictures of the tower taken by Greg Kraft showing these other antennas. While the *315 foot* AGL receiver tower holds antennas mounted high up on it, the receiver antenna used for the test was mounted on top of the associated electronics building at a height of just *50 feet above ground level*.<sup>38</sup>

Moreover, appropriate receive antennas must be used. The antenna used by SE Cable TV to receive the WACP signal is shown in **Exhibit 3** to this pleading. It should be compared to the Yagi antennas used on the tower for actual reception, as shown in **Exhibit 3** to this pleading. Indeed, we do not even know what antenna was used because the Blonder and Tongue catalog does not show a BRY-LP-LB antenna. In any event and to satisfy the good engineering practice requirement, the antenna used for the measurement is required to be comparable to the antennas used by the cable operator for actual TV broadcast station signal reception and it is clear that the antenna used for the test is not of the quality of the cut Yagi antennas that appear on the tower.

The February 5, 2012 test is late. Rule 76.61(a)(2) requires the cable operator to provide thorough test results to the broadcaster within 30 days of the date the cable operator receives the broadcaster's carriage demand letter if the cable operator seeks to deny carriage for lack of a good quality signal. No tests results and none of the data required by that rule were provided to Western Pacific within that 30 day period, which ended in October 2012. Accordingly, SE Cable should be deemed to have failed for this additional reason in its burden of proof with respect to the good quality signal defense to carriage.

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<sup>36</sup> *Complaint of United Broadcast Group II, Inc. Against Falcon Cable TV*, 12 FCC Rcd 10262, 10264 ¶6 (1997) (tests not accepted when 25 foot measurement height used for test is considerably less than the normal placement of antennas on tower).

<sup>37</sup> *Complaint Against Tele-Media Co. of S.E. Florida*, 13 FCC Rcd 136 (1998).

<sup>38</sup> The height of the tower is reported in ASR registration 1026723, appearing at <http://wireless2.fcc.gov/UlsApp/AsrSearch/asrRegistration.jsp?regKey=127380>.

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The Opposition claims, by quoting to its Exhibit 2, that WACP's Greg Kraft "was satisfied that we could not pick up WACP as stated in our previous test in October of 2012." Notably, Exhibit 2 is just a fact sheet that is not identified with any author or signed by any person or other entity. The fact is that Mr. Kraft observed what SE Cable TV did at these tests, to the extent he was allowed. He conducted no analysis and did not participate in the tests, which SE Cable TV unilaterally scheduled and which were not requested by Western Pacific. Mr. Kraft was not satisfied that the tests show that a signal cannot be received, as he says in his declaration attached hereto as **Exhibit 3**. In fact, he noted the tremendous discrepancy in height between the antenna used for this test and the other antennas pointed toward the other Philadelphia TV stations, as shown in the pictures he took which are attached to this pleading.

Exhibit 2 of the Opposition is also significant as it calls into question the Opposition's claim that SE Cable TV even attempted to measure the signal of WACP in July and September 2012, as claimed in the Opposition.<sup>39</sup> Exhibit 2 refers to just one "previous test in October of 2012." We would not normally be suspicious about a discrepancy like this one, except that SE Cable TV refers to tests in July and September of 2012 but has never provided any information whatsoever on these supposed tests, and has never before made mention of an October test.

***IV. SE Cable TV's Substantial Duplication Argument, which It Raises for the First Time in the Opposition, Is Without Any Factual Basis***

SE Cable TV's final argument is that, while SE Cable TV admits to not knowing what programming is broadcast on WACP,<sup>40</sup> this unknown programming somehow substantially

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<sup>39</sup> Opposition, at 6.

<sup>40</sup> Opposition, at 6.

duplicates the programming of another TV station carried on the cable system.<sup>41</sup> This is a throw-away argument, as SE Cable TV admits that it has no factual basis for it.

Rule 76.56(b)(5) defines substantial duplication as “a station regularly simultaneously broadcasts the identical programming as another station more than 50 percent of the broadcast week.” SE Cable TV offers no evidence of the simultaneous duplication of identical programming, or of any program duplication, as it admits that it does not know what programming is broadcast by WACP.

*V. Conclusion*

**WHEREFORE**, the foregoing premises considered, Western Pacific Broadcast, LLC hereby respectfully requests that the Commission order Service Electric Cable TV Inc. to carry local commercial television station WACP in accordance with the must carry rules and policies for the remaining duration of the current must carry election cycle, expiring December 31, 2014.

Respectfully submitted,

WESTERN PACIFIC BROADCAST LLC

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<sup>41</sup> *Id.*