

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

In the Matter of:
Cable Television Company of
Greater San Juan
Request For Carriage of
Television Broadcast Station WIDP
Guayama, Puerto Rico
CSR-5453-M

MEMORANDUM OPINION AND ORDER

Adopted: February 24, 2000

Released: February 28, 2000

By the Chief, Consumer Protection and Competition Division, Cable Services Bureau:

I. INTRODUCTION

1. Ebenezer Broadcasting Group, Inc., licensee of television broadcast station WIDP, Channel 46, Guayama, Puerto Rico ("WIDP"), has filed a petition with the Commission pursuant to Sections 76.7 and 76.55(e) of the Commission's rules requesting carriage of WIDP on the Cable Television Company of Greater San Juan ("CTC"), the cable system serving the communities of San Juan, Bayamon, Trujillo Alto, Guaynabo, Carolina, Toa Baja, Catano, and Toa Alta (the "Communities"). CTC filed an opposition to which WIDP replied.

2. Pursuant to Section 614 of the Communications Act and implementing rules adopted by the Commission in Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Broadcast Signal Carriage Issues ("Must Carry Order"), commercial television broadcast stations are entitled to assert mandatory carriage rights on cable systems located within the station's market. A station's market for this purpose is its "designated market area" or DMA, as defined by Nielsen Media Research. A DMA is a geographic market designation that defines each television market exclusive of

1 47 C.F.R. §§ 76.7 and 76.55(e).

2 8 FCC Rcd. 2965, 2976-2977 (1993).

3 Section 614(h)(1)(C) of the Communications Act, as amended by the Telecommunications Act of 1996, provides that a station's market shall be determined by the Commission by regulation or order using, where available, commercial publications which delineate television markets based on viewing patterns. See 47 U.S.C. § 534(h)(1)(C). Until January 1, 2000, Section 76.55(e) of the Commission's rules provides that the ADIs to be used to implement the mandatory carriage rules are those published in Arbitron's 1991-1992 Television Market Guide. Effective January 1, 2000, Section 76.55(e) will require that a commercial broadcast television station's market shall be defined by Nielsen Media Research's designated market areas ("DMAs"). For the must carry/retransmission consent elections that took place on October 1, 1999, commercial television stations were required to make their (continued....)

others, based on measured viewing patterns. Essentially, each county in the United States is allocated to a market based on which home-market stations receive a preponderance of total viewing hours in the county. For purposes of this calculation, both over-the-air and cable television viewings are included.<sup>4</sup>

3. Under the Commission's must-carry rules, cable operators have the burden of showing that a commercial station that is located in the same television market is not entitled to carriage.<sup>5</sup> One method of doing so is for a cable operator to establish that a subject television station's signal, which would otherwise be entitled to carriage, does not provide a good quality signal to a cable system's principal headend.<sup>6</sup> Should a station fail to provide the requisite over-the-air signal quality to a cable system's principal headend, it still may obtain carriage rights because under the Commission's rules a station may provide a cable operator with specialized equipment, at the station's expense, which will improve the station's signal to an acceptable quality at a cable system's principal headend.<sup>7</sup>

## II. DISCUSSION

4. WIDP states that it is entitled to mandatory carriage because the television station and CTI are both located in the Puerto Rico television market.<sup>8</sup> WIDP further states that, by letter dated January 9, 1998, it requested carriage on CTI's cable system serving the Communities. WIDP further requested a response from CTI in a second letter dated April 1, 1998. WIDP sent a third letter, dated September 24, 1998, which it claims constitutes the official written notice to CTI required under Section 76.61 of the Commission's rules.<sup>9</sup> WIDP asserts that CTI has failed to meet its mandatory carriage obligations and has never responded to any of its letters.<sup>10</sup>

5. CTI argues that WIDP's complaint is procedurally defective and should be dismissed. CTI asserts that WIDP's complaint was not timely filed.<sup>11</sup> CTI states that WIDP first invoked its rights to mandatory carriage in its letter of January 9, 1998.<sup>12</sup> CTI notes that WIDP did not receive a response

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elections based on DMAs. *See Definition of Markets for Purposes of the Cable Television, Broadcast Signal Carriage Rules*, Order on Reconsideration and Second Report and Order, 14 FCC Rcd. 8366 (1999) ("*Market Modification Final Report and Order*").

<sup>4</sup> For a more complete description of how counties are allocated, *see* Nielsen Market Research's *Nielsen Station Index: Methodology Techniques and Data Interpretation*.

<sup>5</sup> *Must Carry Order*, 8 FCC Rcd. At 2990.

<sup>6</sup> 47 C.F.R. § 76.55(c)(3).

<sup>7</sup> *Must Carry Order*, 8 FCC Rcd. At 2991.

<sup>8</sup> Petition at 2.

<sup>9</sup> *Id.* at 1.

<sup>10</sup> *Id.*

<sup>11</sup> Opposition at 2.

<sup>12</sup> *Id.*

to its initial request within the established thirty days and asserts that the lack of response constituted an effective denial of carriage and triggered the sixty-day period in which a timely complaint must be filed with the Commission.<sup>13</sup> CTI maintains that WIDP's September 24, 1998 request should not give it an opportunity to extend the required filing timeframe applicable to must-carry complaints.

6. WIDP responds that its initial letter of January 9, 1998 did not constitute the required notice to the cable system because the letter merely "requested carriage" but did not state that the cable system had failed to meet its carriage obligations as required by Section 76.61(a)(1) of the Commission's rules.<sup>14</sup> WIDP states that the plain meaning of the rule requires that notice to a cable operator include such a statement.<sup>15</sup> In contrast, WIDP states that its September 24, 1998 letter includes the statement that the cable system had failed to meet its carriage obligations.<sup>16</sup> Alternatively, WIDP argues that, because of a change in ownership, WIDP had the right to renew its mandatory carriage rights against the new owners.

7. CTI further argues that WIDP's complaint was procedurally defective because the complaint was signed by WIDP's counsel and not the complainant as required by Section 76.6(a)(4) of the Commission's rules.<sup>17</sup> WIDP responds that the Commission's rules are unclear because Section 76.6(a)(4) permits all "pleadings" to be signed by a party's attorney but then states that complaints must be signed by the complainant.<sup>18</sup> To address this issue, WIDP submits a verification of its complaint, which is signed by the president of Ebenezer Broadcasting, Inc., the licensee of television station WIDP.<sup>19</sup>

8. CTI maintains that, notwithstanding the procedural infirmities of WIDP's complaint, the television station fails to provide a signal of adequate quality to the cable system's principal headend.<sup>20</sup> WIDP responds that the Commission has made it clear that if a television station's over-the-air signal is found to be inadequate under Commission rules, the station may provide specialized equipment sufficient

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<sup>13</sup> *Id. citing of Astroline Communications L.P. v. Century Cable Management Corporation*, 13 FCC Rcd. 2220 (1998) ("Astroline") and *Hector Negroni Cartagena, Licensee of Television Station WMEI, San Juan, Puerto Rico vs. Cable TV of Greater San Juan, Inc. and Century Communications*, 13 FCC Rcd. 13426 (1998) ("Cartagena").

<sup>14</sup> Reply at 4, *see also* 47 C.F.R. § 76.61(a)(1).

<sup>15</sup> Reply at 4-5.

<sup>16</sup> WIDP, in a footnote, states that the initial must-carry requests were submitted by the television station's accountant who did not have the authority to make a mandatory carriage request. However, the Commission does not interpret its rules governing must-carry complaints to require that must-carry complaints "be made by the owner or licensee of a television broadcast station seeking carriage. Rather we construe the Commission's rule to mean that a representative of a station may assert the station's statutorily provided mandatory carriage rights on its behalf." *See Cartagena*, 13 FCC Rcd at 13427. In fact, the third letter to CTI, which is signed by WIDP's counsel, does not attempt to disavow the prior requests signed by WIDP's accountant; rather that letter incorporates the prior requests by reference. *See* Complaint at Exhibit 1.

<sup>17</sup> Opposition at 3, *see also* 47 C.F.R. § 76.6(a)(4).

<sup>18</sup> Reply at 2.

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

<sup>20</sup> Opposition at 3.

to deliver a good quality signal.<sup>21</sup> WIDP states that it will provide, at its own expense, any specialized equipment necessary to deliver a good quality signal to CTI's principal headend.<sup>22</sup>

9. We find that WIDP's request for mandatory carriage is moot because of the timing of the most recent election cycle in which commercial television stations were required to select either retransmission consent or must-carry status with respect to carriage on a cable system. Pursuant to Section 76.64(f)(2), a commercial television station is required to make an election between retransmission consent and must-carry at three-year intervals.<sup>23</sup> WIDP was required to make an election by October 1, 1999 and such elections took effect on January 1, 2000.<sup>24</sup> Television stations that fail to make an election are deemed to have elected must-carry status.<sup>25</sup> There is no evidence in the record to indicate that WIDP made an election by October 1, 1999 and, in fact, the station filed its complaint with the Commission more than a month after the election deadline. Because a new cycle began January 1, 2000, WIDP's prior complaint is moot. WIDP is deemed to be a must-carry station because it failed to make an election and, if it is not being carried, can now file a new request for mandatory carriage with CTI.

10. While we dismiss WIDP's complaint as moot, we note that the complaint was not timely filed. WIDP's initial letter, dated January 9, 1998, requests carriage and a channel assignment and notes that the cable operator has thirty days in which to respond. Although CTI did not assign a channel to WIDP and did not respond to its request, WIDP did not file a complaint with the Commission until November 19, 1999, more than ten months later. The Bureau has previously made it quite clear that "[n]o must-carry complaint filed pursuant to § 76.61 will be accepted by the Commission if filed more than sixty (60) days after the ... denial by a cable television system of a request for carriage ..."<sup>26</sup> The Commission has further explained that, if within thirty days of the cable operator's initial request for carriage or for channel position, the cable operator either denied it or did not respond to it, then the cable system has only sixty days to file a complaint with the Commission.<sup>27</sup>

11. We further note WIDP's assertion that it has a right to renew its mandatory carriage request against CTI as the new owner of the cable system. WIDP concedes that the timing of its third request for carriage was "providential" in that it arrived on the date that CTI became the new owner of the cable system.<sup>28</sup> In any event, CTI is bound by the same rules governing mandatory signal carriage obligations as were the previous owners and inherited WIDP's request for mandatory carriage. To allow

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<sup>21</sup> Reply at 8 citing *R y F Broadcasting, Inc. v. TCI Cablevision of Puerto Rico, Inc.*, DA 99-1144 (CSB, rel. June 14, 1999).

<sup>22</sup> Reply at 8.

<sup>23</sup> 47 C.F.R. § 76.64 (f).

<sup>24</sup> *Id.*, see also n. 3, *supra*.

<sup>25</sup> 47 C.F.R. § 76.64(f)(3).

<sup>26</sup> *Cartagena*, 13 FCC Rcd. at 13429; see also 47 C.F.R. § 76.7(c)(4)(iii).

<sup>27</sup> *Astroline*, 13 FCC Rcd at 2222.

<sup>28</sup> See Reply at n.2.

a change in ownership to toll or extend the filing time limits would not serve the interests of broadcasters, cable systems, and subscribers.

### III. ORDERING CLAUSES

12. Accordingly, **IT IS ORDERED**, that pursuant to Section 614 of the Communications Act of 1934, as amended, 47 U.S.C. § 534(d)(3), and Sections 76.7 and 76.61(a) of the Commission's rules, 47 C.F.R. §§ 76.7 and 76.61(a), the complaint filed by Ebenezer Broadcasting Group, Inc. against cable Television Company of Greater San Juan seeking carriage of television station WIDP **IS DISMISSED** as moot.

13. This action is taken pursuant to authority delegated under Section 0.321 of the Commission's rules, 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Deborah E. Klein  
Consumer Protection and Competition Division  
Cable Services Bureau