

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

In the matter of:
Acadiana Cable Advertising, Inc.
v.
Telecable Associates, LLC
d/b/a Cox Communications
Request for Carriage
CSR-6036-M

MEMORANDUM OPINION AND ORDER

Adopted: April 4, 2003

Released: April 9, 2003

By the Deputy Chief, Policy Division, Media Bureau:

I. INTRODUCTION

1. Acadiana Cable Advertising, Inc., licensee of low power television station KDCG-LP, Opelousas, Louisiana ("KDCG-LP") filed the above-captioned complaint against Telecable Associates, LLC d/b/a Cox Communications ("Cox") for its failure to carry KDCG-LP on five cable systems located in the Lafayette, Louisiana DMA. These cable systems and their associated headends are: a) Crowley - Crowley and Rayne; b) Abbeville - Abbeville, Delcambre, Erath, Kaplan and Vermilion; c) Lafayette - Broussard, Carencro, Duson, Lafayette, Maurice, Milton, Scott and Youngsville; d) New Iberia - Iberia, Jeanerette, Loreauville and New Iberia; and e) St. Martin - Beaux Bridge, Henderson, Parks, St. Martin and St. Martinville, Louisiana. An opposition to this complaint was filed on behalf of Cox to which KDCG-LP replied. Subsequently, Cox filed a motion to file a supplemental opposition to KDCG-LP's reply and KDCG-LP filed a motion to deny. For the reasons discussed below, we deny KDCG-LP's complaint.

II. BACKGROUND

2. Both the Communications Act of 1934, as amended, and the Commission's rules require the carriage of "qualified" low power television ("LPTV") stations in certain limited circumstances. An LPTV station that conforms to the rules established for LPTV stations in Part 74 of the Commission's rules will be considered "qualified" if: (1) it broadcasts at least the minimum number of hours required pursuant to 47 C.F.R. Part 73; (2) it adheres to Commission requirements regarding non-entertainment programming and employment practices, and the Commission determines that the programming of the LPTV station addresses local news and informational needs that are not being adequately served by full power television broadcast stations because of the geographic distance of such full power stations from the low power station's community of license; (3) it complies with interference regulations consistent

1We believe that the information contained in this supplement is pertinent to the record and its inclusion will not prejudice the parties. We therefore accept Cox's supplemental filing and deny KDCG-LP's motion.

247 U.S.C. § 534(c)(1); 47 C.F.R. § 76.56(b)(3).

with its secondary status; (4) it is located no more than 35 miles from the cable system's headend and delivers to the principal headend an over-the-air signal of good quality; (5) the community of license of the station and the franchise area of the cable system were both located outside the largest 160 Metropolitan Statistical Areas on June 30, 1990, and the population of such community of license on that date did not exceed 35,000; and (6) there is no full power television broadcast station licensed to any community within the county or other political subdivision (of a State) served by the cable system.³

III. DISCUSSION

3. In support of its complaint, KDCG-LP states that, by letter dated September 16, 2002, it elected must carry status on Cox's cable systems for the 3-year cycle beginning January 1, 2003.⁴ Cox denied this election of carriage on September 26, 2002.⁵ Cox argues that KDCG-LP's complaint should be denied because the station's September 16, 2002 election letter did not constitute a demand for carriage.⁶ As such, Cox states that KDCG-LP's complaint is premature and should be dismissed. Further, Cox argues that KDCG-LP's complaint is also deficient in that it failed to serve the local television stations carried on the Cox systems in violation of Section 76.7 of the Commission's rules.⁷

4. Although KDCG-LP filed its complaint within 60 days of Cox's denial of its election of carriage, it should be noted that the Commission's rules contain a two-part must carry process. Section 76.64(f)(2) of the Commission's rules requires that television broadcast stations make an election between must carry and retransmission consent status every three years. This KDCG-LP did in its September 16, 2002 letter to Cox.⁸ Such a letter, however, is merely an election notice and not a demand for carriage pursuant to Section 76.61(a)(1) of the Commission's rules.⁹ Cox's September 26, 2002 denial of carriage, therefore, was premature and would not have triggered the 60-day complaint cycle under Section 76.61(a)(5)(i) of the rules.¹⁰ However, because the parties have raised arguments relative to the must carry status of KDCG-LP on Cox's cable systems, we will treat this as a formal must carry complaint and will not dismiss KDCG-LP's complaint as untimely filed. With regard to Cox's allegation that KDCG-LP failed to serve the local television stations it carries, it has long been accepted that the only parties required to be served notice of a must carry complaint, among those listed in Section 76.7(a)(3) of the Commission's rules, are the cable system and its franchising authority as they are the only parties directly affected by the complaint.¹¹ For market modification petitions, however, where an alteration of a market is contemplated, the Commission's rules explicitly require that the service list include all other cable systems and television broadcast stations in the market and all associated franchising authorities.¹²

5. KDCG-LP argues that the Communications Act requires a cable system with more than

³47 U.S.C. § 534(h)(2); 47 C.F.R. § 76.55(d).

⁴Complaint at Exhibit A.

⁵*Id.* at Exhibit B.

⁶*Id.* at 4, citing *Prime Time Christian Broadcasting, Inc. v. TCI Cablevision of New Mexico*, 16 FCC Rcd 7919, 7921 (2001); *SAH Acquisition Corporation II v. Olmstead Cable Company Corporation*, 13 FCC Rcd 22404, 22407 (1998).

⁷*Id.*, citing 47 C.F.R. § 76.7.

⁸47 C.F.R. § 76.64(f)(2).

⁹47 C.F.R. § 76.61(a)(1).

¹⁰47 C.F.R. § 76.61(a)(5)(i).

¹¹47 C.F.R. § 76.7(a)(3).

¹²See *Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Broadcast Signal Carriage Issues*, 8 FCC Rcd 2965, 2977 (1993) ("Must Carry Order").

35 channels to carry two qualified LPTV stations if there are not enough local commercial television stations to fill the channels set aside for must carry.¹³ KDCG-LP states that Cox has well over 100 activated channels, but lists only 6 local commercial television stations as being carried, a number far less than the one-third required to be set aside for must carry use.¹⁴ KDCG-LP states that while Cox lists two LPTV stations in its line-up, one is clearly not a “qualified” LPTV station pursuant to Section 76.55(d) of the Commission’s rules because its community of license is Lafayette which is located within the 153rd largest MSA as of June 30, 1990.¹⁵ As a result, KDCG-LP maintains that Cox is required to carry at least one additional “qualified” LPTV station.¹⁶ KDCG-LP maintains that it meets all of the requirements to be a “qualified” LPTV station: 1) it broadcasts 24 hours a day, seven days a week and complies with all interference regulations;¹⁷ 2) it meets all the obligations with respect to nonentertainment programming and provides local news, informational and children’s programming that addresses local needs that are not being met by other full power stations in addition to a unique blend of programming that celebrates the Cajun heritage and culture of the south central Louisiana region known as Acadiana;¹⁸ 3) it complies with all interference regulations consistent with its secondary status;¹⁹ 4) it is located within 35 miles of Cox’s principal headend at Lafayette and delivers a good quality signal to the headend;²⁰ 5) its community of license, Opelousas, and the franchise areas of several of the communities served by Cox are located outside the largest 160 MSAs and the population of Opelousas as of the 1990 Census was less than 35,000;²¹ 6) there is no full power television station licensed to any community in St. Landry Parish, where KDCG-LP’s city of license is located.²²

6. With regard to programming, Cox argues that KDCG-LP fails to demonstrate that it provides the type of programming required by Section 76.55(d) of the rules that addresses the locals news and informational needs of the cable system subscribers.²³ Indeed, Cox notes that most of the entries from KDCG-LP’s “Acadiana Today” fail to reflect any stories that could be identified with any of Cox’s communities and none of its other programs show any programming of local interest or concern.²⁴ Cox asserts that all of KDCG-LP’s programming can be classified as programming of a regional type that would be found on any full power station in Louisiana rather than community-specific programming. KDCG-LP counters that Cox failed to provide any evidence that the full power stations it carries adequately provide for the local news and informational needs of its subscribers or any justification for its undocumented assertion that KDCG-LP provides only regional type programming.²⁵

7. We do not agree with Cox that KDCG-LP fails to meet the local programming requirements of Section 76.55(d) of the Commission’s rules. While it is true that a portion of KDCG-

¹³Complaint at 3; *see also* 47 U.S.C. § 534(c)(1)(B).

¹⁴Complaint at 3 and Exhibit E.

¹⁵*Id.* at 3 n. 6 and Exhibit E; *see also* 47 C.F.R. § 76.55(d)(5).

¹⁶Complaint at 3.

¹⁷*Id.* at 4.

¹⁸*Id.* at 5-7 and Exhibit F.

¹⁹*Id.* at 4.

²⁰*Id.* at 7.

²¹*Id.* at 11-12.

²²*Id.* at 12-13.

²³*Id.* at 9.

²⁴*Id.*

²⁵*Id.* at 10.

LP's programming can be classified as regional rather than local, Exhibit G to KDCG-LP's complaint indicates sufficient locally-focused programming to meet this qualification.

8. KDCG-LP asserts that Cox operates a large, integrated system in which Lafayette is the principal headend that feeds the secondary headends at New Iberia, Abbeville, St. Martin and Crowley.²⁶ KDCG-LP states that not only does Lafayette have the largest television household population in the DMA but it is the geographic center of the system as well as being the location of Cox's headquarters.²⁷ KDCG-LP points out that Section 76.5(pp) of the Commission's rules defines a principal headend in the case of a cable operator with more than one headend as the principal headend as designated by the cable operator.²⁸ Further, KDCG-LP notes that the Commission has stated that "that the 'principal headend' in the majority of systems will be the headend serving the most subscribers, accommodating the most signal processing equipment, or lying closest to the geographical center of the system."²⁹ Cox argues that KDCG-LP's contention that Lafayette is the principal headend of an integrated system is mistaken. It states that all of its five systems are separate, non-integrated systems that are not interconnected.³⁰ Each system has its own manager and processes its signal channel line-ups independently.³¹ KDCG-LP argues in reply that Cox has not supplied sufficient evidence to conclude that its five headends do not make up one technically-integrated system. It asserts that separate managers and the ability to process signal channel line-ups independently does not necessarily make five separate systems. KDCG-LP states that to determine the principal headend of a technically-integrated cable system, the Bureau looks not only at the factors enumerated in the *Clarification Order* but also: a) whether the headends receive off-air signals; b) the headends operate as independent systems; c) the headends are historically associated with multiple cable systems in the area; and d) the registration information filed by the cable provider with the Bureau.³² KDCG-LP points out that Cox presented none of this information.³³ Moreover, KDCG-LP notes that it was Cox's own general manager and its regional vice president who verbally assured KDCG-LP that Lafayette was indeed the principal headend.³⁴

9. We do not believe that KDCG-LP has presented any information that would refute Cox's statement that it operates five separate, non-integrated systems. KDCG-LP has argued that it is Cox's responsibility to provide information about its system that is more detailed than its statement that each cable system processes its channel line-ups separately and has separate managers. We do not agree. Not only is Cox's statement sufficient in the context of this proceeding to clarify that it operates five separate systems, but Commission records confirm that each system is a separate physical system.

10. Cox states that it conducted signal strength tests of KDCG-LP's signal on December 5th and 6th at the headends located at Lafayette, Crowley, Abbeville and New Iberia, and the test results indicated that KDCG-LP failed to deliver a good quality signal at each location.³⁵ Cox states that the test

²⁶*Id.* at 8-9.

²⁷*Id.* at 9 and Exhibit K.

²⁸47 C.F.R. § 76.5(pp).

²⁹Complaint at 8, citing *Must Carry Order*, 8 FCC Rcd at 2968.

³⁰Opposition at 5.

³¹*Id.*

³²Reply at 2; *see also Must Carry Order*, 8 FCC Rcd at 2968.

³³Reply at 2.

³⁴*Id.* at 3 and Exhibits A and B (Affidavits of D. Andrew Gordon and Thom Daly).

³⁵*Id.* at 6 and Exhibit 2. Cox states that in Lafayette KDCG-LP's signal was unreadable. In Crowley, Abbeville and New Iberia, the readings averaged -56-72 dBm, -90.67 dBm, and -91-84 dBm, respectively. No test was

(continued...)

for the Lafayette system was conducted at the 27 foot “nub” of the former Lafayette tower that was destroyed by Hurricane Lili and which Cox does not intend to rebuild.³⁶ Cox states that the Lafayette system receives other broadcast signals at this headend through direct feeds rather than over-the-air transmissions.³⁷ KDCG-LP maintains that the signal strength test Cox conducted at its Lafayette headend was performed so far below accepted engineering practices as to be unreliable.³⁸ KDCG-LP notes that when it first elected carriage on Cox’s system in September 2002, the Lafayette tower was still standing, but it maintains that Cox arbitrarily refused to test KDCG-LP’s signal strength at that time.³⁹ With respect to the Crowley headend, KDCG-LP states that the test performed at that site, except for the height of the test, has similar flaws to those found in the Lafayette test.⁴⁰

11. In a supplementary opposition, Cox argues that KDCG-LP’s attempts to attack the integrity of its signal strength tests are factually inaccurate and unsupported.⁴¹ Cox states that the record demonstrates that its signal tests complied with each of the Commission’s requirements.⁴² Of all the faults in testing methodology alleged by KDCG-LP, our review of the record reveals one minor fault – the absence in the initial record of a sketch or description of the method by which Cox processed the signal. Cox has corrected this fault by supplementing the record.⁴³

12. KDCG-LP asserts that the most significant flaw in Cox’s signal test at the Lafayette headend is that the test was conducted at the remaining “nub” of the Lafayette tower. KDCG-LP argues that the Commission has repeatedly rejected tests done at this height because the results are inherently unreliable.⁴⁴ KDCG-LP maintains that Cox should have performed its test at a height comparable to the other local stations it receives.⁴⁵ KDCG-LP states that another local broadcaster previously carried on

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conducted for the St. Martin headend as that system is fully within the Lafayette MSA, and KDCG-LP would not be eligible for carriage.

³⁶*Id.* at 6.

³⁷*Id.*

³⁸Reply at 5. KDCG-LP alleges the following deficiencies in Cox’s signal testing procedures: a) there was no sketch or description of the method by which it processed the signal (i.e., it did not specify the type of connectors nor how and where the equipment was positioned and connected); b) it failed to provide the antenna range of the antenna used; c) it did not provide the antenna orientation in degrees; d) the ability of the ten or thirteen-year old antenna used to actually receive a signal is questionable; e) Cox failed to indicate the time of day it conducted the test; f) Cox failed to take into consideration attenuation per 100’ of line in its final RF levels, nor explain why 150’ of line was needed to conduct a test at a height of only 27 feet; and g) Cox failed to indicate if it used the same equipment that it also uses to receive the signals of similar frequency range, type or distance at the principal headend. *Id.* at 7-8.

³⁹*Id.*

⁴⁰*Id.* at 9.

⁴¹Cox Supplementary Opposition at 5.

⁴²*Id.* at 6.

⁴³Attachment to Cox’s April 1, 2003 Supplementary Letter.

⁴⁴Reply at 7, citing *Maranatha Broadcasting Company, Inc. v. Suburban Cable*, 16 FCC Rcd 10790, 10800 (2001); *Time Warner Cable*, 10 FCC Rcd 936 (1995); *United Broadcast Group II, Inc. v. Falcon Cable TV*, 12 FCC Rcd 10262 (1997); *Larry L. Schrecongost*, 12 FCC Rcd 13194 (1997); *Central Missouri State University v. Douglas Cable Communications*, 12 FCC Rcd 16400 (1997); *Seaway Broadcasters v. Continental Cablevision of Ohio, Inc.*, 13 FCC Rcd 20835 (1998); *Rural California Broadcasting Corporation v. TCI Cablevision of California*, 10 FCC Rcd 10342 (1995); *Vision 3 Broadcasting, Inc. v. Time Warner Cable*, 14 FCC Rcd 15348 (1999).

⁴⁵*Id.* at 7.

Cox's downed tower has leased space on the local Fox affiliate's tower across the street from the Lafayette headend to enable reception of its signal on the cable system.⁴⁶ KDCG-LP contends that Cox permits that station to deliver its signal from this 170 foot tower via coaxial cable to the Lafayette headend.⁴⁷ KDCG-LP argues that it would be able to deliver an adequate signal at no more than 150 feet.⁴⁸ KDCG-LP asserts that, despite the restrictions normally applied to LPTV stations regarding signal delivery, the extenuating circumstances in this case dictate that KDCG-LP should be allowed carriage in the same manner – via a tower across the street - as other signals that Cox receives.⁴⁹

13. In a supplementary opposition, Cox states that it has never sought to deny KDCG-LP carriage nor refused to test its signal. Indeed, it maintains that it made extraordinary attempts to receive the signal. Such methods included an attempt to receive KDCG-LP's signal via the facilities of another LPTV station located approximately four miles from the Lafayette headend and attempts to have KDCG-LP lease tower space.⁵⁰ Cox states that KDCG-LP's unsupported allegation that Cox has entered into a temporary arrangement to allow another local broadcaster previously located on Cox's tower to deliver its signal over-the-air to Cox's headend by use of leased space on a 170 foot tower across the street is simply untrue.⁵¹ Cox explains that KDCG-LP's contention is implausible because the antenna to which KDCG-LP refers is not a receive antenna but rather a transmit antenna. Cox contends that the antenna in question is used by LPTV station KAJN to reach a segment of its viewing audience that it not covered by its principal transmitter.⁵² Thus, Cox concludes, the 170-foot figure cited by KDCG-LP is irrelevant because Cox receives no signals from an antenna mounted on that tower. Moreover, Cox points out that the Commission has never rejected a signal strength test merely because the test antenna was mounted at a 30-foot elevation nor has it stated that tests performed at 30-feet are "inherently unreliable."⁵³ Indeed, Cox points out that Commission requirements regarding field strength measurements for broadcast signals specify that the testing antenna should be mounted at a 30-foot elevation.⁵⁴ Cox states that in circumstances where tower facilities are unavailable, the Commission has strongly recommended adherence to the 30-foot standard reflected in its rules.⁵⁵ In view of the fact that Cox's Lafayette system is without a headend tower, Cox asserts that testing KDCG-LP's signal at approximately 30 feet was entirely consistent with the Commission's standards. Cox argues that there is no precedent which would require it to accept the signal of an LPTV station by other than over-the-air transmissions.⁵⁶

⁴⁶*Id.* at 7-8.

⁴⁷*Id.* at 8 and Exhibit B.

⁴⁸*Id.* at Exhibit C.

⁴⁹*Id.*

⁵⁰Cox Supplementary Opposition at 2-3.

⁵¹*Id.* at 3.

⁵²*Id.* at Exhibit 1.

⁵³*Id.* at 4. Cox notes that all the cases cited by KDCG-LP concerned cable operators with antenna towers who failed to perform their test with an antenna mounted at a height used for signals of similar frequency range, type, or distance from the principal headend.

⁵⁴*Id.*, citing 47 C.F.R. § 73.686(b)(2).

⁵⁵*Id.* at 5, citing *Implementation of the Satellite Home Viewer Improvement Act of 1999; Broadcast Signal Carriage Issues, Retransmission Consent Issues, Report and Order*, 16 FCC Rcd 1918, 1948 (2000) ("*SHVIA Carriage Order*").

⁵⁶Cox states that it receives 5 local broadcast stations and 3 out-of-market broadcast stations by direct fiber or cable feeds at its Lafayette headend. Cox explains that the hardwires by which Cox receives the five local broadcast signals had been installed as back-up facilities and were in place before its tower was destroyed. *Id.* at 4.

14. In a motion to deny Cox's supplement, KDCG-LP argues that Cox has not clarified any issue with its supplement and merely rehashes previous arguments. While Cox attempts to refute that its continued carriage of KAJN-LP is inconsistent with its treatment of KDCG-LP, it does not offer any evidence as to how KAJN-LP's signal is transmitted from the Youngsville transmitter to Cox's headend in Lafayette.⁵⁷ Further, while Cox states that it receives 5 local signals via hardwire at the headend, the receipt of the 6th station listed in Cox's channel line-up is unexplained.⁵⁸ Given this lack of information, KDCG-LP asserts that Cox should be required to test and ultimately receive KDCG-LP from a nearby tower or permit an alternative method of delivery because KDCG-LP is facing a unique and novel bar to its rightful exercise of its must carry rights.⁵⁹ Finally, KDCG-LP states that Section 73.686(b)(2) of the Commission's rules, which Cox cites in support of signal strength tests performed at 30-feet, applies only to measurements of field strength for propagation analysis and not to testing for must carry purposes.⁶⁰

15. KDCG-LP alleges that the signal strength test conducted by Cox at its Lafayette principal headend was defective because it was not conducted at a minimum of 150 feet above ground level; a height at which KDCG-LP is confident it would provide a good quality signal. Alternatively, KDCG-LP has requested that it be allowed to deliver its signal via the use of a nearby 170-foot tower. Because such an alternative solution is not available to LPTV stations pursuant to the provisions of Section 614(h)(B)(iii) of the Communications Act, the only option would be to require Cox to rebuild its tower in order to test KDCG-LP's signal at 150-feet.⁶¹ However, KDCG-LP has introduced no empirical evidence to support its contention that it would be able to provide a good quality signal at 150 feet.

16. Based on the record before us, we find that Cox is not required to rebuild its tower. Cox conducted its signal strength test of KDCG-LP's signal at approximately 30 feet. Given the flat topography of the region in this instance, we do not believe that Cox's test of KDCG-LP's signal at this height was unreasonable. This is particularly true in the case of LPTV stations, such as KDCG-LP, because they have a limited service area and must be within 35 miles of a cable system's principal headend. In this respect, we note that Cox's Lafayette principal headend lies well outside KDCG-LP's predicted contour. KDCG-LP introduced no evidence that Cox is attempting to escape its must carry obligations. As Cox notes, the Commission has stated at Section 73.686(b)(2) of its rules that a height of 30 feet is generally sufficient to measure a station's field strength.⁶² We do not believe that Cox's test at its Lafayette headend constitutes a material diversion from the provisions of this section, and we cannot find that Cox's test under these circumstances violates the Commission's signal carriage rules.

17. For the reasons discussed herein, we find that the signal strength tests of KDCG-LP's signal conducted by Cox at its Crowley and Lafayette headends demonstrate that KDCG-LP fails to provide a signal of sufficient strength to the cable systems' principal headends. With respect to the Abbeville and New Iberia systems, the signal strength tests of KDCG-LP's signal demonstrate that the station fails to deliver a signal of good quality to those systems' principal headends. The results of these tests were not disputed by KDCG-LP. Moreover, KDCG-LP's city of license is more than 35 miles from the Abbeville and New Iberia systems' principal headends. Consequently, the station is not entitled to carriage on these systems. Additionally, the St. Martin cable system's communities are wholly located within the Lafayette MSA rendering KDCG-LP ineligible for carriage.⁶³ In view of our action herein, we

⁵⁷Motion at 3. KAJN-LP's letter is equally silent on this issue.

⁵⁸*Id.* at 4 and Exhibit A.

⁵⁹*Id.* at 4.

⁶⁰*Id.* at 4-5.

⁶¹47 U.S.C. § 534(h)(B)(iii).

⁶²47 C.F.R. § 73.686(b)(2).

⁶³ *See, supra*, note 35.

need not address the other issues raised in the petition.

IV. ORDERING CLAUSES

18. Accordingly, **IT IS ORDERED**, pursuant to Section 614 of the Communications Act of 1934, as amended, 47 U.S.C. § 534, and Sections 76.55(d) and 76.56(b)(3)⁶⁴ of the Commission's rules, that the complaint filed by Acadiana Cable Advertising, Inc. **IS DENIED**.

19. This action is taken pursuant to authority delegated under Section 0.283 of the Commission's rules.⁶⁵

FEDERAL COMMUNICATIONS COMMISSION

Steven A. Broeckaert
Deputy Chief, Policy Division
Media Bureau

⁶⁴47 C.F.R. §§ 76.55(d) and 76.56(b)(3).

⁶⁵47 C.F.R. § 0.283.