

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

In the Matter of:)	
)	
LeSEA Broadcasting Corp.)	
)	CSR-6103-M
v.)	
)	
Cox Communications Kansas, L.L.C.)	
)	
Request for Mandatory Carriage of)	
Television Station KWHB-TV,)	
Tulsa, Oklahoma)	

MEMORANDUM OPINION AND ORDER

Adopted: June 6, 2003

Released: June 10, 2003

By the Deputy Chief, Policy Division, Media Bureau:

I. INTRODUCTION

1. LeSEA Broadcasting Corp. (“LeSEA”), licensee of television broadcast station KWHB-TV, Tulsa, Oklahoma (“KWHB” or the “Station”) filed the above-captioned must carry complaint against Cox Communications Kansas, L.L.C. (“Cox”), for failing to carry KWHB on its cable television systems serving Montgomery County, Kansas in the Tulsa, Oklahoma DMA, specifically Coffeyville, Cherryvale, Caney and Tyro, Kansas (the “cable communities”). Cox filed an opposition to which LeSEA replied. For the reasons and to the extent indicated below, we grant the complaint for must carry status in the cable communities, but allow Cox additional time to conduct a signal strength test at the principal headend of its cable system.

II. BACKGROUND

2. Under Section 614 of the Communications Act of 1934, as amended, 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, such as KWHB, are entitled to assert mandatory carriage rights on cable systems located within the station’s market.¹ A station’s market for this purpose is its “designated market area,” or DMA, as defined by Nielsen Media Research.² The term DMA is a geographic market designation that defines each television market exclusive of others, based on measured viewing patterns.

¹ 8 FCC Rcd 2965, 2976-2977 (1993).

² 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). Section 76.55(e) of the Commission’s rules requires that a commercial broadcast television station’s market be defined by Nielsen Media Research’s DMAs. 47 C.F.R. § 76.55(e).

3. Section 614 of the Communications Act and the Commission's rules also provide that a commercial television station asserting must carry rights is required to deliver a good quality signal to the principal headend of a cable system. Because the cable operator is in the best position to know whether a given station is providing a good quality signal to the system's principal headend, the initial burden of demonstrating the lack of a good quality signal appropriately falls on the cable operator. For UHF commercial television stations, the standard used to determine what constitutes a good quality signal at a cable system's headend is -45dBm.³

4. With regard to channel positioning rights, Section 614(b)(6) of the Communications Act and Section 76.57 of the Commission's rules provide commercial television stations electing must carry status with three channel positioning options. A station may elect to be carried on: (1) the channel number on which the station is broadcast over the air; (2) the channel number on which the station was carried on July 19, 1985; or (3) the channel number on which the station was carried on January 1, 1992. The Communications Act and the Commission's rules also provide that a broadcast station may be carried on any other channel number mutually agreed upon by the station and the cable operator.⁴

III. DISCUSSION

5. In support of its Complaint, LeSEA states that its television station, KWHB, is licensed to Tulsa, Oklahoma, which is in the Tulsa, Oklahoma DMA. It further states that Cox operates cable television systems in the cable communities, which are also in the Tulsa DMA. LeSEA contends that because KWHB is located within the same DMA as these cable systems, KWHB is entitled to mandatory carriage on the cable systems. LeSEA asserts that in September 2002, it formally requested that Cox commence carriage of KWHB's signal on its cable systems in the cable communities, and that Cox responded that KWHB failed to provide an adequate signal to its headend in Cherryvale and provided a copy of its signal strength test conducted in November 2002. LeSEA claims that this test was based on "unsound engineering practices," and that Cox had not begun to carry KWHB on its other cable systems in Montgomery County.⁵

6. In its opposition, Cox explains that it operates a technically integrated cable system that serves from the same headend the cable communities and other communities.⁶ Cox further explains that it receives the off-air signals of television stations at its "receive site in Cherryvale, Kansas, and transmits those signals 16 miles to the System's principal headend [in Parsons, Kansas] via [its] fiber optic link."⁷ According to Cox, when it received LeSEA's must carry complaint, it conducted a second signal strength test at the Cherryvale receive site on February 13, 2003, which reflected that KWHB did not provide an adequate signal to the site. Further, Cox states that Cox and LeSEA jointly conducted a third test at the Cherryvale receive site on February 24, and that KWHB failed again to deliver a good quality signal. Cox asserts that a fourth test was performed on February 27 "at the System's principal headend in Parsons," and that this test "failed to detect any [KWHB] signal whatsoever at the principal headend."⁸

³ 47 U.S.C. § 534(h)(1)(B)(iii); 47 C.F.R. § 76.55(c)(3).

⁴ 47 U.S.C. § 534(b)(6); 47 C.F.R. § 76.57.

⁵ Complaint at 1-6.

⁶ Opposition at 1 n.1, and Exhibit 1.

⁷ *Id.* at 2.

⁸ *Id.* at 2 and Exhibits 2, 3 and 4.

Finally, Cox argues that if the Commission grants LeSEA's complaint conditioned on KWHB providing a good quality signal to Cox's headend, that the Commission should direct that "LeSEA is responsible for the costs of delivering the requisite signal to the System's principal headend in Parsons, including any incremental costs necessary to transport KWHB's signal from the Cherryvale receive site to the System's principal headend [in Parsons] via Cox's fiber system." Cox, moreover, indicates that even if the Commission only requires LeSEA "to deliver a good quality signal to the Cherryvale receive site rather than the principal headend" in Parsons that LeSEA should still be "responsible for the incremental costs of the necessary electronics equipment to activate Cox's fiber link for the transport of KWHB's signal to the Parsons headend."⁹

7. In its reply, LeSEA claims that Cox's testing at the various sites is inconsistent and contrary to its representations to LeSEA. LeSEA also disputes that Cox's principal headend is in Parsons because Cox does not provide service to the community of Parsons, and has no subscribers within 30 miles of Parsons. LeSEA further states that even if Parsons is the principal headend, the proper place to take signal strength measurements is at the equipment that first processes the signal at issue, which is at Cherryvale.¹⁰ In addition, LeSEA argues that Cox's various tests of KWHB's signal strength did not follow sound engineering practices and did not provide necessary information.¹¹ Finally, LeSEA asserts that it should not be liable for any costs involved in transporting its signal from Cherryvale to Parsons because other Tulsa area stations are not required to pay this cost, and "[t]he only costs stations are required to pay for are those directly related to the *delivery* of their signals, not for transporting their signals after delivery."¹² LeSEA concludes that "[i]f Cox were to ultimately conduct a legitimate test of KWHB using a specialized, professional antenna like those it uses to receive other Tulsa stations, it would determine that KWHB's signal strength qualifies it for must carry. Under those circumstances, KWHB would agree to assume the cost of a specialized, professional antenna to deliver its signal."¹³

8. In general, as indicated below, we find in favor of LeSEA's complaint and request for must carry status on Cox's cable system serving the cable communities. Under the Commission's rules, cable operators have the burden of establishing that a commercial television station located in the same DMA as a cable system is not entitled to carriage. If a cable operator claims that a station fails to deliver a signal of adequate strength, the allegation must be supported by signal strength tests that comply with good engineering practices. A review of the signal strength tests conducted by Cox regarding the reception of KWHB at Cherryvale and Parsons, Kansas indicates that the tests did not comply with good engineering practices. For example, Cox did not provide sketches or block diagrams of equipment used for the three signal strength tests conducted at Cherryvale. A more significant problem is LeSEA's criticism of the February 24 test at Cherryvale that "the calibration date of the spectrum analyzer used to calibrate the Wavetek Line Sam II is not provided." This information is also lacking regarding the prior two tests. For the February 27 test at Parsons, Cox merely states that it was calibrated in 2000, which is not sufficiently current to be relevant.¹⁴ The lack of calibration information calls into question the accuracy of the signal

⁹ *Id.* at 4-5.

¹⁰ Reply at 2-5.

¹¹ *Id.* at 5-8, and Exhibit B.

¹² *Id.* at 8-9 (emphasis original).

¹³ *Id.* at 9 n.13.

¹⁴ *Id.* at 8 n.11 and Exhibit B; see *Opposition* at Exhibit 4 (block diagram); *Must Carry Order*, 8 FCC Rcd 2965, 2990-2991 (1993); 47 C.F.R. § 76.61(a)(2).

strength measurements which is the central issue in this must carry proceeding. Cox has not contested this shortcoming alleged by LeSEA. In addition, Cox has not explained or justified why it selected two different locations to conduct the four signal strength tests. In its November 27, 2002 letter to LeSEA, Cox states that its first test was conducted at “our headend site (Cherryvale) in accordance with the FCC Rules.”¹⁵ Then in Cox’s opposition it states “our letter inadvertently and incorrectly indicated that Cox conducted the signal test at the System’s headend. In fact, Cox conducted the first test at its Cherryvale receive site.”¹⁶ However, Cox conducted additional tests at Cherryvale on February 13 and 24, 2003, the last test jointly with LeSEA. Then on February 27, Cox conducted a fourth test at what it claims was “the System’s principal headend in Parsons.”¹⁷ LeSEA, as discussed above, claims the testing at different locations was unusual, and challenges Cox’s claim that its headend is located in Parsons. Cox has not responded to these arguments. Based on the above, we cannot conclude that Cox has established that KWHB fails to achieve the minimum signal strength criterion established by the Commission.¹⁸

9. The Commission’s rules require that signal strength tests be conducted “at the input terminals of the signal processing equipment” located at a cable systems principal headend.¹⁹ A cable system’s principal headend is defined, in part, by the Commission’s rules as the “headend designated by the cable operator, except that such designation shall not undermine or evade the requirements of subpart D of this part” (must carry requirements). The same section of the rules also requires that “each cable system shall place in its public file the location of its designated principal headend” and “[e]xcept for good cause, an operator may not change its choice of principal headend.”²⁰ Thus, it would seem that there should be no confusion by a cable operator regarding the location of a principal headend. Cable operators are not required to inform the Commission of the location of their principal headends, although cable operators are required to file a registration statement with the Commission providing other information concerning their cable television systems before they begin to operate.²¹ Further, the Commission’s rules allow commercial television stations claiming must carry rights to provide, at their own expense, whatever equipment is necessary to ensure delivery of a good quality signal to a cable system’s principal headend.²²

10. We therefore grant LeSEA’s complaint and require Cox to commence carriage of KWHB within 60 days of the release date of this order, unless Cox conducts within 15 days of the release date of

¹⁵ Complaint at Exhibit B.

¹⁶ Opposition at 2 n.3.

¹⁷ *Id.* at 2. Although Cox is not required to have a principal headend collocated with a cable system, they are often collocated. Further, although Cox is not required to register a principal headend with the Commission, it is required to register cable television systems. 47 C.F.R. § 76.1801. Our records do not reflect it has a cable system in or near Parsons. Thus, if Cox has a cable system in the area of Parsons, it should notify us of this system to correct the record in this proceeding, and it should register it with the Commission.

¹⁸ 47 C.F.R. § 76.55(c)(3).

¹⁹ *Id.*

²⁰ 47 C.F.R. § 76.5(pp).

²¹ 47 C.F.R. § 76.1801.

²² 47 C.F.R. § 76.55(c)(3).

this order, new signal quality tests at the principal headend of its cable system serving the cable communities, and these tests demonstrate that KWHB does not meet the signal strength standards. If Cox believes that it is not obligated to carry KWHB based on the results of new tests, it may submit the results of the tests to the Commission's Media Bureau within 20 days of the release date of this order. Furthermore, if Cox conducts these tests at its facility in Parsons, it shall submit justification for designating this facility as its principal headend.

IV. ORDERING CLAUSES

11. Accordingly, **IT IS ORDERED**, pursuant to Section 614(d)(3) of the Communications Act of 1934, as amended, 47 U.S.C. § 534(d)(3), that the must carry complaint filed by LeSEA Broadcasting Corp., licensee of television broadcast station KWHB, Tulsa, Oklahoma against Cox Communications Kansas **IS GRANTED** as conditioned herein.

12. **IT IS FURTHER ORDERED** that Cox may, within 15 days of the release date of this order, conduct new signal quality tests consistent with this order at the principal headend of its cable system serving the cable communities. If based on these tests, Cox believes that it is not obligated to carry KWHB on its cable system, it may submit the results of the tests to the Media Bureau within 20 days of the release date of this order. The Media Bureau will then decide the issue on reconsideration.

13. **IT IS FURTHER ORDERED** that if Cox operates a cable system in or near Parsons, Kansas, that Cox shall, within 15 days of the release date of this order, notify the Media Bureau of the existence of this system to correct the record in this proceeding, and file a registration statement with the Commission in accordance with Section 76.1801 of the Commission's rules, 47 C.F.R. § 76.1801.

14. **IT IS FURTHER ORDERED** that Cox Communications Kansas shall commence carriage of KWHB within 60 days after the release date of this order in the absence of new tests that demonstrate the KWHB does not provide an adequate signal. KWHB shall be carried on the channel of the cable system as specified by Sections 76.57(a) and (d) of the Commission's rules, 47 C.F.R. § 76.57(a) and (d).

15. This action is taken under authority delegated by Section 0.283 of the Commission's rules, 47 C.F.R. § 0.283.

FEDERAL COMMUNICATIONS COMMISSION

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