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

In the Matter of	)	
	)	
Gary White	)	
v.	)	CSR-8494-M
City of Bardstown, KY	)	
	)	
Request for Carriage	)	
	)	

MEMORANDUM OPINION AND ORDER

Adopted: September 20, 2011 **Released: September 21, 2011**

By the Senior Deputy Chief, Policy Division, Media Bureau:

I. INTRODUCTION

1. Gary White, licensee of low power television station W06AY-D, Lebanon, Kentucky ("W06AY-D"), filed the above-captioned complaint against the City of Bardstown, Kentucky ("Bardstown"), operator of the cable system serving Bardstown, Kentucky, for its failure to carry W06AY-D on its system. An opposition to this complaint was filed on behalf of Bardstown to which W06AY-D replied. For the reasons discussed below, we grant W06AY-D's request.

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.[1] 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 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 ("MSAs") 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.[2]

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

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

III. DISCUSSION

3. In support of its complaint, W06AY-D states that it requested carriage on Bardstown's cable system by letter dated February 24, 2011.[3] On April 1, 2011, W06AY-D states that Bardstown denied carriage, claiming that W06AY-D did not provide a "good quality signal" at the cable system's principal headend.[4] As a result, W06AY-D states that it filed the instant complaint within the 60-day period required pursuant to Section 76.7(c)(4)(iii) of the Commission's rules.[5]

4. W06AY-D argues that it is a "qualified" low power station pursuant to Section 76.55(d) of the Commission's rules and is thus entitled to carriage on Bardstown's cable system.[6] W06AY-D states that it broadcasts 168 hours per week; adheres to all relevant Commission requirements imposed on full-power television stations regarding non-entertainment, political and children's programming; broadcasts news and informational programming that is locally oriented and addresses local needs not addressed by full-power stations; complies with the Commission's interference rules; Lebanon, its community of license, has a population of less than 35,000; and it transmits from a location within the required 35-miles from the cable system's headend.[7] W06AY-D points out that both its community of license and the franchise area of Bardstown's cable system are located outside of the largest 160 MSAs, as determined by OMB on June 30, 1990, and are located in Nelson County, where no full-power television stations are licensed.[8] W06AY-D asserts that, given its proximity to the Bardstown cable system, it is able to provide a good quality signal to Bardstown's principal headend.[9] Furthermore, W06AY-D argues that because the Bardstown system is currently carrying less than the mandatory number of local commercial television stations required by Section 76.56(b) of the Commission's rules, the system is required to set aside and carry at least two qualified low power stations.[10]

5. W06AY-D notes that, in its denial of carriage, Bardstown asserted that, based on signal quality tests, W06AY-D did not provide a "good quality signal" at the system's principal headend.[11] W06AY-D asserts, however, that not only is Bardstown's signal quality "study" flawed, but its conclusions are dubious.[12] Moreover, W06AY-D states, the system's study was done without the participation of the station's licensee or its personnel.[13] W06AY-D points out that the majority of the signal test data provided by Bardstown pertains to allegedly significant "signal-to-noise" and Modulation Error Ratio ("MER") problems that exist in the reception of W06AY-D signal.[14] However, W06AY-D

[3] Complaint at Exhibit A.

[4] *Id.* at Exhibit B. We note that, in its complaint, W06AY-D responded to allegations made by Bardstown in its denial of carriage that the station did not provide locally-oriented programming by providing detailed programming information. After review of the information, which it stated had not been made available at the time of its must carry response, Bardstown conceded in its opposition that W06AY-D met this requirement. As a result, we need not address this issue.

[5] *Id.* at 1, citing 47 C.F.R. § 76.7(c)(4)(iii).

[6] *Id.* at 4, citing 47 C.F.R. § 76.55(d).

[7] *Id.* at Attachment 1.

[8] *Id.* at 5 and Attachment 1.

[9] *Id.* at Attachments 1 and 3-4.

[10] *Id.* at 6, citing 47 C.F.R. § 76.56(b).

[11] *Id.* at Exhibit B.

[12] *Id.* at Attachments 3-4.

[13] *Id.* at 7.

[14] *Id.*

argues that the failure to receive a "good picture" is not a basis for rejection of must carry status.[15] Indeed, W06AY-D maintains the situation herein is essentially identical to that in *Richard C. and Lisa A. Goetz v. Charter Communications,* where the Commission stated "where a broadcaster's signal strength at the cable headend meets the [Commission's technical] standard but, for reasons beyond the control of the cable operator, a good quality picture is not receivable, the broadcast station and the cable operator should . . . attempt to resolve the problem."[16] W06AY-D asserts that it will cooperate with Bardstown in resolving all MER problems with its signal once carriage commences.[17]

6. W06AY-D states that Bardstown also alleges that the station does not produce a signal of sufficient strength to the cable system's headend to justify must carry status.[18] W06AY-D asserts that this claim is also groundless because, based upon the Commission's prediction methodology, a more than ample signal strength should be expected at the Bardstown headend since W06AY-D is located only 21.5 miles from the cable system's principal headend.[19] W06AY-D states that this conclusion is also supported by its consulting engineer who indicated that "using an analysis executed with the OET 60 methodology, a signal strength of -53.7 dBu should be present when measured with a 0 dB gain antenna (reference to a dipole) at a height of 100 feet at the headend location coordinates."[20] W06AY-D argues that not only were Bardstown's signal measurements taken without the consultation or participation of W06AY-D, but they were not taken when the station was operating at full licensed parameters.[21] W06AY-D states about a month prior to the tests conducted by Bardstown, the antenna array for the station had been damaged by high winds, causing a signal loss of approximately 7 dB into areas west and northwest of the transmitter – an area which would include Bardstown.[22] As a result, W06AY-D argues that such antenna damage would result in a weakened signal measurement determination.[23]

7. Despite this, W06AY-D notes that, based on the raw measurement data supplied by Bardstown and using the measurement point the system chose to utilize, W06AY-D achieved a signal strength level ranging from -51.35 dBm to -47.25 dBm.[24] However, W06AY-D argues, Bardstown's technical consultant chose to reduce each measured value by "19 dB" to account for his decision to use a "pre-amplifier" as part of the testing methodology and thus manipulated the raw data to support Bardstown's overall conclusion that W06AY-D did not provide a good quality signal.[25] W06AY-D points out that in *Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Broadcast Signal Carriage Issues,* the Commission stated that "[f]or broadcast stations not currently on the cable system, to the extent the cable system currently is able to do so, the signal level shall be determined based on measurements made with generally accepted equipment that is currently used to receive signals of similar frequency range, type, or distance from the principal headend."[26] In this

[15] *Id.*

[16] *Id.* at 7-8, citing 23 FCC Rcd 10493, 10495 (2008).

[17] *Id.* at 8.

[18] *Id.*

[19] *Id.*

[20] *Id.* at Attachment 3.

[21] *Id.* at Attachment 4.

[22] *Id.*

[23] *Id.*

[24] *Id.* at Exhibit B.

[25] *Id.* at 9-10 and Exhibit B.

[26] *Id.* at 11, citing 8 FCC Rcd 4142, 4143 (1993) (*"Clarification Order"*).

instance, argues W06AY-D, Bardstown used an improper antenna, an improper testing methodology and, to the extent that a pre-amplifier may be used in connection with the reception of other broadcast signals, whether the subtraction of gain for its use was proper.[27] W06AY-D maintains that, at such time as it has repaired its wind damage and is again operating at full licensed parameters, Bardstown should be ordered to conduct a supplemental study with all the deficiencies corrected with the full participation of station personnel.[28]

8. In opposition, Bardstown argues that, in order to respond to W06AY-D's February 23, 2011 must carry demand letter, it conducted multiple signal strength tests between March 28-29, 2011.[29] Bardstown maintains that these tests indicated that W06AY-D failed to deliver a good quality signal pursuant to the Commission's signal quality standards.[30] Moreover, while W06AY-D asserts that these signal strength tests were flawed and unreliable, Bardstown argues that according to its engineering consultant, "the test procedures used by the City of Bardstown . . . are consistent with 'good engineering practices.'"[31] Bardstown notes that in its petition W06AY-D claims that its antenna was damaged by wind "on or before February 20, 2011, and that such damage would have been a factor in any determination of signal strength.[32] However, Bardstown points out that this fact was not mentioned in W06AY-D's must carry demand letter, which was sent three days after the alleged incident, and thus the signal strength tests were conducted based on the station's antenna array as of that date.[33]

9. In addition, Bardstown argues that, contrary to W06AY-D's assertions, "signal-to-noise" and "MER" problems can be a basis for denying must carry status.[34] Bardstown points out that in the *Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Broadcast Signal Carriage Issues,* the Commission acknowledged that

> "[t]here may be situations where the levels of undesired signals (noise), outside of the cable operator's control, that are received at the cable system's headend adversely affect the quality of a television station's signal. We believe that, where a broadcaster's signal strength at the cable headend meets the above standard but, for reasons beyond the control of the cable operator, a good quality picture is not receivable, the broadcast station and the cable operator should initially attempt to resolve the problem. In the event that the dispute cannot be resolved, the parties may seek appropriate remedies from the Commission. The Commission, as a matter of course, will consider all relevant technical issues, including the signal-to-noise ratio . . . ."[35]

Bardstown argues that "MER," which is closely related to "signal-to-noise" ratio and is calculated from the average power of a signal, includes all imperfections including deterministic amplitude imbalance,

[27] *Id.* at 11.

[28] *Id.*

[29] Opposition at 2. Bardstown states that in order to conduct the signal strength tests necessary to respond to W06AY-D's must carry demand, it requested and received from the station an extension of time to file its response to the demand letter. *See* Complaint at Exhibit B.

[30] *Id.*

[31] *Id.* at Attachment A.

[32] *Id.* at 3, citing Complaint at Attachment 4.

[33] *Id.*

[34] *Id.* at 4.

[35] *Id.*, citing 8 FCC Rcd 2965, 2990 (1993) (*"Must Carry Order"*).

quadrature error and distortion.[36] Bardstown states that W06AY-D's "MER" is substantially lower than all other broadcast signals received at the cable system's headend which correlates to a marginal to non-functional picture quality.[37] Bardstown states that should repair of W06AY-D's alleged wind damage allow the station to provide a good quality signal pursuant to Commission standards, it reserves the right to object to mandatory carriage due to poor picture quality as evidenced by the station's low "MER."[38]

10. With regard to W06AY-D's request for additional testing once its wind damage is repaired, Bardstown states that it will voluntarily conduct such supplemental signal strength tests and will also agree to conduct the tests without the pre-amplifier.[39] However, Bardstown asserts that in performing these tests it will not agree to the use of any additional or specialized equipment to provide a good quality signal, despite W06AY-D's offer to do so, since the Commission's rules do not allow low power television stations to cure signal quality deficiency with additional or specialized equipment.[40]

11. In reply, W06AY-D argues that because Bardstown has conceded that taking additional measurements is appropriate in light of the station's antenna damage and without the use of a pre-amplifier, the only issues remaining appear to be: 1) the suitability of the Bardstown test antenna; 2) the right of W06AY-D to participate directly in any further testing; and 3) the right of W06AY-D to use supplemental equipment, if necessary, to solve any remaining signal-to-noise "MER" issues.[41] W06AY-D asserts that the *Clarification Order* made it clear that cable operators were to use the same equipment used to receive other signals when conducting signal quality measurements.[42] However, despite this, W06AY-D states that Bardstown provided no information as to why it chose a Scientific Atlanta QCA-2 antenna to conduct its tests or whether the same type of antenna was used to receive other stations on the system.[43] W06AY-D states that, in response to a July 5, 2011 letter of inquiry, Bardstown acknowledged that the antenna used to test W06AY-D's signal was not the type used to receive other stations currently carried on the system.[44] Moreover, W06AY-D states, this antenna was mounted at a lower height and had a lower gain than any other receive-antenna at the headend.[45] W06AY-D maintains that in order to

[36] *Id.* at 4-5, citing Complaint at Exhibit B, Attachment A. Bardstown indicates that during its testing, W06AY-D's "MER" was between 16.3 and 19.7.

[37] *Id.* at 5, citing a June 9-11, 2010 InfoComm presentation by Blonder Tongue Laboratories, Inc. *See id.* at n.19. Bardstown states that all other broadcast signals received by the cable system have a "MER" of no less than 27. Bardstown states further that due to W06AY-D's low "MER" it has observed a chronic tilting of the station's signal.

[38] *Id.* at 5.

[39] *Id.* at 6.

[40] *Id.*, citing *Joan T. and Kenneth D. Wright v. Charter Communications,* 25 FCC Rcd 17394, 17403 (2010) ("Low power television stations, unlike full-power television stations, are not entitled to improve their signal with additional equipment."); *WMTY, Inc. v. James Cable Partners,* 21 FCC Rcd 11709 (2006) ("Unlike full power commercial television broadcast stations, LPTV stations . . . are not allowed by statute or the Commission's rules to cure a signal quality deficiency with additional equipment.").

[41] Reply at 2.

[42] *Id.* at 3, citing *Clarification Order,* 8 FCC Rcd at 4143; *see also Citrus County Association for Retarded Citizens v. Century Cable,* 16 FCC Rcd 20713 (2001).

[43] *Id.* at 3. W06AY-D states that Bardstown also failed to provide any information regarding what other antennas are used in the reception of other stations or what characteristics such antennas might have (*i.e.,* gain, position/height of each antenna, channels received by each antenna, etc.). We note that Bardstown did indeed provide this information in its April 1, 2011 reply to W06AY-D's must carry demand letter. *See id.* at Exhibit B.

[44] *Id.* at Attachments 1 and 2. Bardstown stated that it was an antenna that had been used to receive a station that previously broadcast on analog channel 3.

[45] *Id.*

achieve parity with the other receive-antennas used by Bardstown, any future testing must utilize an antenna mounted at least 112 feet or higher which has a documented gain of at least 9.5dBi or greater.[46]

12. W06AY-D argues further that, although it has offered to provide an appropriate antenna for the supplemental testing at no cost to the system, Bardstown has refused.[47] Moreover, W06AY-D maintains that while Bardstown has agreed to the supplemental testing it is being less than up-front in allowing the participation of W06AY-D's engineer.[48] Finally, W06AY-D continues to assert that Bardstown arguments regarding "MER" problems should be rejected out of hand because the failure to receive a "good picture" is not a basis for rejection of must carry status.[49] While W06AY-D agrees that any specialized testing equipment offered cannot be forced upon Bardstown in establishing the station's more than adequate signal strength level, it argues that once such signal strength is established, both parties must cooperate in taking steps designed to improve any alleged picture quality deficiencies.[50] W06AY-D asserts such cooperation can and should include the option of installing any specialized equipment necessary to cure any deficiences and it pledges to do so at no cost to Bardstown.[51]

13. In our review of the issues raised in this case, we find that there appears to be no disagreement between the parties as to W06AY-D's eligibility as a qualified LPTV station pursuant to the requirements set forth in Part 73 of the Commission's rules. Instead, the argument appears to be a dispute regarding W06AY-D's ability to provide a good quality signal to the cable system's principal headend. Upon analysis we agree with W06AY-D that there are significant discrepancies sufficient to question Bardstown's conclusion that W06AY-D fails to provide a good quality signal.

14. Initially, we point out that WO6AY-D is incorrect in alleging that Bardstown erred in using a preamplifier. A cable system is permitted to follow its customary engineering practices so long as they are sound. Bardstown currently receives five of its ten off-air stations with the use of a preamplifier. In determining whether a LPTV station delivers a particular signal strength to the input of the first active device, it is permissible to subtract the gain of an active device from that calculation, as Bardstown has done here. Bardstown has provided the gain, make, model, and age of the preamplifier and these are all reasonable in this case. Additionally, Bardstown did not err in utilizing a cable-specific analyzer, rather than a general purpose spectrum analyzer, in performing its tests. The Trilithic analyzer used to perform measurements in this case is an appropriate tool for this purpose and has been calibrated within one year of the date of the test. We find no reason to suspect that the values measured by the device are inaccurate.

15. We do not find fault with Bardstown's placement of the antenna used to test W06AY-D's signal since it was placed only ten feet below others used by Bardstown to receive television stations. We note, however, that it is not possible to determine whether the antenna used by Bardstown is appropriate to receive television channel 6, as specifications are not provided regarding its designed frequency range and it was only recently utilized on television channel 3. Additionally, we note that the gain of this antenna is significantly lower than all but one other antenna located on the tower. Bardstown generally receives stations utilizing antennas with a gain of 17 dB, while W06AY-D is potentially receiving a peak gain of only 9.5 dB. A single additional antenna on the tower provides only 11.5 dB of gain, more than that afforded W06AY-D, although this antenna is receiving stations significantly more powerful than

[46] *Id.* at Attachment 3.

[47] *Id.* at 4.

[48] *Id.,* citing *Clarification Order,* 8 FCC Rcd at 4143; *Joan T. and Kenneth D. Wright v. Charter Communications,* 25 FCC Rcd 17399 (2010).

[49] *Id.* at 5, citing *Richard C. and Lisa A. Goetz v. Charter Communications,* 23 FCC Rcd 10493 (2008).

[50] *Id.* at 6.

[51] *Id.*

W06AY-D. For example, WBNA (Ch. 8), is located 21.71 miles from Bardstown's headend (compared to 21.34 miles for W06AY-D), but it transmits at 27 kW, compared to 0.3 kW for W06AY-D. Taken together, these issues lead us to conclude that the tests conducted by Bardstown did not sufficiently follow sound engineering practices.

16. With regard to the issue of damage to W06AY-D's antenna array, W06AY-D states that its array is under repair, with an expected repair date 30-60 days from May 31, 2011. Bardstown has conceded that it is willing to perform supplemental signal strength tests once W06AY-D has repaired its antenna array. We expect the parties to cooperate in the testing, but we agree with Bardstown that, as stated in the *Must Carry Order,* and pursuant to Section 614(h)(B)(iii) of the Communications Act, low power television stations, unlike full-power television stations, are not entitled to improve their signal with additional equipment.[52] Because this is a statutorily mandated requirement, we cannot grant W06AY-D's request to provide a different antenna other than those used by Bardstown to receive other television stations.

17. Finally, we decline to address the MER issue at this time. Should W06AY-D qualify at some later time, Bardstown and W06AY-D should attempt to resolve the issue of poor MER. Should the parties fail to reach an agreement, they may then come to the Commission for a resolution.

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) of the Commission's rules, that the complaint filed by Gary White, licensee of low power television station W06AY-D, **IS GRANTED** to the extent indicated above with respect to the Bardstown, Kentucky cable system operated by the City of Bardstown.

19. **IT IS FURTHER ORDERED,** that Bardstown conduct signal strength tests of W06AY-D within fifteen (15) days after the station informs Bardstown that its facility has been repaired. Such tests shall be conducted in accordance with sound engineering practices and consistent with the discussion set forth above. W06AY-D's engineer shall be given prior notice of, and may observe, such testing.

20. **IT IS FURTHER ORDERED,** that Bardstown commence carriage of W06AY-D within sixty (60) days of the date in which W06AY-TV provides a good quality signal to the cable system's principal headend.

21. This action is taken pursuant to authority delegated by Section 0.283 of the Commission's rules.[53]

FEDERAL COMMUNCIATIONS COMMISSION

Steven A. Broeckaert
Senior Deputy Chief, Policy Division
Media Bureau

[52] *See Must Carry Order,* 8 FCC Rcd at 2991; *see also* 47 U.S.C. § 534(h)(B)(iii).

[53] 47 C.F.R. § 0.283.