

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

In the matter of:
Frank and Linda Azevedo, licensees of KAZV-LP
v.
Charter Communications, Inc.
CSR-8632-M
Docket No. 12-134

MEMORANDUM OPINION AND ORDER

Adopted: September 27, 2012

Released: September 28, 2012

By the Deputy Chief, Policy Division, Media Bureau:

I. INTRODUCTION

1. George A. Baker, General Manager, on behalf of Frank and Linda Azevedo, licensees of Low Power Station KAZV-LP, Modesto, California ("KAZV-LP"), has filed the above-captioned complaint against Charter Communications, Inc. ("Charter") for its failure to carry KAZV-LP on its cable system serving certain unspecified communities in San Joaquin, Stanislaus and Merced Counties, California from Charter's Turlock and Livingston headends. No opposition to this complaint was filed. For the reasons discussed below, we dismiss KAZV-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 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

1 Mr. Baker filed an informal letter complaint on behalf of KAZV-LP, dated April 10, 2012, styled an "Informal Petition for Declaration as a Must Carry Station." See Complaint of KAZV-LP, filed May 18, 2012 ("KAZV-LP Complaint"). Although a paper copy of KAZV-LP's complaint was stamped by the mail room on April 27, 2012, it was only officially filed electronically on May 18, 2012.

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

system.³

3. Under certain limited circumstances enunciated in the Commission's rules, cable systems with more than 12 usable activated channels are required to carry low power television stations on their channel lineups.⁴ Stations with 35 or fewer usable activated channels that have not filled the channels set aside for local commercial television stations must carry one "qualified" low power television station, and stations with more than 35 usable activated channels that have not filled the channels set aside for local commercial television stations must carry two "qualified" low power television stations.⁵

III. DISCUSSION

4. From the evidence in KAZV-LP's letter complaint, the station did not make an affirmative election on October 1, 2011, to be carried on Charter's cable system serving communities in San Joaquin, Stanislaus and Merced, California and accordingly, it defaulted to must carry status.⁶ KAZV-LP asserts it was historically carried on these Charter systems by virtue of a franchise agreement between Charter's predecessor in interest and the cities of Turlock and Ceres in Stanislaus County, but KAZV-LP asserts it had no actual contract for carriage with those parties.⁷

5. KAZV-LP states it was informed by a letter from Charter in mid to late January that it would be removed from Charter's cable systems on or after March 1, 2012.⁸ On February 17, KAZV-LP invoked Section 76.61 of our rules and demanded that Charter continue to carry it on channel 14 of its cable system.⁹ Nevertheless, on March 1, 2012, Charter removed KAZV-LP and sent a letter to the station stating that it was not a qualified low power station entitled to be carried.¹⁰ Charter justified its claim on the grounds that the population of Modesto, KAZV-LP's city of license, had been greater than 35,000 persons as of June 30, 1990,¹¹ and that two full-power stations served the areas served by KAZV-LP, removing the possibility that the station could be a qualified low power station.¹² KAZV-LP subsequently prepared its letter complaint, which it asserts it has served on Charter.¹³

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

⁴ Section 76.56(b)(2) provides that "[a] cable system with more than 12 usable activated channels, as defined in Section 76.5(oo), shall carry local commercial television stations up to one-third of the aggregate number of usable activated channels of such system." 47 C.F.R. § 76.56(b)(2).

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

⁶ See *Folse Comm., LLC v. Allen's TV Cable Service, Inc.*, 18 FCC Rcd 11304, 11306, ¶ 6 (MB June 2, 2003) (a low power must carry station may be carried by default).

⁷ KAZV-LP Complaint at 1. A copy of this franchising agreement was not provided.

⁸ Complaint at 1. A copy of this January letter was not provided, but KAZV-LP asserts Charter sought to remove it from its system for (1) failure to meet the programming requirements for non-entertainment programming, (2) poor signal quality, and (3) because the needs of other members of the community were being met by other channels. Complaint at 1-2.

⁹ KAZV-LP Complaint at Exhibit A1, Letter from George A. Baker, General Manager, KAZV-LP to Lisa Ludovici, Senior Manager, Government Relations, Charter Communications, (Feb. 17, 2012) ("KAZV-LP Feb. 17 Letter").

¹⁰ KAZV-LP Complaint at 2 & Exhibit D, Letter from Christopher Avery, Director and Sr. Counsel, Charter Communications, Inc. to George A. Baker, General Manager & Frank & Linda Azevedo, Licensees, KAZV-LP at Exhibit D (Feb. 27, 2012) ("Charter Feb. 27 Letter").

¹¹ See KAZV-LP Complaint at 3 & Exhibit D, Charter Feb. 27 Letter at D1.

¹² KAZV-LP Complaint at 3 & Exhibit D, Charter Feb. 27 Letter at D1 & D2.

¹³ KAZV-LP Complaint, Declaration of Service by Mail, declaring service on Charter on April 17, 2012.

6. The instant complaint was late filed.¹⁴ In addition, KAZV-LP failed to serve the relevant franchising authorities in its area, creating procedural defects necessitating its dismissal.¹⁵ Moreover, KAZV-LP's complaint suffers from other procedural defects that require its dismissal.

7. We begin by noting that the Commission does not have the authority to waive the rules that have been statutorily promulgated by Congress with respect to what factors define a "qualified" low power station.¹⁶ The Commission must enforce the statute as drafted.¹⁷ As outlined above, Congress has identified six factors that determine whether a low power station is "qualified" and therefore entitled to carriage rights.¹⁸ Because a low power television station must meet each of the six criteria required by the Act and the Commission's rules, its failure to meet just one is fatal to its request for mandatory carriage.¹⁹

8. In its March, 2012 letter, Charter justified KAZV-LP's removal on two grounds; namely, that the population of Modesto, California, KAZV-LP's city of license, had been greater than 35,000 persons as of June 30, 1990,²⁰ and because two full-power stations served the areas served by KAZV-LP, removing the possibility that it was a qualified low power station.²¹ KAZV-LP admits that the station is "technically licensed to the City of Modesto."²² The Communications Act expressly requires that the Commission analyze the population of a station's "community of license."²³ The population of Modesto in 1990 was 162,606.²⁴ Accordingly, KAZV-LP cannot be considered a "qualified" low power station as defined by the Communications Act. As stated above, KAZV-LP's failure to meet this single factor disqualifies it from carriage.²⁵ Accordingly, for all of the reasons listed above, we will dismiss the

¹⁴ The Media Bureau only accepts the electronic filing date of Cable Special Relief petitions (CSR's) as the official filing date, and KAZV-LP's Complaint was filed May 18, 2012, which is over 60 days from Charter's February 27 affirmative denial of its carriage demand, which KAZV-LP asserts it received on or about on March 1st. *See* 47 C.F.R. § 76.61(a)(5).

¹⁵ While failing to serve franchising authorities is a procedural defect that can be cured, we apprise KAZV-LP of this defect for the future as we must also deny its complaint on other grounds. *ITV of Buffalo, LLC v. Time Warner Cable, Inc.*, DA 12-1324, 2012 WL 3253213 at n.13 (MB Aug. 10, 2012).

¹⁶ *See* 47 U.S.C. § 534(h)(2)(A)-(F).

¹⁷ *See Continental Broad. Corp. v. Jones Intercable, Inc.*, 9 F.C.C.R. 2550, 2551, ¶ 8 (CSB May 18, 1994).

¹⁸ *See* 47 U.S.C. § 534(h)(2)(A)-(F) & 47 C.F.R. § 76.55(d)(1)-(6).

¹⁹ *See Continental Broad. Corp.*, 9 F.C.C.R. at 2551, ¶ 7.

²⁰ *See* KAZV-LP Complaint at 3 & Exhibit D, Charter Feb. 27 Letter at D1 (citing 47 C.F.R. § 76.55(d)(5)); *see also* 47 U.S.C. § 534(h)(2)(E).

²¹ KAZV-LP Complaint at 3. & Exhibit D, Charter Feb. 27 Letter at D1 (citing 47 C.F.R. § 76.55(d)(6)); *see also* 47 U.S.C. § 534(h)(2)(F).

²² KAZV-LP Complaint at Exhibit E, Letter from George A. Baker to Christopher Avery, Director and Sr. Counsel, Charter Communications, at 1, March 7, 2012 ("March 7 KAZV-LP Letter").

²³ *See* 47 U.S.C. § 534(h)(2)(E).

²⁴ *See* Bureau of the Census, U.S. Department of Commerce, 1990 Census of Population and Housing: Population and Housing Unit Counts, California 29, Table 8 - Population and Housing Units, 1970 to 1990 (1992).

²⁵ However, we additionally note that the Modesto, CA MSA (containing Stanislaus County), which includes both the community of license of KAZV-LP as well as part of Charter's franchise area, was among the top 160 MSAs ranked by population on June 30, 1990. *See* Statistical Abstract of the United States 1992 at 31 & 32, Table No. 34 Metropolitan Areas - Population: 1970 to 1990; *see also* Metropolitan Areas and Components, 1990 with FIPS Codes, <http://www.census.gov/population/metro/files/lists/historical/90mfips.txt> (last visited Sept. 26, 2012). This also disqualifies KAZV-LP from carriage under 47 U.S.C. § 534(h)(2)(E) and 47 C.F.R. § 76.55(d)(5). *See WFXV-TV, Inc. v. Cablevision of Southern Illinois, Inc.*, 16 F.C.C.R. 433, 435-36, ¶ 7 (MB 2000) (Commission finding that because low power station was licensed to a community within one of the 160 largest MSAs in 1990, it was (continued...))

complaint of KAZV-LP.

IV. ORDERING CLAUSES

9. 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 must carry complaint filed by George A. Baker, General Manager, on behalf of Frank and Linda Azevedo, licensees of Low Power Station KAZV-LP, Modesto, California **IS DENIED**.

10. This action is taken pursuant to authority delegated by Section 0.283 of he Commission's rules.²⁶

FEDERAL COMMUNICATIONS COMMISSION

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ineligible for must carry status, and likewise, because the cable system was similarly located, it did not have a must carry obligation with respect to LPTV stations.). Furthermore, with respect to the sixth factor, Charter noted that two full-power stations, KBSV and KNSO were already licensed to the community or political subdivision KAZV-LP serves, barring the station's "qualified" status. Station KBSV is licensed to Modesto – like KAZV-LP, *see* KBSV, License File No. BLEDT-20090213AAZ, available at http://licensing.fcc.gov/prod/cdbs/pubacc/Auth_Files/1293642.pdf, and this fact alone bars KAZV-LP from being a qualified low power station. *See Schrecongost*, 19 F.C.C.R. at 5784, ¶ 12 & n.32 (citing 47 U.S.C. § 534(h)(2)(F)); *see also* 47 C.F.R. § 76.55(d)(6)).

²⁶47 C.F.R. § 0.283.