

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

In the matter of:
Bellizzi Broadcasting Network, Inc.
Station WEYW-LP, Key West, Florida
Facility ID No. 130765
CSR-8837-M
Docket No. 13-244

MEMORANDUM OPINION AND ORDER

Adopted: December 16, 2013

Released: December 16, 2013

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

I. INTRODUCTION

1. Bellizzi Broadcasting Network, Inc., ("Bellizzi") licensee of Low Power Television Station WEYW-LP, Key West, Florida ("WEYW"), has filed the above-captioned complaint against Comcast Cable Communications, LLC ("Comcast") for its refusal to carry WEYW on its Key West, Florida cable system serving certain communities in Monroe County, Florida; an opposition to this complaint was filed by Comcast, to which WEYW filed a reply. For the reasons discussed below, we deny this 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 system.

1 See Complaint of Bellizzi Broadcasting Network, Inc., filed Sept. 20, 2013 ("Complaint").

2 Opposition of Comcast Cable Communications, LLC, filed Nov. 12, 2013 ("Opposition"); Reply of WEYW, filed Nov. 25, 2013 ("Reply")

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

4 47 U.S.C. § 534(h)(2); 47 C.F.R. § 76.55(d).

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.⁵ 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.⁶

III. DISCUSSION

4. WEYW asserts it is being carried on Comcast's cable systems serving Monroe County in Key West, Florida pursuant to a retransmission consent agreement entered into between the station and Comcast on November 1, 2011.⁷ However, it notes that on July 2, 2013, Comcast advised WEYW that it would no longer carry the station beyond December 31, 2013.⁸ Although WEYW asserts it made a must-carry demand in response on July 24, 2013, seeking carriage on Comcast's cable system as a must-carry station,⁹ Comcast replied on August 14, 2013, stating that because there were two full power television broadcast stations already licensed to the same community as WEYW, in Key West, namely, WGEN and WSBS, in accordance with the 1992 Cable Act and 47 C.F.R. §76.55(d)(6), WEYW is not a "qualified" low-power station entitled to mandatory carriage on Comcast's Key West cable system.¹⁰ Comcast does not otherwise contest that WEYW meets the other statutory requirements for being a qualified low power station entitled to carriage, and it is not disputed that there are, in fact, two other full-power stations, WGEN and WSBS, licensed to Key West, located in Monroe County, Florida.

5. WEYW's argument in chief is that notwithstanding that there are two other full power stations licensed to its community of license, this fact should not be considered when analyzing whether WEYW is "qualified" under the Act and 47 C.F.R. §76.55(d)(6). WEYW argues it is a qualified low power station because it provides 28 hours of local programming in English every week to the communities served by Comcast's Key West Cable system, including programming addressing the local news and informational needs of Key West residents, whereas the two full-power stations licensed to the same community provide only Spanish language programming and broadcast from studios over 120 miles north of these stations' transmitter sites.¹¹

6. WEWN is not a "qualified" low power television station. Section 76.55(d)(6) of our

⁵ Section 76.56(b)(2) provides that "[a] cable system with more than 12 usable activated channels, as defined in Section 76.5(o), 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).

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

⁷ Complaint at 3 & Exhibit 1, Letter from Lee Peltzman, Counsel for Bellizzi, to Comcast, July 24, 2013.

⁸ Complaint at 3 & Exhibit 1, Letter from Michael Nissenblatt, Comcast, to Rick Bellizzi, WEYW-LP, July 2, 2013.

⁹ See *id.* at 4 and Exh. 2, Letter from Lee Peltzman, Counsel for Bellizzi, to Comcast, July 24, 2013. WEYW's mandatory carriage demand presumes it has not elected retransmission consent for the current carriage cycle – an issue we cannot not address in this order based upon the facts presented to us. See *In re Radio Perry, Inc.*, 25 FCC Rcd 9110, 9111 ¶ 3 (MB 2010).

¹⁰ See *id.* at Exh. 3, Letter from Michael Nissenblatt, Comcast, to Lee Peltzman, Counsel for Bellizzi, Aug. 14, 2013.

¹¹ See Complaint at 5 & 6. WEYW also points to Census data which shows that more than 80% of the Monroe County population (which includes Key West) does not speak Spanish whereas over 40% of the Miami-Dade and Broward County populations taken together speak Spanish. See Complaint at 8 & n.20 (citing Exhibit 5, Census Scope, Percent Speaking Spanish – 2000, http://www.census.gov/s12/rank_language_spanish.html (last visited Dec. 16, 2013)).

rules directly implements the mandate of Section 614(h)(2)(F)¹² of the Cable Act, pursuant to which a low power station can only qualify for mandatory carriage if there is no full power television station licensed to its community or political subdivision. WEYW is licensed to the same community, Key West, Florida, as full power stations WGEN and WSBS. Accordingly, because a low power television station must meet each of the Act's six criteria to be considered "qualified," WEYW's failure to meet this one factor is fatal to its request for mandatory carriage.¹³ Although WEYW asks us to waive or sidestep this requirement, the Commission may not waive any part of the statutory definition of a qualified low power television station.¹⁴ Finally, as we have stated before, for purposes of Section 614(h)(2)(F) it is irrelevant if the full power stations licensed to the same community do not provide locally-focused programming; their proximity is sufficient to prevent WEYW from being considered "qualified."¹⁵

IV. ORDERING CLAUSES

7. 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) of the Commission's rules, that the must carry complaint filed by Bellizzi Broadcasting Network, Inc., on behalf of Low Power Station WEYW-LP, Key West, Florida **IS DENIED**.

8. This action is taken pursuant to authority delegated by Section 0.283 of the Commission's rules.¹⁶

FEDERAL COMMUNICATIONS COMMISSION

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Media Bureau

¹² 47 U.S.C. § 534(h)(2).

¹³ See *Continental Broad. Corp. v. Jones Intercable, Inc.*, 9 FCC Rcd 2550, 2551 ¶ 7 (CSB 1994).

¹⁴ *Washington County Television, Inc. v. DR Partners, d/b/a Dorney Cablevision*, 10 FCC Rcd 3766, 3766 ¶ 2 (CSB 1995). Although WEYW argues it is not asking for us to waive our rules, see Reply at 3, it references a line of cases in which the Commission has considered late filed petitions for reconsideration in "extraordinary circumstances" – effectively waiving the statutory deadline for such filings. See Reply at 3-4 & n.6 (citing *Gardner v. FCC*, 530 F.2d 1086, 1091 (D.C. Cir. 1976) ("It appears that the seemingly mandatory language of section 405 [of the Act] does not prevent the entertainment of rehearing petitions beyond the statutory period where extraordinary circumstances indicate that justice would thus be served."); *Mediacom Southeast, LLC*, 22 FCC Rcd 4825 (MB 2007)); but see *FCC v. Reuters, Ltd.*, 781 F.2d 946, 952 (D.C. Cir. 1986) (refusing to find facts amounting to 'extraordinary circumstances' warranting consideration of a late filed petition for reconsideration); accord *In re Application of Robert J. Maccini*, 10 FCC Rcd 9376, 9376 ¶ 3 (1995); *In re Lloyd Morris*, 27 FCC Rcd 6979, 6980 ¶ 4 (EB 2012). Petitioner's argument is unavailing because the discrete set of Commission precedent it cites has no application in these very different circumstances. Petitioner's argument fails to bridge the qualitative differences between disregarding the lateness of a petition, particularly when the Commission's mistake is a causal factor of that lateness, and a low power station's failing to meet requirements for it to be classified as a "qualified" station, a definitional failure in no way caused by Commission action or inaction.

¹⁵ *In re Larry L. Schrecongost*, 19 FCC Rcd 5779, 5784 ¶ 12 (2004).

¹⁶ 47 C.F.R. § 0.283.