

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

In the Matter of )
Ellington Broadcasting, WHCQ-LD ) CSR-8935-M
v. ) Docket No. 17-96
Cable One Inc. )

MEMORANDUM OPINION AND ORDER

Adopted: July 24, 2017

Released: July 24, 2017

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

I. INTRODUCTION

1. Ellington Broadcasting, licensee of Low Power Television Station WHCQ-LD, Cleveland, Mississippi (WHCQ-LD), has filed the above-captioned complaint against Cable One Inc. (Cable One) for its refusal to carry WHCQ-LD on its cable system serving Clarksdale, Mississippi. Cable One filed an opposition to the complaint, to which WHCQ-LD filed a reply. Cable One's failure to address WHCQ-LD's request for carriage on its Clarksdale cable system, and issues with its signal quality testing, resulted in the Bureau sending Cable One a letter seeking clarification of certain facts. Cable One then filed a Clarification Letter, to which WHCQ-LD filed a response. For the reasons discussed below, we provisionally grant WHCQ-LD's carriage complaint. However, we will provide Cable One the opportunity to provide conclusive evidence in accordance with the good engineering practices discussed herein within 20 days of the release of this Order that WHCQ-LD does not provide a good quality signal to Cable One's Clarksdale headend.

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

1 Ellington Broadcast Complaint filed April 12, 2017 (Complaint).

2 Opposition of Cable One Inc. filed April 21, 2017 (Opposition); Reply of WHCQ-LD, filed May 1, 2017 (Reply).

3 See Letter from Steven A. Broeckaert, Senior Deputy Chief, Policy Division, FCC Media Bureau, to David Ellington, Ellington Broadcasting, and Craig A. Gilley, Mintz, Levin, Cohn, Ferris, Glovsky & Popeo, P.C. (May 23, 2017 Letter).

4 Cable One Inc. Clarification Letter, filed June 2, 2017 (Clarification Letter); Reply of WHCQ-LD to Clarification Letter, filed June 12, 2017 (Clarification Letter Reply). The Media Bureau's May 23, 2017 Letter indicated that it would allow a Reply from WHCQ-LD if it deemed necessary.

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

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 principal headend and delivers to the 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.<sup>6</sup>

### III. DISCUSSION

3. We begin our analysis 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.<sup>7</sup> The Commission must enforce the statute as drafted.<sup>8</sup> As outlined above, Congress has identified six factors that determine whether a low power station is "qualified" and therefore entitled to mandatory carriage rights.<sup>9</sup> 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.<sup>10</sup>

4. In its Complaint, WHCQ-LD claims that it is a qualified LPTV station, and seeks mandatory carriage on Cable One's Clarksdale, Mississippi cable system.<sup>11</sup> WHCQ-LD filed a formal request for cable carriage with Cable One on January 13, 2017.<sup>12</sup> However, Cable One did not reply to WHCQ-LD's carriage request.<sup>13</sup> WHCQ-LD argues that its carriage demand letter to Cable One established that it met all six requirements as required under the Communication's Act for mandatory carriage.<sup>14</sup>

5. In Opposition, Cable One asserts that it opposes WHCQ-LD's request for carriage on Cable One's "Cleveland" system<sup>15</sup> because WHCQ-LD failed to provide a good quality signal to the systems principal headend.<sup>16</sup> To support its contention, Cable One provided signal tests that it conducted of WHCQ-LD.<sup>17</sup> On January 31, 2017, Cable One had a signal strength test conducted of WHCQ-LD's signal in Cleveland.<sup>18</sup> On April 11, 2017, Cable One had a signal strength test conducted of WHCQ-LD's

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<sup>6</sup> 47 U.S.C. § 534(h)(2); 47 CFR § 76.55(d).

<sup>7</sup> See 47 U.S.C. § 534(h)(2)(A)-(F).

<sup>8</sup> See *Continental Broad. Corp. v. Jones Intercable, Inc.*, 9 FCC Rcd 2550, 2551, ¶ 8 (CSB 1994).

<sup>9</sup> See 47 U.S.C. § 534(h)(2)(A)-(F); 47 CFR § 76.55(d)(1)-(6).

<sup>10</sup> See *Continental Broad. Corp. v. Jones Intercable, Inc.*, 9 FCC Rcd at 2551, ¶ 7.

<sup>11</sup> Complaint at 1.

<sup>12</sup> See *id.*

<sup>13</sup> *Id.* at 1.

<sup>14</sup> *Id.* Attach. 2.

<sup>15</sup> Opposition at 1. WHCQ-LD is seeking carriage on Cable One's Clarksdale system, not the Cleveland system. The Cleveland system serves the communities located in the Greenwood-Greenville, Mississippi designated market area.

<sup>16</sup> *Id.* at 1.

<sup>17</sup> See *id.* Exhibits.

<sup>18</sup> *Id.* Exhibit 2.

signal in Clarksdale.<sup>19</sup> According to these tests, WHCQ-LD's signal strength readings were between 84.8 and 102.3 dBm, well below the -61 dBm threshold.<sup>20</sup> Based upon these results, Cable One asserts that the signal quality tests establish that WHCQ-LD "is unable to deliver any viewable picture at all to the Clarksdale, MS headend."<sup>21</sup> Cable One then inexplicably asserts that this failure disqualifies the Station from mandatory carriage on Cable One's *Cleveland cable system*.<sup>22</sup>

6. In Reply, WHCQ-LD reiterates that it is seeking carriage on Cable One's Clarksdale system, not its Cleveland system.<sup>23</sup> Thus, Cable One's failure to directly address the carriage request for Clarksdale means that Cable One is not opposed to WHCQ-LD's carriage request.<sup>24</sup> WHCQ-LD also indicates that Cable One's failure to properly address its request for carriage on the Clarksdale system has resulted in Cable One failing to provide correct principal headend information.<sup>25</sup> Furthermore, WHCQ-LD states that it is not requesting carriage for Cable One's Cleveland system because it is already carried, and has been carried, by Cable One in Cleveland for the past 24 years.<sup>26</sup> Notwithstanding the fact that the testing information provided by Cable One appeared to be irrelevant for the Clarksdale headend, WHCQ-LD did review Cable One's signal test results for both the Cleveland and Clarksdale headend, and concluded that they are invalid because they are not based on good engineering practices.<sup>27</sup> WHCQ-LD argues that the initial test conducted at the Cleveland headend is invalid because the test states that WHCQ-LD's signal produced no viewable picture, even though WHCQ-LD is currently carried by Cable One on its Cleveland system.<sup>28</sup> WHCQ-LD also asserts that the second test conducted at the Clarksdale headend is invalid because they did not comply with FCC engineering standards for measuring a good quality signal.<sup>29</sup> For example, WHCQ-LD indicates that the make and model of the antenna are omitted.<sup>30</sup> Furthermore, the test states that the antenna is "facing north straight towards the station[']s tower sight."<sup>31</sup> However, WHCQ-LD states that its antenna is located 34 miles to the southwest of Cable One's Clarksdale receive tower.<sup>32</sup> WHCQ-LD concludes that based on this faulty antenna orientation, Cable One has essentially made no effort at all to test WHCQ-LD's signal in Clarksdale.<sup>33</sup> Thus, WHCQ-LD asserts that Cable One's tests of WHCQ-LD's signal cannot be trusted as accurate.<sup>34</sup>

7. After reviewing the pleadings, we determined that the failure of Cable One's Opposition to address the correct cable system had created substantial confusion as reflected in WHCQ-LD's Reply.

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<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 2.

<sup>21</sup> *Id.* (emphasis added).

<sup>22</sup> *Id.* (emphasis added).

<sup>23</sup> Reply at 1.

<sup>24</sup> *Id.* at 1-2.

<sup>25</sup> *Id.* at 2.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 2-6.

<sup>28</sup> *Id.* at 3-4; see Opposition Exhibit 1 (stating WHCQ-LD's Cleveland signal "produced extremely poor to no picture at all, picture not viewable").

<sup>29</sup> Reply at 5.

<sup>30</sup> *Id.* (noting that Cable One's signal test results lists only a single bay channel 7-12 antenna).

<sup>31</sup> *Id.*; Opposition Exhibit 2.

<sup>32</sup> Reply at 5.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

As a result, on May 23, 2017, the Media Bureau sent a Letter to the parties seeking clarification from Cable One about “where and why the signal tests were conducted and what is the principal headend as indicated by Cable One’s own pleadings.”<sup>35</sup> Specifically, we asked Cable One to clarify its apparent failure to address WHCQ-LD’s carriage demand for the Clarksdale cable system.<sup>36</sup> Additionally, the letter sought clarification from Cable One about their test results of WHCQ-LD in Cleveland showing WHCQ-LD does not provide a good quality signal, even though WHCQ-LD asserts that it has been carried by Cable One in Cleveland for the last 24 years.<sup>37</sup> Cable One has not contested this fact.

8. In response to our Letter, Cable One filed a Clarification Letter that reiterated their opposition to carriage of WHCQ-LD based on their failure to “deliver an over-the-air good quality signal to the requested system’s designated principal headends . . . .”<sup>38</sup> Cable One states that the “Clarksdale cable system’s designated principal headend, where all of the other off-air broadcast stations carried by the system are received for retransmission, is located near that system’s main office in Clarksdale, Mississippi.”<sup>39</sup> However, Cable One did not rebut WHCQ-LD’s allegations or clarify the issues as requested in our May 23, 2017 Letter. Rather, Cable One submitted new signal tests of WHCQ-LD’s signal from Clarksdale that were conducted on May 22 and 23, 2017.<sup>40</sup> According to Cable One, this new test was conducted using “a high gain VHF/UHF diamond antenna oriented southwest directly at WHCQ’s transmitter . . . .”<sup>41</sup> Cable One goes on to conclude that these tests produced results between -149.6 dBm and -150.2 dBm, well below the Commission’s -61 dBm threshold for a good quality signal and disqualify the station “from mandatory carriage on the *Cleveland* system.”<sup>42</sup>

9. WHCQ-LD filed a reply to Cable One’s Clarification Letter and argues that Cable One’s Clarification Letter failed to address “the questionable data and comments made during their initial signal tests” and “merely claims to have performed two new signal tests.”<sup>43</sup> According to WHCQ-LD, Cable One did not contact them regarding the new signal tests.<sup>44</sup> WHCQ-LD also asserts that these new tests do not follow good engineering practices as required by the Commission.<sup>45</sup> WHCQ-LD notes that the tests are dated May 22 and 23, one day before we sent the Letter requesting clarification, so it is doubtful that these tests were made in response to the Letter.<sup>46</sup> WHCQ-LD also questions the quality of the testing. For instance, Cable One stated in their Clarification Letter that the signal test was conducted using a “high gain VHF/UHF diamond antenna.”<sup>47</sup> However, WHCQ-LD contends that this statement is false because Cable One’s form for the new signal tests listed a consumer grade “Mediasonic HOMEWORX HDTV Outdoor Antenna” as the antenna used for signal testing.<sup>48</sup> According to WHCQ-LD, this is a very low

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<sup>35</sup> Letter at 2.

<sup>36</sup> *Id.* at 1.

<sup>37</sup> *Id.*

<sup>38</sup> Clarification Letter at 1.

<sup>39</sup> *Id.* at 2.

<sup>40</sup> *Id.* at 2-3, Exhibit 2.

<sup>41</sup> *Id.* at 3.

<sup>42</sup> *Id.* (emphasis added).

<sup>43</sup> Clarification Letter Reply at 1.

<sup>44</sup> *Id.* at 2.

<sup>45</sup> *Id.* at 1.

<sup>46</sup> *Id.* at 2.

<sup>47</sup> *Id.*; Clarification Letter at 3.

<sup>48</sup> Clarification Letter Reply at 2; Clarification Letter at 3; Clarification Letter Exhibit 2.

grade, 3 dB, gain antenna made for consumer home use, and can be purchased at Walmart for \$24.99.<sup>49</sup> WHCQ-LD also questions Cable One's assertion that the antenna used for testing was installed in 1994, because there was no "HDTV" broadcast signals in the United States before 1994.<sup>50</sup> Thus, WHCQ-LD concludes it is impossible that a consumer home HDTV antenna was installed in 1994 on two cable television receive towers.<sup>51</sup> WHCQ-LD also states that a visual inspection of Cable One's Clarksdale tower indicates that no "Mediasonic HOMEWORZ HDTV" antenna is even currently installed.<sup>52</sup> Further, WHCQ-LD argues that not only is Cable One's signal testing of WHCQ-LD inconsistent with Commission standards, Cable One has not afforded WHCQ-LD the same treatment as other stations received at their headend sites.<sup>53</sup> According to WHCQ-LD, Cable One's Clarksdale tower contains four high gain VHF diamond quad array antennas for receiving VHF broadcast stations.<sup>54</sup> WHCQ-LD asserts that Cable One affords other stations the use of these antennas, as opposed to the Mediasonic HDTV consumer antenna used by Cable One in WHCQ-LD's signal testing.<sup>55</sup> Consequently, Cable One has once again failed to provide signal tests for WHCQ-LD that comply with the Commission's standards for good engineering, because of their questionable data, improper antenna equipment, and testing methods.<sup>56</sup> As such, WHCQ-LD requests that the Commission grant carriage to WHCQ-LD on Cable One's Clarksdale cable system.<sup>57</sup> Additionally, WHCQ-LD requests the Commission require Cable One to provide similar treatment to WHCQ-LD as other stations on their Clarksdale tower, and provide WHCQ-LD with a new high gain VHF diamond quad array antenna precisely peaked to receive WHCQ-LD along with a new coaxial cable.<sup>58</sup>

10. We will provisionally grant WHCQ-LD's petition. WHCQ-LD's complaint was timely filed pursuant to section 76.7(c)(4)(iii) of the Commission's rules within 60 days of Cable One's refusal of carriage.<sup>59</sup> Additionally, there appears to be no disagreement between the parties that WHCQ-LD satisfies five of the six requirements set forth in the Commission's rules to be considered a qualified LPTV station.<sup>60</sup> The parties' only dispute is over WHCQ-LD's ability to provide a good quality signal to Cable One's Clarksdale headend. We are not persuaded by Cable One's Clarification Letter, or additional test of WHCQ-LD's signal at the Clarksdale headend that WHCQ-LD has failed to produce a good quality signal. Even after a request for clarification, Cable One still appears to be confused as to which headend they oppose for carriage of WHCQ-LD's signal. In their Clarification Letter, Cable One indicates that because WHCQ-LD alleged numerous defects in the April 11 test, rather than rebutting those allegations, "Cable One retested [WHCQ-LD's] signal at the Cleveland headend on May 22, 2017, using different equipment and new parameters in line with correcting for Ellington's technical complaints. . . The results of this test, reported on the test sheet attached hereto as Exhibit 2, were exactly the same, no good quality over the air signal received at the headend. Indeed, receive levels for the station's signal

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<sup>49</sup> Clarification Letter Reply at 2; Clarification Letter Reply Exhibit 2.

<sup>50</sup> *Id.* at 3.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 4-5.

<sup>54</sup> *Id.* at 5; Clarification Letter Reply Exhibit 6.

<sup>55</sup> Clarification Letter Reply at 5.

<sup>56</sup> *Id.* at 1-3.

<sup>57</sup> *Id.* at 6.

<sup>58</sup> *Id.*

<sup>59</sup> 47 CFR § 76.7(c)(4)(iii).

<sup>60</sup> 47 CFR § 76.55(d).

came in between -149.6 dBm and -150.2 dBm, again well below the Commission's -61 dBm threshold for a good quality signal, indicating no viewable signal whatsoever, and disqualifying the station from mandatory carriage on the *Cleveland* system.”<sup>61</sup>

11. Cable One’s Clarification Letter contains the testing results for WHCQ-LD’s signal from the Clarksdale headend, which took place on May 22, 2017.<sup>62</sup> This test does not reflect the testing results for WHCQ-LD’s signal at the Cleveland headend as Cable One stated in the excerpt above. Furthermore, although Cable One makes a broad statement that they oppose WHCQ-LD’s signal carriage on their Clarksdale headend because of poor signal quality in their opening and closing, they fail to make that connection in their discussion of the relevant signal test results.<sup>63</sup> As seen in the excerpt above, Cable One concludes its discussion of Exhibit 2’s signal test results as disqualifying WHCQ-LD’s from mandatory carriage on the Cleveland station, not the Clarksdale system. As such, it is still unclear “where and why the signal tests were conducted and what is the principal headend as indicated by Cable One’s pleadings.”<sup>64</sup>

12. The Communications Act of 1934, as amended, (the Act)<sup>65</sup> provides that a cable operator is not required to carry a local commercial television station that does not deliver a good quality signal to the principal headend of a cable system.<sup>66</sup> With respect to the standard to be used to determine what constitutes a good quality signal, the Commission adopted a standard for determining the availability of VHF and UHF commercial stations at a cable system's headend. For VHF commercial television stations, the standard is -49 dBm, and for UHF commercial television stations, the standard is -45 dBm.<sup>67</sup> Generally, if the test results are less than -51 dBm for a UHF station, we have said that at least four readings must be taken over a two-hour period. Where the initial readings are between -51 dBm and -45 dBm, inclusive, we believe that the readings should be taken over a 24-hour period with measurements not more than four hours apart to establish reliable test results.<sup>68</sup>

13. Because the cable operator is in the best position to know whether a given low power television 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 falls on the cable operator. In meeting this burden, the cable operator must show that it used good engineering practices to measure the signal delivered to the headend. To measure a station’s signal to see if it meets the Commission’s requirements, a cable operator’s signal strength surveys should, at a minimum, include the following: 1) specific make and model numbers of the equipment used, as well as its age and most recent date(s) of calibration; 2) description(s) of the characteristics of the equipment used, such as antenna ranges and radiation patterns; 3) height of the antenna above ground level and whether the antenna was properly oriented; and 4)

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<sup>61</sup> Clarification Letter at 3 (emphasis added). Although our Clarification Letter provided Cable One an opportunity to address WHCQ-LD’s carriage request for its Clarksdale cable system, Cable One has continued to confuse the cable system at issue as well as which station is seeking carriage. In addition, in the section responding to WHCQ-LD’s Request for Carriage, Cable One appears to mistakenly refer to WPRQ, which is addressed in a separate section in the letter.

<sup>62</sup> *Id.* Exhibit 2.

<sup>63</sup> *See Id.* at 1-3.

<sup>64</sup> May 23, 2017 Letter at 2.

<sup>65</sup> 47 U.S.C. § 534(h)(2)(D).

<sup>66</sup> 47 U.S.C. §534(h)(1)(B)(iii).

<sup>67</sup> 47 CFR § 76.55 note to paragraph (d); *In re: Complaint of Maranatha Broadcasting Company, Inc. against Suburban Cable*, 12 FCC Rcd 22930 (1997).

<sup>68</sup> *Complaint of Maranatha Broadcasting*, 12 FCC Rcd 22930 (1997).

weather conditions and time of day when tests were done.<sup>69</sup>

14. In our review, we note that in their first opposition, Cable One's signal test of WHCQ-LD in Clarksdale failed to include the make and model of the equipment used, its age, and its most recent date of calibration. After obtaining a second chance to correct such deficiencies in their Clarification Letter, Cable One still failed to include the most recent date of calibration of the equipment used in its tests.<sup>70</sup> It should also be pointed out that the antenna used by Cable One for WHCQ-LD's second signal test in Clarksdale was a consumer grade "Mediasonic HOMEWORX HDTV Outdoor Antenna," as opposed to one of the VHF diamond quad array antennas installed on Cable One's Clarksdale receive tower. When measured against our criteria, we conclude that the determination reached by Cable One is insufficient to demonstrate that WHCQ-LD's signal is not of "good-quality" at its system headend. Accordingly, we provisionally grant WHCQ-LD's carriage complaint. However, because there is still a possibility that WHCQ-LD does not provide a good quality signal to Cable One's Clarksdale headend and because a low power television station cannot use alternate means other than over-the-air delivery to provide a good quality signal, we provide Cable One with the opportunity to provide the Commission within 20 days of the release of this Order a definitive engineering study of WHCQ-LD's signal quality.<sup>71</sup> Such engineering study will be conducted in accordance with the good engineering practices discussed above. Further, Cable One shall provide WHCQ-LD with at least three business days' advance notice of the time and place of such signal quality testing and permit WHCQ-LD representatives to observe all phases of the testing if they so choose. If Cable One does not provide its engineering study to the Commission within twenty days, it shall commence carriage of WHCQ-LD on its Clarksdale cable system within sixty days of the release date of this Order.

#### IV. ORDERING CLAUSES

15. Accordingly, **IT IS ORDERED**, that the petition filed April 12, 2017 by WHCQ-LD **IS PROVISIONALLY GRANTED** pursuant to Section 614 of the Communications Act of 1934, as amended (47 U.S.C. §534), and Cable One **IS ORDERED** to commence carriage of Station WHCQ-LD within sixty (60) days of the release date of this order unless Cable One provides within twenty (20) days of the release date of this Order an engineering report that complies with Commission engineering standards that substantiates its claim of poor signal quality.

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<sup>69</sup> *Id.* at 22933.

<sup>70</sup> Cable One's tests also appear to have been conducted at different heights than the initial test, include the use of a splitter, only test part of the signal (Exhibit 1 – only tested channel 12.1), and contained a nonexistent frequency (207.0000MHz). The test also indicates that there is "extremely poor, no picture at all, picture not viewable," even though a signal testing meter measures a signal and does not provide a picture. See Clarification Letter Exhibits 1 and 2.

<sup>71</sup> See *Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Broadcast Signal Carriage Issues*, 8 FCC Rcd 2965, 2991 (1993); *Gary White v. City of Bardstown, KY*, 26 FCC Rcd 13090, 13096, para 16 (MB 2011) ("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, para 3 (MB 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.").

16. This action is taken pursuant to authority delegated by Section. 0.321 of the Commission's rules.

FEDERAL COMMUNICATIONS COMMISSION

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