

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

In the Matter of
Michael Karr d/b/a WVUX-LD
v.
DIRECTV, LLC and DISH Network L.L.C.
CSR-8964-M
MB Docket No. 18-274

MEMORANDUM OPINION AND ORDER

Adopted: October 23, 2019

Released: October 24, 2019

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

I. INTRODUCTION

1. Michael Karr, owner and operator of Low Power Television Station WVUX-LD, Fairmont, West Virginia (WVUX-LD), has filed a Petition for Declaratory Ruling Regarding Mandatory Satellite Carriage of a Qualified LPTV and Demand for Carriage against DIRECTV, LLC (DIRECTV) and DISH Network L.L.C. (DISH) for their refusal to carry WVUX-LD on their satellite systems serving the Clarksburg-Weston Designated Market Area (DMA).1 DIRECTV and DISH filed a joint opposition.2 For the reasons discussed below, we deny both the Demand for Carriage (Complaint) and the Petition for Declaratory Ruling (Petition).

II. BACKGROUND

2. The Communications Act of 1934, as amended (Act), does not afford mandatory carriage rights to low power television (LPTV) stations with respect to satellite carriers.3 Under section 338 of the Act, full power "television broadcast station[s]" are entitled to satellite carriage in their local markets so long as certain conditions are met.4 However, section 338 is unambiguous that these carriage rights are not available to LPTV stations. Section 338(a)(3) states that "[n]o low power television station . . . shall

1 Michael Karr d/b/a WVUX-LD Petition for Declaratory Ruling and Demand for Carriage filed September 7, 2018. The Demand for Carriage is in essence a must carry complaint.

2 DIRECTV and DISH Joint Opposition filed September 7, 2018 (Opposition). WVUX-LD filed an untimely Reply to the Opposition. WVUX-LD's Reply was nearly four months out of date and was not filed with a Motion to Accept Late Filed Pleading explaining any extenuating circumstances concerning why WVUX-LD could not file a timely Reply. Accordingly, we will not consider WVUX-LD's Reply in resolving this proceeding.

3 47 U.S.C. § 338.

4 Specifically, full power stations are entitled to carriage on a satellite carrier any time that carrier relies on the statutory copyright license in 17 U.S.C. § 122 to retransmit the signal of any other local station (i.e., one located in the same DMA). 47 U.S.C. § 338(a)(1) ("[e]ach satellite carrier providing . . . secondary transmissions to subscribers located within the local market of a television broadcast station of a primary transmission made by that station shall carry upon request the signals of all television broadcast stations located within that local market. . ."). This is commonly referred to as the "carry one, carry all" requirement. See Implementation of Section 203 of the Satellite Television Extension and Localism Act of 2010 (STELA), 25 FCC Rcd 10430, 10434, at para. 6 (2010).

be entitled to insist on carriage under this section.”⁵ Moreover, section 325(b)(7) of the Act defines the term “television broadcast station” as “an over-the-air commercial or noncommercial television broadcast station licensed by the Commission under subpart E of part 73 of title 47, Code of Federal Regulations, except that such term does not include a low power television station.”⁶ In contrast, some LPTV stations do have cable carriage rights. The Act provides that, under very narrow circumstances, an LPTV station can become “qualified,” and therefore eligible for mandatory carriage on a local cable system, if it meets certain statutory criteria.⁷

3. WVUX-LD claims that it is a qualified LPTV station that is currently carried on the local cable system. WVUX-LD states that it sought mandatory carriage on the satellite systems of DIRECTV and DISH that provide service to the Clarksburg-Weston DMA,⁸ but that DIRECTV and DISH rejected the mandatory carriage request based on a claim that they “are not required to carry any low power television stations – not even qualified low power television stations.”⁹ On January 16, 2018, WVUX-LD sent DIRECTV and DISH a final demand letter for mandatory carriage.¹⁰ DIRECTV and DISH responded to the demand letter on February 5, 2018, and February 8, 2018, respectively, and again denied the carriage request because WVUX-LD is a LPTV station.¹¹

III. DISCUSSION

4. We deny WVUX-LD’s Complaint and Petition because both are based on a misunderstanding of the law.¹² We first address WVUX-LD’s Complaint and then its Petition.

5. WVUX-LD contends in its Complaint that DIRECTV and DISH improperly rejected its carriage request because WVUX-LD is a “qualified” LPTV station under the Act and the Commission’s rules.¹³ WVUX-LD claims that there is no legitimate reason that cable providers and satellite carriers should be treated differently with respect to their carriage obligations, although it acknowledges that there is “no separate definition of qualified low power television in section 338 of Title 47.”¹⁴ WVUX-LD says that if the must-carry rules do not apply to satellite carriers, then the options of satellite subscribers, which are already scarce due to a “dearth of full power television stations in the Clarksburg-Weston DMA,” will be further limited.¹⁵ Finally, WVUX-LD asserts that if the must-carry rules do not apply to satellite

⁵ 47 U.S.C. § 338(a)(3) (“No low power television station whose signals are provided under section 119(a)(14) of title 17, United States Code, shall be entitled to insist on carriage under this section, regardless of whether the satellite carrier provides secondary transmission of the primary transmissions of other stations in the same local market pursuant to section 122 of such title, nor shall any such carriage be considered in connection with the requirements of subsection (c) of this section.”).

⁶ 47 U.S.C. § 325(b)(7).

⁷ The mandatory carriage rights of LPTV stations on cable systems, including the criteria for becoming “qualified,” are set forth in Section 614(h)(2) of the Act. 47 U.S.C. § 534(h)(2).

⁸ Complaint at 1-2.

⁹ *Id.*

¹⁰ *Id.* at 3.

¹¹ *Id.*

¹² WVUX relies on a statement in a GAO report, which incorrectly states that federal law requires both cable systems and satellite providers to carry the signal of qualified LPTV stations. *Id.* at 5 (citing *Information on Low Power Television, FCC’s Spectrum Incentive Auction, and Unlicensed Spectrum Use*, GAO-17-135, rel. Dec. 5, 2016, available at <https://www.gao.gov/assets/690/681394.pdf> (GAO Report)).

¹³ *Id.* at 4; 47 U.S.C. § 534(c)(1); 47 CFR § 76.56(b)(3). WVUX-LD states that unlike a qualified LPTV, a Class A station would not be entitled to mandatory carriage.

¹⁴ *Id.*

¹⁵ Complaint at 6.

carriers, the satellite industry will unilaterally determine the criteria for such carriage and that will necessitate amending the law to meet “constitutional requirements.”¹⁶

6. WVUX-LD’s status as an LPTV station is fatal to its request for satellite mandatory carriage. Despite its disagreement with the current state of the law and the policy considerations that may underlie it, it is not entitled to mandatory carriage on DIRECTV’s and DISH’s satellite systems serving the Clarksburg-Weston DMA because a LPTV station is not entitled to mandatory carriage on satellite carriers under the Act.¹⁷ As DIRECTV and DISH state in their Opposition, WVUX-LD’s claim that it is entitled to mandatory carriage rights on a satellite system is contrary to section 338(a)(1) of the Act and the Commission’s implementing regulations, as well as 20 years of Commission precedent, all of which unambiguously establish that LPTV stations do not have mandatory carriage rights on a satellite provider’s system.¹⁸ Moreover, WVUX-LD’s emphasis on being a qualified LPTV is meaningless because Congress has explicitly excluded LPTV stations from a satellite carrier’s mandatory carriage obligation.

7. In its Petition for Declaratory Ruling, WVUX-LD requests that the Commission “declare [section 338(a)(3)] does not apply to qualified LPTVs, and that satellite providers must carry qualified [LPTV stations] that meet the criteria of [sections 614 and 615 of the Act] so that they are treated equally with cable operators.”¹⁹ For the reasons amply demonstrated above, we deny WVUX-LD’s Petition. Section 1.2(a) of the Commission’s rules states that “[t]he Commission may, in accordance with section 5(d) of the Administrative Procedure Act, on motion or on its own motion issue a declaratory ruling

¹⁶ *Id.* WVUX-LD does not explain what it means when referring to “constitutional requirements.” WVUX-LD states that in West Virginia, where it is based, the Charleston/Huntington/Parkersburg DMA was expanded to include stations WSAZ, WCHS, WOWK, and WVAH. WVUX-LD also states that Gray Television purchased LPTV stations WOVA and WIYE in 2011, which were not qualified LPTVs, but they were subsequently carried by satellite carriers without even becoming qualified LPTVs or even Class A stations. WVUX-LD does not state why this information is germane to its claims of mandatory carriage on a satellite system. We note, however, that it is always within a satellite carrier’s purview to voluntarily carry via retransmission consent a LPTV station.

¹⁷ Section 338(a)(1) limits mandatory carriage on a satellite system to a “television broadcast station.” Section 76.66(b)(1) of our rules directly implements the mandate of section 338 of the Act, pursuant to which a satellite carrier “providing, under section 122 of title 17, United States Code, secondary transmissions to subscribers located within the local market of a television broadcast station of a primary transmission made by that station, shall carry upon request the signals of all television broadcast stations located within that local market, subject to section 325(b) of title 47, United States Code, and other paragraphs in this section.” 47 CFR § 76.66(b)(1). This section specifically limits carriage rights to television broadcast stations. Section 76.66(a)(4) defines a television broadcast station as “an over-the-air commercial or noncommercial television broadcast station licensed by the Commission under subpart E of part 73 of title 47, Code of Federal Regulations, *except that such term does not include a low-power or translator television station.*” 47 CFR § 76.66(a)(4) (emphasis added). In addition, section 338(a)(3) specifically states that mandatory carriage is not available to LPTV stations. 47 U.S.C. § 338(a)(3).

¹⁸ Opposition at 1, 3-5; (citing *Implementation of the Satellite Home Viewer Improvement Act of 1999, Broadcast Signal Carriage Issues*, CS Docket No. 00-96, Notice of Proposed Rulemaking, 15 FCC Rcd 12147, at para. 12 (2000); *Innovation in the Television Broadcast Bands, Channel Sharing and Improvements to VHF*, ET Docket No. 10-235, Notice of Proposed Rulemaking, 25 FCC Rcd 16498, para. 33 (2010) (“[L]ow power broadcasters do not have DBS carriage rights.”); *Expanding the Economic and Innovation Opportunities of Spectrum through Incentive Auctions, et al.*, GN Docket No. 12-268, Notice of Proposed Rulemaking, 27 FCC Rcd 12357, n. 566 (2012) (“[L]ow power television stations and Class A stations are not entitled to carriage on satellite systems.”); *Expanding the Economic and Innovation Opportunities of Spectrum through Incentive Auctions, et al.*, GN Docket No. 12-268, First Order on Reconsideration and Notice of Proposed Rulemaking, 30 FCC Rcd 6668, para. 37 (2015) (“[L]ow power stations, including Class A stations do not have DBS carriage rights.”); *Expanding the Economic and Innovation Opportunities of Spectrum through Incentive Auctions, et al.*, GN Docket No. 12-268, Report and Order, 32 FCC Rcd 2637, n. 43 (2017) (“We limit our discussion to the burdens on cable operators because low power stations do not have DBS carriage rights.”).

¹⁹ Petition at 7.

terminating a controversy or removing uncertainty.”²⁰ The record indicates that there is no genuine controversy or uncertainty. The text of the Act, the Commission’s rules implementing that text and Commission precedent all conclusively indicate that LPTV stations have absolutely no carriage rights on satellite providers, even if they meet the cable definition of a “qualified” LPTV station. Such “qualified” status may impart mandatory carriage status on cable operators in its local market but means nothing in the satellite carriage context.²¹ It necessarily follows that we cannot grant a declaratory ruling that directly conflicts with the unambiguous state of the law.²²

IV. ORDERING CLAUSES

8. Accordingly, **IT IS ORDERED**, pursuant to section 614 of the Communications Act of 1934, as amended, 47 U.S.C. § 338, and section 76.66(b)(1) of the Commission’s rules, that the must carry complaint filed by Michael Karr, owner and operator of Low Power Television Station WVUX-LD, Fairmont, West Virginia **IS DENIED**.

9. **IT IS FURTHER ORDERED**, pursuant to section 1.2(a) of the Commission’s rules, 47 CFR § 1.2(a), that the petition for declaratory ruling filed by Michael Karr, owner and operator of Low Power Television Station WVUX-LD, Fairmont, West Virginia **IS DENIED**.

10. This action is taken pursuant to authority delegated by Section 0.283 of the Commission’s rules.

FEDERAL COMMUNICATIONS COMMISSION

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²⁰ 47 CFR § 1.2(a).

²¹ WVUX-LD would have us disregard the statutory language of section 325(b)(7) of the Act expressly excluding low power television stations from the definition of the term television broadcast station, which we are not permitted to do. *See Potter v. United States*, 155 U.S. 438, 446 (1894) (the presence of statutory language “cannot be regarded as mere surplusage; it means something”); *Hoffman v. Connecticut Dept. of Income Maintenance*, 429 U.S. 96, 103 (1989) (statute should be construed to “give effect, if possible, to every clause and word”); *Northwest Forest Resource Council v. Glickman*, 82 F.3d 825, 833-34 (9th Cir. 1996) (“statute must be interpreted to give significance to all of its parts ... statutes should not be construed to make surplusage of any provision.”).

²² *See supra* n. 17 (discussing precedent).