

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

In the Matter of
Service Electric Cablevision
For Waiver of Section 76.101 of the Commission's
Syndicated Exclusivity Rules
MB Docket No. 13-287
CSR-8855-N

MEMORANDUM OPINION AND ORDER

Adopted: July 24, 2020

Released: July 24, 2020

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

I. INTRODUCTION

1. Service Electric Cablevision (Service Electric) filed a petition seeking waiver of section 76.101 of the Commission's syndicated exclusivity (Syndex) rules. Service Electric's Petition is unopposed. For the reasons set forth below, we grant Service Electric's Petition.

II. BACKGROUND

2. Shortly before filing its Petition, Service Electric added a new broadcast station, WFMZ, to its channel lineup. Soon thereafter, Service Electric received a notice from New Age Media (New Age) asserting its Syndex rights on behalf of its affiliate, WOLF, for the programs Dr. Phil and The Doctors (the Programs) on Service Electric's Hazelton, Pennsylvania system. New Media's assertion of its Syndex rights would require Service Electric to delete the Programs to subscribers in all of the Hazelton communities. Service Electric subsequently filed this Petition, seeking waiver of section 76.101 and the requirement to provide Syndex protection for the Programs as requested by New Age. In its Petition, Service Electric states that its Hazelton system consists of 39 communities, only four of

1 Service Electric Cablevision, Petition for Special Relief Requesting Waiver of Section 76.101 of the Commission's Rules, MB Docket No. 13-287 (Petition). The Media Bureau placed the Petition on Public Notice, Report No. 0407 (MB Nov. 26, 2013) (Public Notice). Contemporaneously with its Petition, Service Electric filed a Petition for Stay of Section 76.101 of the Commission's Rules (Stay Petition). The Media Bureau granted the Stay Petition on November 20, 2013. See Service Electric Cablevision, Order on Petition for Stay, DA 13-2228, 28 FCC Rcd 15901 (MB Nov. 20, 2013).

2 Petition at 3.

3 Petition at 3; see 47 CFR § 76.105 (providing for notifications asserting Syndex rights).

4 Section 76.101 of the Commission's rules states that "[u]pon receiving a notification pursuant to [section] 76.105, a cable community unit located in whole or part within the geographic zone for a syndicated program, the syndicated exclusivity rights to which are held by a commercial television station licensed by the Commission, shall not carry that program as broadcast by any other television signal, except as otherwise provided below." 47 CFR § 76.101.

5 47 CFR § 76.101.

which are subject to the Syndex deletion requirements.<sup>6</sup> Service Electric asserts that it is not required to delete the Programs on the other 35 communities comprising the Hazelton system because it places a Grade B contour over those 35 communities and, thus satisfies the exception contained in section 76.106(a) of the Commission's rules.<sup>7</sup> This exception states that broadcasters cannot assert Syndex rights against competing broadcast stations that place a Grade B signal over all or part of a community.<sup>8</sup> Service Electric also maintains that the cost to provide section 76.101 Syndex protection to WOLF for the four communities is extremely prohibitive (over \$100,000); and that only a very small number of Hazelton subscribers (4.8 percent) would be affected by grant of the Petition.<sup>9</sup> Service Electric states that if it "deleted the affected programs from those communities that are otherwise entitled to receive it, it would violate Section 76.62(a) of the Commission's rules which prohibits the alteration of a broadcast signal, unless required by the rules."<sup>10</sup>

### III. DISCUSSION

3. We find that Service Electric has demonstrated sufficient support to grant the Petition. In doing so, we find that Service Electric has met our requirement that petitioners "shall state the relief requested . . . [and] shall state fully and precisely all pertinent facts and considerations relied on to demonstrate the need for the relief requested and to support a determination that a grant of such relief would serve the public interest."<sup>11</sup>

4. In adopting the Syndex rules, the Commission acknowledged that "[a]lthough cable operators may have to make some changes to the way they do business, compliance costs will not be burdensome and, in any event, are outweighed by the benefits."<sup>12</sup> The Commission further noted that such "cable systems may continue to avail themselves of the standard waiver procedures provided in the Communications Act."<sup>13</sup>

5. First, we find that Service Electric is not required to delete the Programs to 35 of the 39

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<sup>6</sup> Petition at 3.

<sup>7</sup> 47 CFR § 76.106(a) (providing, in pertinent part, that "a broadcast signal is not required to be deleted from a cable community unit when that cable community unit falls, in whole or part, within that station's Grade B contour"); see Petition at 3-6, Exhibit 4.

<sup>8</sup> In creating the section 76.106(a) exception the Commission observed that "where a cable system's viewers can receive, off the air, the signals of two or more broadcast stations . . . neither station will be permitted to invoke syndicated exclusivity rights against the programming of the other. . . . Thus, a broadcaster cannot contract for exclusive rights when it has no reasonable expectation of exclusivity in any case. . . . [W]hen a cable community unit falls, in whole or in part, within the predicted Grade B contour of a broadcast signal, . . . the cable community unit cannot be required to delete the signal." See *Amendment of Part 73 and Part 76 of the Commission's Rule Relating to Program Exclusivity in the Cable and Broadcast Industries*, 3 FCC Rcd 5299, 5313 (1988) (*Program Exclusivity Order*), reconsideration and clarification granted in part, 4 FCC Rcd 2711 (1989), *aff'd* 890 F2d 1173 (D.C. Cir. 1989).

<sup>9</sup> *Id.* n.8.

<sup>10</sup> Petition at 6. Service Electric also asserts that alteration of WFMZ's signal to eliminate the Programs could also potentially lead to an infringement claim under section 111(b)(3) of the Copyright Act. *Id.* (citing 17 U.S.C. § 111(b)(3)).

<sup>11</sup> 47 CFR § 76.7(a)(4).

<sup>12</sup> *Program Exclusivity Order*, 3 FCC Rcd at 5313.

<sup>13</sup> *Id.* at 5339, n.243.

Hazelton communities because WFMZ places a Grade B signal over all or parts of those communities. Service Electric's petition includes a map demonstrating WFMZ's Grade B contour, which displays a signal over all but four Hazelton communities.<sup>14</sup>

6. For the remaining four communities, we find that the cost of compliance with the rules outweighs the benefit. Service Electric has provided evidence that the current technical configuration of the Hazelton system cannot delete the Programs to only the four communities deserving Syndex protection and that the cost to provide section 76.101 Syndex protection to WOLF for the four communities is extremely prohibitive. Specifically, Service Electric asserts that "the [Hazelton] cable system is technically integrated and due to the age and configuration of the cable system cannot simply blackout the programming only in the affected communities."<sup>15</sup> Service Electric argues that the cost of making the Hazelton system capable of deleting the Programs to the four communities is economically infeasible, noting that "[s]ending separate channel lineups to the Affected Communities would require modifications to the existing plant, separation of the nodes by geographic area and the creation of separate statistical multiplexing. The cost to redesign the plant would be prohibitive, amounting to well over \$100,000."<sup>16</sup> According to Service Electric, "[g]iven the current configuration of the [Hazelton] system, without a waiver Service Electric would have to delete the two affected programs throughout the entire Hazelton system, send the affected programs through to the entirety of the system or drop the signal entirely."<sup>17</sup>

7. Moreover, we find that WOLF will not be injured by the grant of Service Electric's Petition because only a very small number of Hazelton subscribers (4.8 percent) are affected.<sup>18</sup> We note that Bureau precedent supports granting waivers of section 76.101 where, as here, only a *de minimis* number of subscribers are involved. Service Electric maintains that the Hazelton system has a total of 25,042 subscribers as of the filing of its Petition and that the four communities in which it would be required to delete the Programs consist of only 1,208 of the 25,042 subscribers, or 4.8 percent of the Hazelton subscribers.<sup>19</sup> Service Electric asserts that the Commission accounts for the percentage and number of subscribers affected in considering whether a waiver of the Syndex rules is merited. Service Electric notes that although the Syndex rules were designed to protect "parties' legitimate contractual rights so that the supply and diversity of programming demanded by viewers may be increased," failure to waive the rules in a *de minimis* case would "provide protection to only a few hundred viewers at the expense of thousands not barred from receiving the programming in question."<sup>20</sup>

8. Finally, we agree with Service Electric that dropping WFMZ would not serve the public interest because WFMZ provides news and information of interest to the Hazelton communities. Service

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<sup>14</sup> Petition, Exhibit 4.

<sup>15</sup> *Id.* at 3.

<sup>16</sup> *Id.* at 5-6 (footnotes omitted) (citing Exhibit 2, Declaration of Don Brandt at 12-13).

<sup>17</sup> *Id.* at 6.

<sup>18</sup> We note that although New Age asserted its Syndex rights to the Programs, it did not oppose Service Electric's Petition.

<sup>19</sup> *Id.* at 4.

<sup>20</sup> *Id.* at 5 (quoting *Continental Cablevision*, 7 FCC Rcd at 499, 500, para. 7 (1992) (internal quotation marks omitted). Service Electric cites additional Commission support that waiver is appropriate when a *de minimis* number of subscribers are impacted. See *id.* (citing *Missouri Valley Communications, Inc.*, 58 FCC 2d 1101, 1102, at para. 5 (1976) (224 affected subscribers deemed *de minimis*); *Sabre Cablevision Co., Inc.*, 52 FCC 2d 328, 331, at para. 5 (1975) (finding 5.6 % of affected subscribers to be *de minimis*)).

Electric observes that “absent a waiver Service Electric would be left with the option to remove WFMZ from the [Hazelton] system, which would deprive its subscribers of an important source of local programming.”<sup>21</sup> For all the above reasons, we find that Service Electric’s Petition serves the public interest and is granted.

#### IV. ORDERING CLAUSES

9. Accordingly, **IT IS ORDERED**, pursuant to sections 76.7 and 76.101 of the Commission’s rules, 47 C.F.R. §§ 76.7, 76.101, that the captioned petition for special relief (MB Docket No. 13-287, CSR 8855-N) filed by Service Electric Cablevision **IS GRANTED** and the above-captioned docket **IS TERMINATED**.

10. This action is taken pursuant to authority delegated by section 0.283, 47 C.F.R. § 0.283, of the Commission’s rules.<sup>22</sup>

FEDERAL COMMUNICATIONS COMMISSION

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<sup>21</sup> Petition at 7. Service Electric provides a list of news stories regarding incidents in Schuylkill County, Pennsylvania where the majority of Hazelton subscribers reside. *Id.*, Exhibit 9.

<sup>22</sup> 47 CFR § 0.283.