

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

In re:)	
)	
Complaint of Pikes Peak Broadcasting Company against Ouray Cablevision)	CSR-4117-M
)	
Petition for Reconsideration)	

MEMORANDUM OPINION AND ORDER

Adopted: September 16, 1996

Released: September 20, 1996

By the Chief, Consumer Protection and Competition Division, Cable Services Bureau:

1 On February 27, 1995, a petition for reconsideration was filed on behalf of Ouray Cablevision ("Ouray"), operator of cable systems serving Ouray and Ridgway, Colorado.¹ Ouray requests that the Commission reconsider its January 19, 1995 action² ordering its cable systems to carry Television Broadcast Station KJCT (ABC, Ch. 8), Grand Junction, Colorado. An opposition to this petition was filed March 23, 1995, on behalf of KJCT. No response to this opposition has been received.

ARGUMENTS

2. In support of its request, Ouray states that for 1994 its cable system serving the community of Ouray served an average of 288 subscribers, while the community of Ridgway had an average of 94 subscribers³ and each system has only 12 or fewer usable, activated channels. Ouray maintains that §76.5(oo) of the Commission's Rules exempts systems serving fewer than 300 subscribers from the must carry requirements so long as it does not delete a station it carried

¹Although it was not expressly stated in our original order, KJCT's original petition apparently included the city of Ridgway, Colorado as part of Ouray's system and subsequent information indicates that this community has always been considered a part of this proceeding. It should be noted, however, that while each community is served by a separate headend and operate under two separate names (i.e. Ouray Cablevision and Ridgway Cablevision), the two systems are owned by the same entity.

²*Complaint of Pikes Peak Broadcasting Company against Ouray Cablevision*, 10 FCC Rcd 1050 (1995).

³In a supplement filed by Ouray on August 8, 1996 at the Bureau's request, it provided a breakdown of the subscribership levels for the community of Ouray on a month-by-month basis for 1995 and the first six months of 1996. This information indicates that the average subscribership count for 1995 is 264 subscribers. A breakdown of the subscribership for Ridgway was not requested at the system currently only has 85 subscribers.

on October 5, 1992.⁴ Ouray states that KJCT was not being carried at that time. In addition, Ouray argues that KJCT does not provide a good quality signal to its headend without the use of translator stations and that it would be a hardship for its small systems to purchase the necessary equipment to modify the system headend in order to receive KJCT on its required channel.

3. KJCT argues in its opposition that since it is the only ABC affiliate in the Grand Junction-Durango, Colorado Area of Dominant Influence (ADI) its programming is of interest to the residents of Ouray and Ridgway, Colorado. While Ouray claims for the first time in its reconsideration that it is exempt from the must carry rules due to the lack of channel capacity and the fact that it serves on average less than 300 subscribers on each system, KJCT states that the information in its petition indicates the cable systems' subscribership is above 300 for at least six months out of the year.⁵ KJCT avers that §76.56(b)(1) of the Commission's Rules does not allow cable operators to be exempt from the must carry rules based on an average subscribership figure or due to changing subscribership levels.⁶ Further, KJCT maintains that Ouray's allegations of poor signal quality are unsupported by the facts. Signal strength readings taken in April 1993 and on February 8, 1995 indicate signal level readings of -23 dBm and -20.7 dBm, respectively, on the headend at Ouray, Colorado.⁷ In addition, a November 11, 1993 letter from the Mayor of Ouray attests to KJCT's excellent reception over-the-air. Finally, KJCT argues that Ouray's claim of financial hardship is completely without documentation and ignores the fact that the system previously carried KJCT until just prior to October of 1992. In any event, the Commission has consistently stated that the cost of placing a station on its over-the-air channel does not relieve the operator of its must carry obligations.⁸

⁴Section 76.5(oo) of the rules states:

Usable Activated Channels. Those activated channels of a system, except those channels whose use for the distribution of broadcast signals would conflict with technical and safety regulations. See part 76, subpart K.

⁵Ouray's own documentation for the community of Ouray indicates that for the months of June through November 1994, it served, on average, more than 300 subscribers.

⁶Section 76.56(b)(1) states:

A cable system with 12 or fewer usable activated channels, as defined in §76.5(oo), shall carry the signals of at least three local commercial television stations, except that if such system had 300 or fewer subscribers on October 5, 1992, it shall not be subject to these requirements as long as it does not delete from carriage the signal of a broadcast television station.

⁷Declaration of Mark Vannest, Studio/Translator Engineer for KJCT.

⁸See, e.g., *Complaint of Greater Dayton Public Television*, 10 FCC Rcd 1055, 1056 (1995).

DISCUSSION

4. We are persuaded by the arguments raised by Ouray. The principal argument between the parties as to whether Ouray is obligated to comply with the must carry regulations centers around the issue of the number of subscribers served by the cable systems, an issue not raised in the original petition. However, in view of the fact that the matters herein are statutory in nature, we will accept this issue as part of the proceeding. Ouray's reliance on §76.5(oo) of the rules is misplaced as that section is merely a definition of usable, activated channels and does not provide an exemption from the must carry rules. Section 76.56(b)(1), on the other hand, does provide an exemption for cable systems serving fewer than 300 subscribers with only 12 or fewer usable, activated channels. KJCT argues that it was not the intent that the 300 minimum cited in this section be based on average subscribership levels, however, we find no such restriction in either the 1992 Cable Act⁹ or the Commission's order adopting the must carry regulations.¹⁰ Given the fluctuating nature of cable system subscribership in general, we believe that using an average subscriber count over a consecutive 12-month period better carries out the Congressional intent of allowing systems with less than 300 subscribers a partial exemption from the must carry rules.¹¹ Therefore, based on the fact that the most recent average subscribership count for the Ouray system is 264 subscribers, we find that Ouray has clearly shown that it meets the exemption allowed pursuant to §76.56(b)(1) of the Rules for this system.¹² It should be noted that since the Ridgway system has a separate headend and only serves 85 subscribers its exempt status is self-evident and it will no longer be considered a part of this proceeding.

5. In view of the above, we need not reach the engineering issues raised in this proceeding. However, we wish to note in general that with respect to the standard to be used to determine what constitutes a good quality signal, the 1992 Cable Act adopted a standard for determining the availability of VHF and UHF commercial stations at a cable system's headend: for VHF commercial station signals, the standard is -49 dBm; for UHF commercial television signals, the standard is -45 dBm. To measure a station's signal to see if it meets the Commission's requirement, 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) weather conditions and time

⁹*Cable Television Consumer Protection and Competition Act of 1992*, Pub. L. No. 102-395, 106 Stat. 1460 (1992).

¹⁰*Report and Order in MM Docket No. 92-259*, 8 FCC Rcd 2965 (1993).

¹¹This is particularly so herein, where the Ouray system only exceeds the 300 minimum 4 months out of 12 and the maximum coverage in only one of those 4 months is 42 subscribers.

¹²In a May 27, 1996 letter to KJCT, Ouray alleges problems with the reception of KJCT via the translators necessary for its reception which are owned by Ouray. While Ouray provides no engineering data to substantiate this claim, and we make no opinion as to its validity, we would encourage both parties to seek a reasonable solution to any carriage problems at such time as Ouray would be required to carry KJCT.

of day when the tests were done. In addition, our rules require that a cable operator must conduct multiple signal quality tests to ensure accurate results and, in turn, provide that testing information to the affected station when there is a dispute over signal level measurements. Generally, if the test results are less than -55 dBm for a VHF station, we believe that at least four readings must be taken over a two-hour period. Where the initial readings are between -55 dBm and -49 dBm, inclusive, we believe that the readings should be taken over a 24-hour period, with measurements no more than 4 hours apart to establish reliable test results.

6. In light of the above, therefore, and pursuant to §§0.321 and 1.106 of the Commission's rules, the petition for reconsideration, filed February 27, 1995, on behalf of Ouray Cablevision IS GRANTED and are Order adopted January 19, 1995 IS RESCINDED.

FEDERAL COMMUNICATIONS COMMISSION

Gary M. Laden
Chief, Consumer Protection and Competition Division
Cable Services Bureau