

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

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| In re: |) | |
| |) | |
| Paxson Boston License, Inc. |) | |
| |) | |
| vs. |) | CSR-5063-M |
| |) | |
| Cablevision of Boston, L. P. |) | |
| |) | |
| Request for Mandatory Carriage of Television Station WGOT-TV, Merrimack, NH |) | |
| |) | |

MEMORANDUM OPINION AND ORDER

Adopted: December 16, 1997

Released: December 19, 1997

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

INTRODUCTION

1. Paxson Boston License, Inc. ("Paxson"), licensee of commercial television station WGOT-TV, Merrimack, New Hampshire, filed a complaint pursuant to Sections 76.7 and 76.1(a) of the Commission's rules,¹ claiming that Cablevision of Boston, L.P. ("Cablevision"), a cable operator serving Boston, Massachusetts and surrounding areas has unlawfully refused to carry the signal of WGOT-TV on its cable television system. Paxson is a subsidiary of Paxson Communications Corporation ("PCC"). Cablevision filed an Opposition to the Petition and Paxson filed a Reply. Cablevision also filed a Motion for Leave to File Response to Reply accompanied by a Response to Reply. Paxson then filed a Motion for Leave to File and a Supplemental Pleading. Cablevision responded with an Opposition to Motion for Leave to File and Supplemental Pleading.

SUMMARY OF PLEADINGS

2. In support of its complaint, Paxson argues that WGOT-TV is entitled to mandatory carriage on Cablevision's Boston system because it meets the statutory definition of a "qualified local commercial television station" under the Commission's must carry rules. Paxson states that WGOT-TV and Cablevision are both located within the Boston Area of Dominant Influence ("ADI") and, as such, the carriage of WGOT-TV's signal will not cause increased copyright liability for Cablevision.² Paxson

¹47 C.F.R. §76.7 and 47 C.F.R. §76.61(a).

²See 17 U.S.C. § 111(f). Paxson notes that, as amended by the Satellite Home Viewer Act of 1994, the Copyright Act provides that a cable operator's carriage of a local station (*i.e.*, within the same ADI as the operator) does not increase the operator's copyright liability.

further states that tests conducted by Paxson personnel demonstrate that WGOT-TV is delivering a good quality signal to Cablevision's principal headend. Finally, Paxson states that despite WGOT-TV's eligibility for carriage on Cablevision's system, Cablevision has failed to respond to Paxson's May 2, 1997 letter requesting carriage within thirty days of receipt of that request as required by Section 76.61(a)(2) of the Commission's rules.³

3. In opposition, Cablevision argues that Paxson's complaint should be dismissed as procedurally defective because the complaint was filed prematurely in violation of the notice requirement set forth in Section 76.61(a)(1) of the Commission's rules.⁴ According to Cablevision, Paxson's assertion that Cablevision never replied to Paxson's May 2, 1997 letter requesting carriage for WGOT-TV is false. Cablevision states that following receipt of Paxson's May 2 letter, the parties engaged in ongoing, mutual conversations regarding discrepancies surrounding Paxson's ability to deliver a good quality signal from WGOT-TV to Cablevision's principal headend. Cablevision notes that Paxson sent Cablevision a letter dated July 31, 1997, which culminated in the completion of a re-test of WGOT-TV's receiving equipment on July 29, 1997.⁵ Cablevision states that while it was not planning to dispute the July 29 test results, Cablevision had no opportunity to respond to Paxson's July 31 letter because Paxson filed its Complaint on August 1, 1997.⁶ Thus, according to Cablevision, not only did Paxson fail to provide notice of the alleged violation pursuant to Section 76.61(a)(1) of the Commission's rules,⁷ but Paxson also failed to provide Cablevision any opportunity to respond, as required by Section 76.61(a)(2) of the Commission's rules.⁸

4. Cablevision also argues that Paxson's Complaint should be denied because WGOT-TV is a duplicative network signal and, as such, is not entitled to carriage on Cablevision's Boston system. Cablevision states that pursuant to Section 614(b)(5) of the Communications Act and Section 76.56(b)(5) of the Commission's rules,⁹ cable systems are not required to carry the signals of more than one local television station affiliated with a particular broadcast network as defined by Section 76.55(f) of the

³47 C.F.R. §76.61(a)(2).

⁴47 C.F.R. § 76.61(a)(1).

⁵Cablevision points out that this July 31 letter from Paxson was not attached to the Complaint. According to Cablevision, had this letter been attached to the Complaint as required by section 76.7 of the Commission's rules, the letter would have demonstrated that the instant Complaint was prematurely filed.

⁶Cablevision states that it did not receive the July 31, 1997 letter until August 5, 1997.

⁷47 C.F.R. §76.61(a)(1).

⁸47 C.F.R. §76.61(a)(2). Cablevision also requests that the cost of preparing the instant Opposition, which it contends would not have been necessary but for the filing of the premature instant Complaint, should be borne by Paxson because it constitutes a cost properly attributable to WGOT-TV relative to a determination concerning the delivery of its signal. Cablevision argues that the costs of preparing this Opposition are similar to the costs properly recoverable by cable operators in connection with testing a station's signal to determine whether or not it complies with the Commission's signal strength requirements. See 47 C.F.R. §76.60(a) (providing that a broadcast station may be required to bear the costs associated with delivering a good quality signal).

⁹47 U.S.C. §534(b)(5) and 47 C.F.R. §76.56(b)(5).

Commission's rules.¹⁰ Cablevision argues that it is not required to carry WGOT-TV because WGOT-TV is affiliated with the *inTV* Network (also known as the "InfoMall TV Network") and another station affiliated with that same network -- WHRC, Norwell, Massachusetts -- has also requested carriage on Cablevision's Boston system. Cablevision states that the Commission's rules provide that a cable operator must only carry the signal of the closest network affiliate whose community of license reference point, as defined Section 76.53, is closest to the principal headend of the cable system.¹¹ Cablevision states that the principal headend for the Boston System is located in West Roxbury, Massachusetts. Cablevision further states that Norwell, Massachusetts, the community of license of WHRC, is located approximately 20 miles from West Roxbury, while Merrimack, New Hampshire, the community of license of WGOT-TV, is located approximately 44 miles from West Roxbury. Thus, according to Cablevision, if its cable system were faced with having to carry the duplicative signals of both WGOT-TV and WHRC, it should only be required to carry the signal of WHRC, which is the station located closest to its principal headend.

5. Cablevision further notes that Paxson is an indirect corporate subsidiary of PCC, which in turn owns and operates the *inTV* Network. Cablevision also notes that the Commission has previously determined that *inTV* is a television network for purposes of the must carry requirements.¹² Cablevision also argues that there can be no dispute that WGOT-TV is an affiliate of the *inTV* Network because the station is owned and operated by an subsidiary of the entity that owns the network, and WGOT-TV consistently has been identified on corporate letterhead and promotional materials as an affiliate of the *inTV* Network. Cablevision also contends that PCC and *inTV*, through its subsidiary Paxson, controls almost all of the air time on WHRC. Cablevision reports that Paxson has leased approximately 162 hours per week of the air-time of WHRC pursuant to a Time Brokerage Agreement with WHRC's licensee.¹³ In addition, Cablevision reports that PCC, through various subsidiaries, has provided, or may in the future provide, financing and/or financial guarantees in connection with the acquisition of WHRC.¹⁴

6. In reply, Paxson argues that WGOT-TV's Complaint is timely filed and procedurally sound. Paxson contends that it filed a Complaint because Cablevision failed to respond to Paxson's carriage request in writing within 30 days as required by Section 76.61(a)(2) of the Commission's rules.¹⁵ Paxson notes that Cablevision concedes that it did not respond to Paxson's May 2 letter, in writing, as required. Paxson contends that it sent a follow-up letter on July 31, 1997 in an attempt to forestall the need to file a must carry complaint. According to Paxson, it was under no obligation to send the July 31,

¹⁰The Commission's rules state that for must carry purposes, a commercial television network is an entity that offers programming on a regular basis for 15 or more hours per week to at least 25 affiliates in 10 or more states. 47 C.F.R. §76.55(f).

¹¹47 C.F.R. § 76.56(b)(5).

¹²*MediaOne, Inc.*, DA 97-1776 (CSR-5012-A, CSR-4990-M) (released August 20, 1997). ("*MediaOne*").

¹³Cablevision Opposition at 8, Exhibit 5.

¹⁴*Id.* Cablevision also notes that an October 29, 1996 press release posted on PCC's Internet Web Site identifies WHRC as one of several recently announced additions to the *inTV* Network. See Cablevision Opposition Exhibit 6, p.2 (Paxson Reports Third Quarter Financial Results, October 29, 1996, at <http://www.paxon.com/PR961029.htm>).

¹⁵47 C.F.R. § 76.61(a)(2).

1997, and, as such, the letter is irrelevant to the proceeding. Paxson claims that it simply filed its must carry complaint in order to preserve its rights.¹⁶

7. Paxson further argues that WGOT-TV and WHRC are not affiliates of a common network. According to Paxson, while WGOT-TV receives a substantial portion of its programming from *inTV*, WHRC obtains programming from a separate and distance entity -- "Paxnet." Paxson argues that the Commission has previously held in *Jovan Broadcasting Corp.* that distinct entities owned by a common parent which provide television broadcast stations with programming that is comparable in content do not constitute the same network for purposes of Section 76.56(b)(5) of the Commission's rules.¹⁷ Paxson argues that while *inTV* and Paxnet may be owned by the same corporate parent, both are separate business entities that provide different programming and utilize different distribution methods.¹⁸

8. Cablevision responds to Paxson's reply¹⁹ by stating that because the Commission has recently rendered two adverse decisions regarding the *inTV* Network,²⁰ requiring affected cable systems to carry the closer of two *inTV* affiliates under circumstances similar to those in the instant case, Paxson has deliberately created "Paxnet," a new network designed as an artificial vehicle for avoiding the Commission's rules. Cablevision argues that none of the information in PCC's corporate, financial or other promotional materials suggest that WHRC is anything but an *inTV* Network affiliate.²¹

¹⁶Paxson also argues that there is conflicting Commission precedent regarding the circumstances in which the time for filing a must carry complaint will be tolled. See *Complaint of Friendly Bible Church, Inc.*, 11 FCC Rcd 17115 (1996) (where a cable operator responds to a broadcaster's request for carriage with a denial that fails to explain the reason for refusing to carry, as required by Section 76.61(a)(2), the broadcaster is required to file a must carry complaint within 60 days in order to preserve its carriage rights) and *Fouce Amusement Enterprises, Inc.*, 10 FCC Rcd 668 (1995) (holding that a cable operator's response to a broadcaster's carriage request which did not (1) offer to commence carriage or (2) specify the conditions to be satisfied prior to commencement of carriage, nevertheless satisfied Section 76.61 and obviated the need for a must carry complaint).

¹⁷47 C.F.R. §76.55(b)(5). See *Jovan Broadcasting Corp.*, 10 FCC Rcd 14,15 (1994).

¹⁸Paxson notes that *inTV*'s programming consists of paid programming and program-length commercials. According to Paxson, Paxnet provides "direct response" programming. Paxson states that this programming is distributed by a 24 hour satellite feed, portions of which WHRC broadcasts during the day.

¹⁹We will grant Cablevision's Motion for Leave to File Response to Reply, along with Paxson's Motion for Leave to File a Supplemental Pleading. We will correspondingly deny Cablevision's Opposition to Paxson's Motion for Leave to File, but we will consider the merits of Cablevision's Supplemental Pleading incorporated into its Opposition Motion filed in response to Paxson's last filing. We do so for good cause in order to examine a complete record in this proceeding.

²⁰See *MediaOne, Inc.*, DA 97-1776 (CSR-5012-A, CSR-4990-M) (released August 20, 1997); *Cablevision of Cleveland, L.P. et al.*, DA 97-2000 (CSR-5006-A, CSR 5021-M, CSR 5028-M) (released September 19, 1997).

²¹See Cablevision Opposition at Exhibit 3 (Annual Report of Paxson Communications Company on Security and Exchange Commission Form 10-K for the Fiscal year Ending December 31, 1996); Exhibit 4 (Paxson's Broadcast Television Group - downloaded on September 5, 1997 from Paxson Communications' Internet Web Site at: http://www.paxson.com/Tvmain_new.htm); Exhibit 6 (Paxson Reports Record Third Quarter Financial Results - Internet Web Site at: <http://www.paxson.com/PR961029.htm>); and Exhibit 7 (Letterhead of Paxson Communications Corporation dated July 18, 1997 noting television stations "owned, managed, affiliated or to be acquired" listing

9. Cablevision also argues that the programming schedules of WGOT-TV and WHRC submitted by Paxson do not demonstrate that Paxnet is a separate and distinct entity from *inTV* because the schedules highlight three identical programs aired on both stations on the same day.²² Cablevision argues that the only other programming schedule submitted by Paxson is not dated.²³ Cablevision further argues that this schedule for WHRC only identifies blocks of air time labeled "Paxnet," "Praise TV," and "Children's Programming."²⁴

10. Cablevision also disputes that the instant case is controlled by *Jovan Broadcasting, Corp.*,²⁵ a decision in which it states the Commission held that two unaffiliated, independently owned TV stations that chose to affiliate with two different home shopping networks owned by the same corporate parent were both entitled to carriage. Cablevision argues that unlike *Jovan Broadcasting, Corp.*,²⁶ the two stations involved are themselves affiliated with the same corporate parent and the stations do not exercise distinct and independent program format decisions.

11. Paxson responds in its supplemental pleading that the manner in which it obtains programming for its stations is completely consistent with Commission rules. Paxson explains that it secures programming for some of its stations by selling producers of long-form advertising airtime on the *inTV* Network. Paxson then states that stations broadcasting *inTV* programming block out a fixed number of hours each day for what it terms "*inTV* time," during which the stations all broadcast the same programming from pre-recorded videotapes. Paxson states that WGOT-TV obtains programming from *inTV* and allocates a portion of its broadcast day to that programming. The remainder of WGOT-TV's programming, according to Paxson, is devoted to local programming and long-form advertising which is broadcast during airtime purchased on WGOT-TV rather than on all stations airing *inTV* programming.

12. Paxson also states that it secures programming for other stations, including WHRC, by selling producers of "direct response" long-form advertising airtime on Paxnet, which it maintains is separate and distinct from *inTV*. Paxson states that those stations receiving Paxnet programming are not obligated to coordinate with other stations or to reserve a fixed number of hours each day for Paxnet programming. Most importantly, Paxson states that because Paxnet programming is run by stations not carrying *inTV* programming, Paxnet programming generally attracts different programming than *inTV*, i.e., producers of long form advertising find value in purchasing airtime that is less expensive than *inTV*

Boston - WGOT/WHRC). Cablevision also argues that Paxson did not state in its Reply that it has changed those materials or provided new information to the Commission.

²²See Paxson Reply, Exhibit 2 and 3 (programming identified was aired on September 17, 1997).

²³Paxson Reply, Exhibit 3 (broadcast schedule for WHRC).

²⁴*Id.* Cablevision also argues that this schedule bears a clear resemblance to the programming format used by *inTV* on their other *inTV* Network affiliates (programming schedules for *inTV* affiliates WOAC and WAKC, attached at Exhibit 3 to *Cablevision of Cleveland, L.P. et al.*'s Consolidated Opposition to Must Carry Complaints, (CSR-5021-M and CSR-5028-M) filed July 14, 1997.

²⁵10 FCC Rcd 14.

²⁶*Id.*

time but reaches a different, smaller group of stations than *inTV*. Paxson also notes that in addition to airing Paxnet programming, WHRC allocates airtime for the broadcast of local programming and long form advertising purchased specifically for broadcast on WHRC.²⁷

13. In its opposition to Paxson's supplemental pleading, Cablevision argues that even if WHRC's programming is now different, allowing PCC to alter the programming on its stations after the date on which Cablevision was required to respond to its must carry requests would be contrary to administrative due process. Finally, Cablevision argues that even if Paxnet is now, or becomes in the future, a separate network from *inTV*, this does not change the fact the programming decisions at both stations are still controlled by the same source -- Paxson's corporate parent, PCC. According to Cablevision, such common control of programming makes this a case of first impression under the Commission's "dual network" policy.

DISCUSSION

14. Based on the record before us, we conclude that WGOT-TV satisfies the definition of a "qualified local commercial television station" under the Commission's must carry rules. We also disagree with Cablevision that Paxson's complaint should be dismissed as procedurally defective because the complaint was filed prematurely in violation of our rules. Pursuant to Section 76.61(a)(2) of our rules, Cablevision did not respond to Paxson's request for carriage of WGOT-TV within the requisite 30 day time period in order to notify Paxson that it would commence carriage of its station or state the reasons for its refusal to carry the station.²⁸ Conversations between the parties regarding signal quality and a follow-up letter sent by Paxson regarding signal quality tests are irrelevant to the instant proceeding, especially in light of the fact that poor signal quality is not the reason Cablevision is refusing to carry the signal of WGOT-TV. Paxson was not in error to file the subject must carry complaint in order to preserve its rights.

15. We also disagree with Cablevision that WGOT-TV is not entitled to carriage on its Boston system because it is a duplicative network signal. Section 76.56(b)(5) of our rules states, in pertinent part:

A cable operator is not required to carry the signal of any local commercial television station that substantially duplicates the signal of another local commercial television station that is carried on its cable system, or to carry the signals of more than one local commercial television station affiliated with a particular broadcast network, as defined in §76.55(f). However, if a cable operator declines to carry duplicating signals, such cable operator shall carry the station whose community of license reference point, as defined in §76.53, is closest to the principal headend of the cable system. For purposes of this

²⁷With regard to Cablevision's argument regarding three identical programs being aired on both stations on the same day, Paxson states that the duplicative programming consumed only 1.5 non-simultaneous hours. Paxson argues that given its description of the purchase of airtime on *inTV* and Paxnet, this *de minimis* duplication is the result of individualized decisions of producers of long-form advertising in their airtime purchases. Paxson notes that on occasion, a program producer will make a decision to purchase time for a particular program on more than one station, or to purchase time on *inTV* as well as time on a station such as WHRC which does not carry programming from *inTV*.

²⁸47 C.F.R. §76.61(a)(2).

paragraph, substantially duplicates means that a station regularly simultaneously broadcasts the identical programming as another station for more than 50 percent of the broadcast week.²⁹

16. Cablevision has not met its burden with regard to demonstrating that WGOT-TV and WHRC are affiliates of a common network, or that one station substantially duplicates the signal of the other station. While the Commission has previously determined that *inTV* is a television network for must carry purposes,³⁰ Cablevision has not shown that the two stations in question are both affiliates of that particular broadcast network as defined by Section 76.55(f) of our rules.³¹ Here, WGOT-TV and WHRC, both independently owned stations, receive programming not from the same programming source, but from two separate and distinct entities -- *inTV* and Paxnet, respectively -- which are both owned by the same corporate parent. Paxson has sufficiently demonstrated that both business entities, while owned by the same corporate parent, provide different programming and utilize different distribution methods. In addition to not meeting its burden with regard to network affiliation, Cablevision has not shown that the stations duplicate each other's signals by simultaneously broadcasting identical programming for more than 50 percent of the broadcast week.

17. Finally, we do not agree that Cablevision has been denied administrative due process because it was required to make a carriage decision regarding WGOT-TV based on facts that subsequently changed. In this proceeding, Cablevision has been accorded every opportunity to present its objections to the carriage of WGOT-TV based on current facts and we have considered all of the relevant information presented.

ORDERING CLAUSES

18. Accordingly, **IT IS ORDERED**, pursuant to Section 614 of the Communications Act of 1934, as amended, (47 U.S.C. §534), that the petition filed by Paxson Boston License, Inc. **IS GRANTED**. Cablevision of Boston, L.P. **IS ORDERED** to commence carriage of television station WGOT-TV, Merrimack, NH, within sixty (60) days from the release date of this Order on its Boston cable system.

19. This action is taken pursuant to authority delegated under §0.321 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

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

²⁹47 C.F.R. §76.56(b)(5). See also 47 U.S.C. §534(b)(5).

³⁰See *MediaOne, Inc.* DA 97-1776 (CSR-5012-A, CSR-4990-M) (released August 20, 1997).

³¹47 C.F.R. §76.55(f).