

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

In the Matter of:
Complaint of WFXV-TV, Inc. against
United Cablevision of Southern Illinois,
Inc. d/b/a TCI of Illinois
Application for Review
CSR-4949-M

MEMORANDUM OPINION AND ORDER

Adopted: December 20, 2000

Released: December 26, 2000

By the Commission:

I. INTRODUCTION

1. WFXV-TV, Inc., licensee of low power station WSPY-LP, Plano, Illinois ("WSPY-LP"), filed an application for review of the Cable Services Bureau's decision which denied WSPY-LP's must carry complaint against United Cablevision of Southern Illinois, Inc. d/b/a TCI of Illinois ("TCI-I").

II. BACKGROUND

2. Section 614(c) of the Communications Act of 1934, as amended, and implementing rules adopted by the Commission require cable operators to set aside a certain portion of their channel capacity for the carriage of the signals of those local full power broadcast television stations that exercise their "must carry" rights.

1See WFXV-TV, Inc. v. Cablevision of Southern Illinois, Inc. d/b/a TCI of Illinois, 13 FCC Rcd 1870 (1997)("Bureau Order").

2Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Broadcast Signal Carriage Issues ("Must Carry Order"), 8 FCC Rcd 2965 (1993).

347 C.F.R. §76.55(d). Section 76.55(d) states in pertinent part:

A qualified low power station is any television broadcast station conforming to the low power television rules contained in part 74 of this chapter, only if:

(continued...)

3. On February 27, 1997, WSPY-LP filed a must carry complaint against TCI-I following the cable operator's decision to delete carriage of the station, which occurred on December 29, 1996, from its Newark, Illinois cable system. In addition to seeking reinstatement on TCI-I's cable system, WSPY-LP asserted that a forfeiture should be issued against TCI-I for that system's alleged violation of Section 76.58(a) of the rules, which requires a cable operator to give a 30-day advance written notice to a broadcaster prior to its removal.⁴ Among other things, TCI-I contended that WSPY-LP was not a qualified LPTV station because both the Newark, Illinois franchise area and Plano, Illinois, the city of license of WSPY-TV, are located within the third largest MSA as determined by the Office of Management and Budget (OMB). WSPY-LP maintained that OMB provided individual and separate definitions for MSAs, Primary Metropolitan Statistical Areas ("PMSAs"), and Consolidated Metropolitan Statistical Areas ("CMSAs"), and that Kendall County, where both Newark and Plano are located, is defined as a PMSA. Since PMSAs are separate from MSAs, WSPY-LP concluded that neither Newark nor Plano is in an MSA, thus undercutting TCI-I's justification for deleting the broadcaster's signal. The Cable Services Bureau agreed with TCI-I that Kendall County is within the Chicago consolidated MSA, one of the 160 largest MSAs, and denied WSPY-LP's complaint.⁵ In addition, in order to make a more accurate determination as to whether a forfeiture was warranted against TCI-I's undisputed failure to provide the 30-day advance notice required by Section 76.58(a), the Bureau ordered TCI-I to provide a written explanation of its actions in this regard. In a letter to the Cable Services Bureau dated September 8, 1997, TCI-I acknowledged its failure to comply with the

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(1) Such station broadcasts for at least the minimum number of hours of operation required by the Commission for full power television broadcast stations under part 73 of this chapter;

(2) Such station meets all obligations and requirements applicable to full power television broadcast stations under part 73 of this chapter, with respect to the broadcast of nonentertainment programming; programming and rates involving political candidates, election issues, controversial issues of public importance, editorials, and personal attacks; programming for children; and equal employment opportunity; and the Commission determines that the provision of such programming by such station would address local news and informational needs which 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) Such station complies with interference regulations consistent with its secondary status pursuant to part 74 of this chapter;

(4) Such station is located no more than 56.32 km (35 miles) from the cable system's principal headend, as defined in §76.5(pp), and delivers to that headend an over-the-air signal of good quality;

(5) The community of license of such station and the franchise area of the cable system are both located outside of the largest 160 Metropolitan Statistical Areas, ranked by population, as determined by the Office of Management and Budget on June 30, 1990, and the population of such community of license on such 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 equivalent political subdivision (of a State) served by the cable system.

NOTE TO PARAGRAPH (d): For the purposes of this section, a good quality signal shall mean a signal level of either -45 dBm for UHF signals or -49 dBm for VHF signals at the input terminals of the signal processing equipment, or a baseband video signal.

⁴47 C.F.R. §76.58(a).

⁵See *WFXV-TV, Inc. v. Cablevision of Southern Illinois, Inc. d/b/a TCI of Illinois*, 13 FCC Rcd 1870 (1997).

notice requirement but argued that it had mitigated the seriousness of the violation by acting in good faith and providing some advance notice to the public of the planned deletion of WSPY-LP.

III. DISCUSSION

4. In its application for review, WSPY-LP argues that the Bureau incorrectly determined that WSPY-LP's community of license and TCI-I's franchise area were located within one of the largest 160 MSAs. WSPY-LP argues that the OMB expressly separates, identifies and defines 268 MSAs, 73 PMSAs, and 21 CMSAs, referring to them collectively as Metropolitan Areas ("MAs").⁶ WSPY-LP states that Plano, its city of license, and Newark, the franchise area of the cable system, are located in Kendall County, which the OMB assigns to the Aurora-Elgin PMSA. Since the Aurora-Elgin PMSA is not among the defined category of 268 MSAs ranked on the OMB report, WSPY-LP argues that it cannot be within the 160 largest MSAs. As a result, WSPY-LP maintains that it is a qualified LPTV station pursuant to Section 76.55(d)(5) of the rules and entitled to must carry status on TCI-I's system.

5. Further, WSPY-LP maintains that the Bureau was in error in accepting a letter of explanation from TCI-I, instead of issuing a forfeiture for TCI-I's alleged violation of Section 76.58(a) of the rules or, at the least, ordering TCI-I to reinstate carriage of WSPY-LP due to its violation of this rule. WSPY-LP contends that the gravity of TCI-I's violation is increased by the fact that, when the system was advised by WSPY-LP that its failure to issue a written notice violated the Commission's rules, TCI-I acknowledged that it issued no individual written notice, but instead relied on a notice that appeared in the *Fox Valley Shopper*. WSPY-LP argues that such knowing and defiant violation of the rules must be calculated into the Commission's ruling in this proceeding. WSPY-LP contends that when cable systems evade the advance written notification rule, consumers are thwarted from the opportunity to voice their concerns or otherwise react in advance of the proposed changes. WSPY-LP argues that for the advanced written notice requirement to have any force or meaning any cable system that fails to give the required notice should be required to reinstate the deleted station.

6. TCI-I states that the Bureau properly recognized that OMB's ranking did not separately identify PMSAs (like Aurora-Elgin) that were encompassed in a larger consolidated MSA (like Chicago).⁷ TCI-I states that even if PMSAs were separately ranked, WSPY-LP would still fall within the 160 largest MSAs since the population of the Aurora-Elgin PMSA significantly exceeds that of the Bremerton, Washington MSA, which is ranked 160 by OMB.⁸ TCI-I argues that under WSPY-LP's approach, the Chicago PMSA, like Aurora-Elgin, would also fall outside the top 160 MSAs.

7. We reject WSPY-LP's contention that because Plano and Newark are located in a PMSA, they are not located in an MSA. To the contrary, a PMSA is, by definition, a part of an MSA. According to OMB's *Revised Standards for Defining Metropolitan Areas in the 1990's*, MSAs are categorized in four levels based on total population: Level A -- MSAs of 1 million or more; Level B -- MSAs of 250,000 to

⁶Application at 3, citing OMB Report.

⁷Opposition at Exhibit 1.

⁸*Id.*

999,999; Level C -- MSAs of 100,000 to 249,999; and Level D -- MSAs of less than 100,000.⁹ OMB states that within a Level A MSA, "any county or group of counties that was designated an SMSA on January 1, 1980, will be designated a PMSA, unless local opinion does not support its continued separate designation for statistical purposes."¹⁰ Further, if any PMSAs have been recognized, according to OMB criteria, "the balance of the Level A metropolitan statistical area [MSA], which includes its largest central city, also is recognized as a primary metropolitan statistical area [PMSA]."¹¹ Further, OMB states that a "Level A metropolitan statistical area [MSA] in which two or more primary metropolitan statistical areas [PMSAs] are identified by section 8 is designated a consolidated metropolitan statistical area [CMSA]."¹² Therefore, while Kendall County is identified as part of the Aurora-Elgin PMSA, the Aurora-Elgin PMSA in turn is part of the Chicago MSA. Because WSPY-LP is licensed to a community within one of the 160 largest MSAs, it is ineligible for must carry status. Likewise, because TCI-I's cable system is similarly located, it does not have must carry obligation with respect to LPTV stations.¹³

8. After reviewing the matter, we do not believe that TCI-I violated the Communications Act's or the Commission's notification provisions. Section 614(b)(9) of the Communications Act states that "[a] cable operator shall provide written notice to a local commercial television station at least 30 days prior to either deleting from carriage or repositioning that station."¹⁴ Section 614(h)(1)(A) of that same statutory provision defines a "local commercial television station" as excluding "low power stations."¹⁵ Consequently, TCI-I's removal of station WSPY-LP did not violate Section 614(b)(9). We also do not believe that TCI-I violated the Commission's notification requirements when it dropped WSPY-LP. Under Section 76.58(a) of the rules, television broadcast stations are entitled to notice before being dropped. However, according to Section 76.5(b) of the rules, LPTV stations are not generally considered to be "television broadcast stations."¹⁶ The only matter to be resolved, therefore, is whether TCI-I's actions violated Section 76.964(a) of our rules.¹⁷ We do not believe so. Section 76.964(a), unlike Section 76.58(a), does not require that a cable operator provide any notice to a low power station prior to deleting its carriage. Rather, it only requires that 30 days prior notice be given to subscribers and local franchising authorities when a cable operator

⁹See Part VI, Office of Management and Budget, *Revised Standards for Defining Metropolitan Areas in the 1990's*; Notice, FR Vol. 55, No. 62 (March 30, 1990) at Section 6(A).

¹⁰*Id.* at Section 8(A).

¹¹*Id.* at Section 8(G).

¹²*Id.* at Section 10(A).

¹³ Like the Bureau, we decline to address the separate defenses raised by TCI-I with respect to the carriage issue, as those defenses are rendered moot by our disposition of this matter on the grounds stated above.

¹⁴47 U.S.C. §534(b)(9).

¹⁵47 U.S.C. §534(h)(1)(A).

¹⁶We note that "qualified" LPTV stations, pursuant to Section 76.55(d) of the rules, are entitled to notice because they are defined for must carry purposes as "television broadcast stations." 47 C.F.R. §76.55(d).

¹⁷ 47 C.F.R. §76.964(a).

implements any service change.¹⁸ We find that TCI-I did provide such notice to the franchising authority on November 26, 1996. It also apparently provided notice to subscribers by publication in a local newspaper of WSPY-LP's proposed deletion on November 29, 1996, thirty days before its deletion on December 29, 1996.¹⁹ Consequently, we find that TCI-I did not violate any provisions of the Communications Act or our rules.

IV. ORDERING CLAUSES

9. Accordingly, **IT IS ORDERED**, pursuant to Section 614(h) of the Communications Act, as amended, 47 U.S.C. §534, and Section 76.5 and 1.115 of the Commission's Rules, 47 C.F.R. §§76.59 and 1.115, that the application for review filed on behalf of WFXV-TV, Inc. **IS DENIED**.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

¹⁸ Section 76.964(b) of the Commission's rules provides that a cable operator may provide notice using any reasonable written means at its sole discretion. 47 C.F.R. §76.964(b).

¹⁹ Although the *Bureau Order* did state that WSPY-LP was dropped on December 27, 1996, we find this date to be in error. A closer review of the information provided by WSPY-LP in its original complaint finds that December 27, 1996 was the date on which the station protested to TCI-I, both in writing and by phone, of its possible deletion. WSPY-LP goes on to state specifically, both in its complaint and by affidavit, that its signal was deleted "[d]uring the weekend of December 28-29, 1996." Complaint at 1. *See also* Affidavit of Larry Nelson, President of WFXV-TV. WSPY-LP has not alleged that a violation occurred with regard to TCI-I's newspaper notification.