

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

In the Matter of:)	
)	
Complaint of Citrus County Association for Retarded Citizens against Mickelson Media, Inc. d/b/a Century Cable)	CSR-4227-M
)	
Application for Review)	

MEMORANDUM OPINION AND ORDER

Adopted: November 15, 2001

Released: November 20, 2001

By the Commission:

I. INTRODUCTION

1. The Citrus County Association for Retarded Citizens, licensee of Low Power Television Station WYKE-LP (Channel 49), Inglis-Yankeetown, Florida,¹ filed an application for review of the decision of the Cable Services Bureau in *Citrus County Association for Retarded Citizens v. Mickelson Media, Inc. d/b/a Century Cable* in which the Bureau denied WYKE-LP's petition for reconsideration seeking to overturn the original dismissal of WYKE-LP's must carry complaint against Mickelson Media, Inc. d/b/a Century Cable ("Century").² An opposition to this petition was filed on behalf of Century to which WYKE-LP replied. After examining the record, we reverse the Bureau's decision and grant the application for review filed by WYKE-LP.

II. BACKGROUND

2. Section 614(c) of the Communications Act of 1934, as amended, and implementing rules adopted by the Commission in *Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Broadcast Signal Carriage Issues ("Must Carry Order")*,³ allow for the carriage of low power television (LPTV) stations in situations where there are insufficient full power local commercial television stations to fill the channels set aside by cable operators for mandatory must carry purposes. In order for an LPTV station to be qualified as a must carry station it must meet the criteria set forth under Section 76.55(d) of the Commission's rules.⁴

3. WYKE-LP filed a must carry complaint against Century for that cable system's refusal to carry

¹Formerly W49AI.

²10 FCC Rcd 8225 (1995), *recon. denied*, 10 FCC Rcd 960 (1995).

³8 FCC Rcd 2965 (1993) ("*Must Carry Order*").

⁴47 C.F.R. §76.55(d).

the station. In that proceeding, WYKE-LP alleged that it met all of the criteria to be considered a qualified LPTV station, but Century proved through signal strength tests, conducted according to Commission criteria, that the station failed to provide a good quality signal to Century's principal headend.⁵ Although WYKE-LP offered to provide, at its own expense, any specialized equipment necessary to provide a good quality signal, neither the 1992 Cable Act nor the Commission's rules allow an LPTV station to cure a signal quality deficiency with additional equipment as full power television stations are allowed to do.⁶ Therefore, WYKE-LP's complaint was dismissed.

4. In its petition for reconsideration, WYKE-LP argued that the antenna used in the signal quality tests performed by Century did not conform to the Commission's requirement that measurements be made with "generally accepted equipment that is currently used by the cable operator to receive signals of similar frequency range, type or distance from the principal headend."⁷ Based on the record before it at the time, the Bureau found that there was no indication that the type of antenna used by Century in its tests was in any way inferior.⁸

III. DISCUSSION

5. The main issue before us is whether or not the model of antenna used by Century in its signal strength tests of WYKE-LP can be considered to be "generally accepted equipment" as envisioned by the Commission's rules. WYKE-LP does not otherwise question the methods by which Century performed the measurements of its signal. WYKE-LP also claims that in its previous review of this case the Bureau failed to examine the full record and did not fully explain the basis for its conclusions. These issues will be addressed below.

6. In its application for review, WYKE-LP states that Century has three professional, single-channel reception antennas in use on its headend tower -- one receives Station WOGX (Ind., Ch. 51), Ocala, Florida; one receives WCJB (ABC, Ch. 20), Gainesville, Florida; and the last, equipped with a preamplifier, receives Station WTOG (Ind., Ch. 44), St. Petersburg, Florida.⁹ It maintains that the receiving antenna used by

⁵The *Cable Television Consumer Protection and Competition Act of 1992* ("1992 Cable Act"), Pub. L. No. 102-385, 106 Stat. (1992), adopted a standard to be used to determine what constitutes a good quality signal for commercial television stations. The Commission has determined that a television station must deliver to the principal headend of a cable system either a signal level of -45 dBm for UHF signals or -49 dBm for VHF signals to be qualified for carriage. See *Must Carry Order*, 8 FCC Rcd 2965, 2989 (1993). Consistent with Congress' guidance with respect to VHF and UHF commercial station availability, we believed it reasonable to utilize the same standards as prima facie tests to determine, absent other evidence, whether VHF or UHF low power stations place adequate signal levels over a cable system's principal headend. *Id.*

⁶See *Citrus County*, 10 FCC Rcd 960 (1995). In the *Must Carry Order*, the Commission specifically rejected a commenter's suggestion "to extend the provisions of Section 614(h)(B)(iii), which apply on their face to full power television stations, to LPTV stations." See *Must Carry Order*, 8 FCC Rcd 2965, 2991. The Commission noted that "such an interpretation is clearly not intended by Congress in the 1992 Cable Act." *Id.*

⁷See *Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Broadcast Signal Carriage Issues* ("Clarification Order"), 8 FCC Rcd 4142, 4143 (1993).

⁸See *Citrus County*, 10 FCC Rcd 8225 (1995).

⁹Application at 2. WYKE-LP states that the preamplifier was provided to Century by WTOG in order to boost the station's signal to overcome noise in the picture.

Century to make its measurements of WYKE-LP's signal is smaller and has less gain than professional antennas and consequently, the antenna used by Century to test WYKE-LP's signal did not meet the requirement that cable operators use "generally accepted equipment that is currently used to receive signals of similar frequency range, type or distance from the principal headend."¹⁰ WYKE-LP argues that in its reconsideration order, the Bureau accepted the "specialized" antenna used by Century to receive Station WTOG as "generally accepted equipment" and determined that the cable system did not have to use a similar antenna when measuring WYKE-LP's signal because it used a preamplifier and that cable operators do not have to use "specialized equipment when making measurements for stations that are not currently carried."¹¹ WYKE-LP asserts that the Bureau overlooked the two antennas not equipped with preamplifiers used by Century to receive Stations WCJB and WOGX which as "non-specialized" antennas are, in fact, the "generally accepted equipment" Century normally uses to receive other area stations. WYKE-LP maintains that instead of comparing the antenna used in its signal's measurements to that used to receive Station WTOG, the Bureau should have used Century's "non-specialized" Channel 20 and Channel 51 antennas as comparison and required Century to make measurements of WYKE-LP using similar equipment.¹²

7. In any event, WYKE-LP argues that the Commission has already considered and rejected the idea that "inexpensive and non-professional" home-type receiving antennas were adequate for signal strength measurements in its *Clarification Order* when it stated that "signal quality measurements. . . should be made using the equipment now used by the cable operator to receive such signals."¹³ WYKE-LP asserts, therefore, that the Bureau erred in the conclusion it reached in the reconsideration order by focusing on the preamplified WTOG antenna instead of the two "non-specialized" antennas used to receive other UHF stations' signals.¹⁴ Moreover, WYKE-LP states that the Bureau failed to explain why it did not consider these two other antennas.¹⁵ In light of these facts, WYKE-LP argues that the Bureau's reconsideration order should be overturned.

8. In its opposition, Century argues that WYKE-LP's application for review presents no new issues or facts and that a re-argument of the issues is unwarranted. It maintains that the Bureau thoroughly examined WYKE-LP's claims along with Century's engineering data not only in the station's original must carry complaint but in its reconsideration request as well.¹⁶ Moreover, it points out, WYKE-LP does not allege that this information has changed since the signal measurements were performed. In any event, Century states that WYKE-LP's argument that a different, more expensive "professional" antenna is used to receive Channel 51 and

¹⁰See *Clarification Order*, 8 FCC Rcd 4142, 4243 (1993).

¹¹See *Citrus County*, 10 FCC Rcd 8225, 8226 (1995)(“While the use of a preamplifier may indeed improve the reception of W49AI’s signal, as pointed out in our original order, a low power station such as W49AI cannot avail itself of this avenue as neither the 1992 Cable Act nor our rules allows a low power station to cure a signal quality deficiency with additional equipment as full power television station are allowed to do.”).

¹²Application at 3.

¹³Application at 6, citing *Clarification Order*, 8 FCC Rcd at 4142-4143.

¹⁴Application at 6.

¹⁵*Id.* at 7.

¹⁶Century Opposition at 2. Century states that in the affidavit of its chief engineer, submitted in opposition to WYKE-LP's original complaint, it clearly sets forth the type of equipment and procedures used to measure the signal. It maintains that the Bureau was fully aware of this affidavit as well as other technical information when it made its first two decisions. *Id.*

Channel 20 is still without merit.¹⁷ It argues that the Bureau found the test antenna to be acceptable and proper.¹⁸

9. In reply, WYKE-LP claims that the points made in Century's opposition are not germane to the resolution of its application for review. First, WYKE-LP states that the Commission's "no new issues or facts" principle applies only in situations where the Commission has already denied an application for review and the proponent thereof submits a petition for reconsideration containing "no new issues or facts."¹⁹ WYKE-LP argues that this principle has no relationship here and is used by Century merely in an effort to obfuscate the issues. Second, WYKE-LP states that Century's claim that the Bureau's staff had all the necessary technical information it needed to make its decisions because Century had described the type of receiving antenna it used in its measurement of WYKE-LP's signal is irrelevant since the type of antenna used by Century, which is the very basis of the instant complaint, has never been in dispute.²⁰ Third, WYKE-LP maintains that the Bureau ignored the *Clarification Order's* ruling that "inexpensive and non-professional" antennas were inadequate for must carry measurements and that it reached an unsupported conclusion that the antenna used by Century was comparable to other UHF antennas used by the system.²¹ Finally, WYKE-LP states that it should be noted that Century did not address both its failure to furnish to WYKE-LP the technical details of the cable system and the fact that WYKE-LP's allegedly "too-weak" signal was previously carried by Century when it broadcast different programming.²²

10. WYKE-LP contends that the Bureau unfairly compared the antenna used in measuring its signal with the one antenna used by Century using a preamplifier, completely overlooking the fact that two other UHF antennas used by Century did not use preamplifiers. It should be noted, however, that WYKE-LP itself specifically stated in its petition for reconsideration that ". . . all of the UHF antennas used for the stations Century wants to receive are equipped with preamplifiers used to overcome the high line losses inherent at UHF frequencies."²³ WYKE-LP further clarified this information when it filed its application for review.

11. In view of the clarifying evidence presented regarding the antenna used by the cable system to test WYKE-LP's signal strength in comparison to the other antennas employed by Century, the Bureau's engineers solicited further information regarding this antenna not only from its manufacturer but also from the chief technicians of both Century and WYKE-LP. According to the technical specification information regarding the antenna in question, the Channel Master Model 5646 antenna is an all-channel broadband antenna with a gain of approximately 9 dB and a radiation range of about 50 miles.²⁴

¹⁷*Id.* at 2. Century points out that both Channels 51 and 20 are more distant than WYKE-LP and are not comparable for purposes of this proceeding. *Id.*

¹⁸*Id.* at 2, citing *Citrus County*, 10 FCC Rcd at 8226.

¹⁹See *Fresno FM Limited Partnership*, 7 FCC Rcd 4339 (1992), citing Section 1.106(b)(2) of the Commission's Rules; *WWIZ, Inc.*, 37 FCC 685 (1965), *aff'd sub nom. Lorain Journal Co. v. FCC*, 352 F. 2d 824 (D.C. Cir. 1965).

²⁰Reply at 3.

²¹Reply at 4.

²²Reply at 4.

²³Petition for Reconsideration at 3.

²⁴Technical Specification Sheet of Model 5646 antenna received from Channel Master, Division of Avnet, Inc., Smithfield, North Carolina.

12. In order to make a judgment as to whether the Channel Master Model 5646 antenna is comparable to those used by Century to receive other similar types of signals, we have taken several factors into consideration. The high-gain antennas used by Century to receive Channel 51 in Ocala and Channel 20 in Gainesville are the type of “professional” antennas which are specifically tuned to receive the signal of one particular station. The low-gain broadband general-purpose antenna Century used for testing WYKE-LP’s signal, however, is not tuned to any one signal but instead picks up numerous signals across the spectrum. This type of antenna is clearly inferior to the “professional” antennas Century uses to receive other UHF stations. Moreover, Century did not provide any explanation of its use of a low-gain broadband antenna for testing purposes or any explanation as to why it could not use a high-gain antenna similar to others it uses other than to state that Channels 51 and 20 were more distant than WYKE-LP.²⁵ In the *Clarification Order* the Commission stated that while cable operators need not employ extraordinary measures or specialized equipment when making measurements, “to the extent that the cable operator is able to do so, the signal level shall be determined based on measurements made with generally accepted equipment that is currently used to receive signals of similar frequency range, type or distance from the principal headend.”²⁶

13. Because the burden of proving a station’s poor signal quality is on the cable operator, we believe that Century has failed to prove, pursuant to the provisions of Section 76.61(a)(2) of the Commission’s rules, that WYKE-LP does not provide a good quality signal to the system’s principal headend.²⁷ The Bureau has stated that “[s]ince the cable operator is at the outset in a superior position to know whether or not a given station is providing a good quality signal to the system’s principal headend, we believe that the initial burden of demonstrating the lack of a good quality signal appropriately falls on the cable operator.”²⁸ We affirm the Bureau’s allocation of this burden. Given the above facts, after careful review we can find no evidence to support the use of a low-gain broadband antenna for signal strength tests of WYKE-LP’s signal.

14. We therefore grant WYKE-LP’s application for review and require Century to commence carriage of WYKE-LP within 60 days of the release date of this Order unless Century conducts, within 20 days of the release date of this Order, new signal quality tests that demonstrate that WYKE-LP does not meet the signal strength criteria. Should Century wish to conduct new signal strength tests, it should do so using an antenna with similar properties as those it currently uses to receive other UHF stations, in accordance with the findings herein. In the event that Century believes that it is not obligated to carry WYKE-LP based on the results of new tests, it may submit the results of such tests to the Cable Services Bureau within 30 days of the release date of this Order. The Cable Services Bureau will then decide the issue on remand, consistent with this *Memorandum Opinion and Order*.

IV. ORDERING CLAUSES

15. Accordingly, **IT IS ORDERED**, pursuant to Section 614(h) of the Communications Act, as amended, 47 U.S.C. §534, and Sections 76.59 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 Citrus County Association for Retarded Citizens, Inc. **IS**

²⁵Century Opposition at 2. *See also* footnote 17.

²⁶8 FCC Rcd 4142, 4145 (1993).

²⁷47 C.F.R. §76.61(a)(2).

²⁸*See Rural California Broadcasting Corp. v. Western Cabled Systems*, 10 FCC Rcd 2743 (CSB 1995).

GRANTED.

16. **IT IS FURTHER ORDERED** that Century Cable may, within 20 days of the release date of this order, conduct new signal quality tests consistent with this Order. In the event that Century believes that it is not obligated to carry WYKE-LP based on the results of new tests, it may submit the results of such tests to the Cable Services Bureau within 30 days of the release date of this Order. The Cable Services Bureau will then decide the issue on remand, consistent with this Order.

17. **IT IS FURTHER ORDERED** that Mickelson Media, Inc. d/b/a Century Cable shall commence carriage of WYKE-LP sixty (60) days after the release date of this Order in the absence of a new test that demonstrates that WYKE-LP does not provide an adequate signal. WYKE-LP shall notify Century in writing of its carriage and channel position elections (§§76.56, 76.57, and 76.64(f) of the Commission's rules) within 15 days of the release date of this Order.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary