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

In the matter of:	)	
	)	
Larry L. Schrecongost, Licensee of	)	
Low Power Television Station WLLS-LP,	)	CSR-4931-M
Indiana, Pennsylvania	)	
v.	)	
TCI of Pennsylvania, Inc., Adelphia	)	
Cable Communications, Hollis Corporation	)	
d/b/a Bethel Cable TV, Summerville	)	
Cablevision, Inc. and Commuter Cable	)	
Television	)	
	)	
Application for Review		

MEMORANDUM OPINION AND ORDER

Adopted: March 17, 2004 **Released: March 25, 2004**

By the Commission:

I. INTRODUCTION

1. Larry L. Schrecongost ("Schrecongost" or "Petitioner"), licensee of low power television station WLLS-LP (Ch. 49), Indiana, Pennsylvania,[1] filed an application for review of the former Cable Services Bureau's decision which denied its petition for reconsideration seeking to overturn the Bureau's earlier decision dismissing in part and denying in part Petitioner's must carry complaint against the above-listed cable systems.[2] A combined opposition was filed on behalf of Adelphia Central Pennsylvania, LLC., Adelphia Cablevision Associates, LP, Chelsea Communications, LLC, Highland Video Associates, LP, Mt. Lebanon Cablevision, Inc., Robinson/Plum Cablevision, LP, Century Lykens Cable Corp., Century Cable Holdings, LLC, Century Ohio Cable TV Corp., UCA, LLC, Henderson Community Antenna Television, Inc., Rigpal Communications, Inc., and Adelphia GS Cable, LLC (hereinafter "Adelphia"). TCI of Pennsylvania, Inc. also filed an opposition. Petitioner filed replies to both oppositions. After examining the record, we affirm the Bureau's decision and deny the application for review.

II. BACKGROUND

2. Section 614(a) of the Communications Act of 1934, as amended, requires the carriage of

[1]Formerly W49BV. Schrecongost stated in its reply that the station had been granted an application for Class A status and that its call letters were now WLLS-CA. However, Commission records indicate that Schrecongost's application still is pending.

[2]*See Larry L. Schrecongost v. TCI of Pennsylvania, Inc. et al.,* 12 FCC Rcd 13194 (1997) (*"Complaint Order"*), *recon. denied,* 16 FCC Rcd 20989 (2001) ("*Bureau Order"*).

"qualified" low power television ("LPTV") stations in certain limited circumstances.[3] Section 614(h)(2)(B) of the Act requires as one of these conditions that the LPTV station seeking carriage establish that the provision of nonentertainment programming by the station would "address local news and information 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."[4]

3. Petitioner filed a must carry complaint against five cable operators for their failure to carry WLLS-LP on various Pennsylvania cable systems.[5] Petitioner argued that it was a "qualified" LPTV station entitled to carriage. Petitioner also argued that the cable systems' denials of carriage based on poor signal quality were not valid because their signal strength tests were not conducted according to accepted engineering practices. The *Complaint Order* denied Petitioner's complaint. Although the *Complaint Order* found that the cable operators did not conform to Commission requirements for good engineering practices in conducting tests of WLLS-LP's signal strength, Petitioner's complaint was ultimately denied because the Bureau found that Schrecongost failed to meet the burden of demonstrating that WLLS-LP provided nonentertainment programming that addressed the local news and informational needs of the systems' subscribers.[6] The *Complaint Order* noted WLLS-LP's failure to introduce any programming logs or other evidence in support of this criterion and thus concluded that the station had not demonstrated that it was a "qualified" LPTV station entitled to mandatory carriage.[7]

4. In its petition for reconsideration, Petitioner argued that there was substantial evidence in the record of WLLS-LP's local programming and, as a result, that it met the statutory definition of a "qualified" LPTV station. Petitioner argued that the Commission's requirement that LPTV stations demonstrate that they meet the local programming needs of the community requires only a general demonstration and not a specific evidentiary showing such as programming logs. Petitioner maintained that the Bureau erred in creating a new standard that suggested there must be a minimum amount of local programming that was regularly scheduled. The Bureau denied Petitioner's request for reconsideration, finding that Schrecongost did not raise a material legal error or omission pursuant to Section 1.106(c)(1) of the Commission's rules.[8] The Bureau found that Petitioner's contention that WLLS-LP's programming was locally-oriented and addressed local programming needs not covered by a full power station was unsupported by the record.

[3] 47 U.S.C. § 534(a); *see also* 47 C.F.R. § 76.55(d)(6).

[4] 47 U.S.C. § 534(h)(2)(B).

[5] The *Complaint Order* originally listed the lead communities of eight TCI cable systems (one of which, Carrolltown, was withdrawn), seven Adelphia cable systems, one each for Summerville Cablevision and Commuter Cable, and three for Bethel Cable TV. Since the time of the original filing Adelphia has apparently obtained ownership of three of TCI's systems, as well as those operated by Summerville Cablevision, Commuter Cable and Bethel Cable. For purposes of this order, TCI states that it operates five cable systems serving a total of 27 communities while Adelphia states that it operates 13 cable systems serving a total of 275 communities. *See* Adelphia Opposition at Exhibit A; TCI Opposition at 1 n.3.

[6] *Complaint Order,* 12 FCC Rcd at 13200. The *Complaint Order's* finding that the cable operators in this matter did not conduct acceptable signal strength tests was not an issue on reconsideration. Adelphia and TCI submitted new engineering studies in their oppositions to Schrecongost's application for review. A review of these tests, however, indicated that the cable operators again failed to perform the tests according to sound engineering practices.

[7] *Id.; see also* 47 U.S.C. § 534(h) and 47 C.F.R. § 76.55(d).

[8] 47 C.F.R. § 1.106(c)(1).

III. DISCUSSION

5. Schrecongost's main contention in this proceeding is that the Bureau erred in its determination that WLLS-LP failed to meet the local programming criteria of Section 614(h)(2)(B) of the Act.[9] It claims that, because the issue was not raised by the opposing parties, the Bureau should not have been able to deny WLLS-LP's carriage complaint solely because WLLS-LP failed to provide program logs or any other type of information regarding programming scheduling because the statute does not allow this type of subjective judgment.[10] In so doing, Schrecongost asserts that the Bureau established a new evidentiary standard not required by the Act or the Commission's rules. WLLS-LP points out that in *Lightning & Broadcast Company,* the Bureau found that a single page letter from the station to the cable system was sufficient to give a breakdown of the local programming the LPTV station provided.[11] Further, in *Mid-Maine Community Broadcasting*, Petitioner states the station submitted descriptions of its programming rather than program logs.[12] Schrecongost maintains that it has continually demonstrated through declaration and program descriptions that WLLS-LP airs an average of 3 hours of local programming per week and that these programs are produced within, and cover events related to, the communities involved in this proceeding.[13]

6. Adelphia argues in response that, in directing the Commission to make determinations with regard to LPTV stations, Congress entrusted the Commission to make judgments about the degree of localism presented by a station's programming and the amount of such programming aired by the station.[14] TCI maintains that the Bureau's analysis of WLLS-LP's programming was the type specifically envisioned by Congress in the statute and was, therefore, not a subjective value judgment, but a determination based upon objective criteria established by Commission precedent.[15]

7. We disagree with Schrecongost that the Bureau introduced a new evidentiary standard in contravention of Section 614(h)(2)(B) of the Act when it denied WLLS-LP's must carry complaint based on the station's failure to meet the programming standards even though the issue had not been raised by any party.[16] By statute, the Commission's review of must carry cases requires a determination that the local programming criteria are met.[17] Thus, the fact that no party raised the programming issue did not eliminate the Bureau's obligation to review this factor or to make a determination as to whether it was met. Further, Section 614(h)(2)(B) of the Act unambiguously places the burden of demonstrating that an LPTV station's programming meets the local news and informational needs of a community upon the

[9]Schrecongost also raises a procedural argument regarding the *Complaint Order's* denial of the station's carriage on cable systems served by Summerville Cablevision and Commuter Cable Television. *See* Application at 12. Petitioner argues that because these cable operators did not participate formally in these proceedings, the Bureau was in error in denying carriage in its decision. *Id.* Schrecongost requests, therefore, that the decision be reversed. We disagree. Carriage on these systems was denied, as it had been for the other cable systems involved, based on WLLS-LP's failure to qualify under the LPTV programming criteria. The Bureau's decision as to these systems, therefore, was appropriate.

[10]*Id.* at 9.

[11]*Id.* at 8, citing 9 FCC Rcd 2297 (1994).

[12]*Id.* at 12, citing 12 FCC Rcd 18048 (1997).

[13]Reply to Adelphia at 3 and Exhibit 2.

[14]Adelphia Opposition at 9, citing 47 U.S.C. § 534(h)(1)(C).

[15]*Id.* at 4-5, citing *Chevron U.S.A., Inc. v. NRDC,* 467 U.S. 837, 842-43 (1984); *see also Vision 3 Broadcasting v. Time Warner Cable,* 14 FCC Rcd 15348, 15353 (1999).

[16]47 U.S.C. § 534(h)(2)(B).

[17]47 U.S.C. § 534(h)(2)(B).

LPTV station.[18] We find no error in the Bureau's review of WLLS-LP's programming in order to determine whether or not the station had carried this burden.

8. Schrecongost claims, however, that even if the Bureau was correct in analyzing WLLS-LP's programming when this issue was not raised in opposition, the station met its burden in the information it provided in its must carry complaint and the further information provided in its petition for reconsideration. We disagree. The programming information provided by Schrecongost in its must carry complaint was approximately one page, listing ten examples of the types of programs carried by WLLS-LP. The *Complaint Order* appropriately found that, except for one regularly-scheduled weekly mass from the local diocese, this information contained "only unspecified examples of political debates, local sports and community events, without information regarding the scheduling of such programming or how it fulfills the mandate of the Commission's rules."[19] The information Schrecongost submitted with its petition for reconsideration merely gave a longer description of the programming it had listed in its complaint and listed one new program that had not been on-the-air at the time.[20] With regard to the cases relied on by Petitioner, the *Bureau Order* distinguished *Lightning Broadcasting* by concluding that decision "involved substantially more frequent irregular and regularly scheduled programming of 'weekly regional interview shows, high school sports, and school and local news' than that offered by [WLLS-LP]."[21] Schrecongost's reliance on *Mid-Maine Community Broadcasting* also is misplaced because that decision was reversed on reconsideration.[22] In any event, we note that the information provided by the LPTV station in *Mid-Maine Community* was of a more specific nature than that provided by Petitioner.

9. We also disagree with Schrecongost's contention that the Bureau made subjective judgments as to the nature of its programming. Because a must carry complaint rests on the question of a station's eligibility for carriage, the Bureau has the responsibility to assess the statutory eligibility requirements to determine if the station involved is entitled to must carry status. In the case of LPTV stations, this evaluation includes the station's compliance with Section 614(h)(2)(B). Contrary to Schrecongost's allegations, such an assessment is not a "value judgment" as to an individual station's quality of programming, but instead a means to determine if a station is meeting the news and informational needs of the community at issue. Although Schrecongost provided programming examples such as coverage of local sports, religious services, and political broadcasts that serve localism and thus meet the statutory requirements, apart from one regularly-scheduled weekly mass from the local diocese, Schrecongost failed to provide any information as to the extent and manner it is meeting community needs. Thus, unlike in *Lightning Broadcasting*, where the broadcaster submitted descriptive information

[18] *Id.* (An LPTV station becomes a "qualified low power station" entitled to must carry rights only if "such station meets all obligations and requirements applicable to television broadcast stations under Part 73 of title 47 . . .with respect to the broadcast of nonentertainment programming; programming and rates involving political candidates, election issues, controversial issues is public importance, editorials, and personal attacks; programming for children; and equal employment opportunity . . .")

[19] *Complaint Order,* 12 FCC Rcd at 13200.

[20] In any event, the fact that Schrecongost submitted information with its petition for reconsideration that was apparently known at the time of the original complaint was not a basis on which to overturn the *Complaint Order*. As stated in the *Bureau Order*, "Section 1.106(c)(1) of the Commission's rules states that reconsideration is appropriate only where the petition shows either material error in the original order or raises additional facts not known or not existing until after the petitioner's last opportunity to respond." *See Bureau Order,* 16 FCC Rcd at 20993 (citing *Eagle Radio, Inc.,* 12 FCC Rcd 5105, 5107 (1997)).

[21] *Id.* at 20994.

[22] *See Mid-Maine Community Broadcasting v. State Cable TV Corporation,* 13 FCC Rcd 20324 (1998) (The vague reference provided by Mid-Maine to programming that WFYW-LP provided before going off-the-air failed to satisfy the burden with respect to a LPTV station's must carry qualifications under Section 614(h)(2)(B)); *see also Mid-Maine Community Broadcasting v. State Cable TV Corporation,* 12 FCC Rcd 18048 (1997).

about the scheduling of its programming, there was no way to determine if the statutory criteria have been met. One of the best ways to make such a determination is to review a station's program logs, but Schrecongost is wrong in its claim that the Bureau has adopted the submission of program logs as a fixed standard in such cases. Program logs are not required. The information certainly can be presented through other forms of evidence, but the salient information provided in the showing must be specific as to the type of programming provided and the number of hours per week such programming is provided. Other types of information we consider relevant would be such things as the length of the program, whether the program is original or repeating, and the time of day the program is aired. Additionally, evidence establishing the local nature of the programming should be provided to distinguish it from general interest programming. This information is necessary to support a finding that the LPTV station is providing programming that addresses "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" WLLS-LP's community of license, under Section 614(h)(2)(B) of the Act.[23] A general summation of programs, such as that provided by Schrecongost in its must carry complaint, provides no descriptive information of programming content and thus is insufficient for this purpose.

10. Schrecongost also argues for the first time in its application for review that the 3-hour per week test of local programming contained in the Class A statute should be adopted by the Commission in the context of must carry proceedings in order to determine whether an LPTV station meets the local informational needs of its viewers.[24] Petitioner notes that in order to qualify as a Class A station, Congress concluded that a station needed to provide at least 3 hours per week of programming produced within an LPTV station's Grade B contour.[25] TCI argues that Schrecongost is urging the Commission to act outside its scope of authority by suggesting that it apply the unrelated standards for establishing Class A television stations in the must carry context.[26] We need not reach this issue, however, because even if we were to accept Schrecongost's proposal, the programming information presented in this case was so generalized that we could not determine whether WLLS-LP would actually meet the 3-hour per week standard of Section 336 of the Act. The only evidence the station presented in this regard was a statement that it aired 3-4 hours of locally-produced programming and a list of the types of programming offered. The list included no information regarding the time period covered or the specific program aired. Further, it was not possible to determine if each program presented was new material or repeat programming.

11. Adelphia argues that Schrecongost has offered no evidence that full power stations do not adequately serve the communities at issue.[27] Adelphia states that, although it is not its burden to provide such proof, it submits numerous samples of programming aired by the stations carried on its cable systems.[28] Adelphia is in error in its assumption that it is the responsibility of the LPTV station to offer evidence that full power stations do not adequately serve the subject communities.[29] As the Bureau stated

[23]47 U.S.C. § 534(h)(2)(B).

[24]Application at 11.

[25]*Id.* at 10, citing 47 U.S.C. § 336(f)(2)(A).

[26]TCI Opposition at 5, citing Application at 4.

[27]Adelphia Opposition at 18.

[28]*Id.* at Exhibit D.

[29]We note that Adelphia claims that some of the communities it serves are located inside the largest 160 MSAs while others are located outside WLLS-LP's 35-mile zone, making the station ineligible for carriage in these communities. *See* 47 U.S.C. § 534(h)(2)(D). Although there appears to be some confusion as to the exact number of Adelphia communities at issue in this proceeding, it is uncontested that WLLS-LP would not be entitled to carriage on any cable system located wholly outside the station's 35-mile zone. With regard to the issue of communities located in counties within the 160 largest MSAs, the Commission has stated that where "the cable system is comprised of franchise areas both within and outside of the largest 160 MSAs . . . the cable operator is (continued....)

in *Frances S. Smith d/b/a NCN Cable Advertising v. Cable One, Inc.,* "once an LPTV station has demonstrated that it is providing locally-focused programming directed to the communities, the cable operator has the responsibility to show that the full-power stations carried by the cable system also provide locally-focused programming directed to the communities."[30]

12. Finally, we disagree with Adelphia's contention that the geographic proximity of full power stations defeats an LPTV station's must carry rights even where there is no full power station licensed to any community within the county served by the cable system.[31] Such an argument ignores the statute's focus on whether and how much local programming the LPTV station is providing to the LPTV station's community and whether the full power stations are providing similar programming. Adelphia's reading would render superfluous the language in the statute that expressly applies a geographic parameter to carriage of LPTV stations. Section 614(h)(2)(F) provides that a LPTV station is not entitled to mandatory carriage if there is a full power station licensed to any community within the county or other State subdivision served by the cable system.[32] For Section 614(h)(2)(F), it is irrelevant if the full power station licensed to the community is not providing locally-focused programming; such proximity is sufficient. If, in Section 614(h)(2)(B), we look only at the distance and ignore the local programming component, we would subvert the relevant emphasis of that section and create a potential conflict with Section 614(h)(2)(F).

13. Our decision herein is without prejudice to the future filing by WLLS-LP of a mandatory carriage complaint which adequately demonstrates that WLLS-LP is a qualified low power television station pursuant to Section 614(h)(2)(B) and we encourage Schrecongost to do so.[33] Such complaint should contain specific evidence, in accordance with our decision herein, that WLLS-LP provides programming that addresses local news and informational needs which are not being adequately served by full power television broadcast stations.

IV. ORDERING CLAUSES

14. Accordingly, **IT IS ORDERED**, pursuant to Section 614(h) of the Communications Act, as amended, 47 U.S.C. § 534, and Sections 76.61 and 1.115 of the Commission's rules, 47 C.F.R. §§ 76.61 and 1.115, that the application for review filed by Larry L. Schrecongost **IS DENIED.**

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

(...continued from previous page)
obligated . . . to carry [the station] in that portion of its system outside of the largest 160 MSAs." *See Joan and Kenneth Wright v. Cox Communications,* 14 FCC Rcd 2071, 2076 (1999).

[30] 18 FCC Rcd 9970, 9972 (2003).

[31] Adelphia Opposition at 18-19.

[32] 47 U.S.C. § 534(h)(2)(F).

[33] In this regard we note that a new election cycle has occurred since the filing of the original complaint.