

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

In the Matter of)	
)	
Michael Karr d/b/a WVUX-LD)	CSR-8964-M
)	MB Docket No. 18-274
v.)	
)	
DIRECTV, LLC and DISH Network LLC)	

MEMORANDUM OPINION AND ORDER

Adopted: June 20, 2020

Released: June 22, 2020

By the Commission:

I. INTRODUCTION

1. In this Memorandum Opinion and Order, we deny the Application for Review (AFR) filed by Michael Karr, owner and operator of Low Power Television Station WVUX-LD, Fairmont, West Virginia (WVUX-LD).¹ WVUX-LD seeks review of a Memorandum Opinion and Order (Order), adopted by the Media Bureau (Bureau) on delegated authority.² The Order denied WVUX-LD's Demand for Carriage (Complaint) and Petition for Declaratory Ruling (Petition). DIRECTV, LLC (DIRECTV) and DISH Network, LLC (DISH) filed a joint opposition to the AFR to which WVUX-LD replied.³ For the reasons discussed below, we affirm the Bureau's finding that because WVUX-LD is a low power television (LPTV) station, it is not entitled to satellite mandatory carriage and also find that its Complaint and Petition were properly denied by the Bureau. We therefore deny the AFR.

II. BACKGROUND

2. This matter addresses the carriage rights of LPTV stations under the different statutory regimes that Congress established with respect to carriage by cable operators and satellite providers. WVUX-LD filed a Petition for Declaratory Ruling Regarding Mandatory Satellite Carriage of a Qualified LPTV and Demand for Carriage against DIRECTV and DISH for their refusal to carry WVUX-LD on their satellite systems serving the Clarksburg-Weston Designated Market Area (DMA).⁴ WVUX-LD asserted that it is a "qualified low power station" that is currently carried on the local cable system. WVUX-LD sought mandatory carriage on the satellite systems of DIRECTV and DISH, but both carriers rejected the request on the basis that WVUX-LD is a LPTV station, which is not entitled to carriage on satellite systems.⁵ The Bureau rejected WVUX-LD's Demand for Carriage because an LPTV station is not entitled to mandatory carriage on satellite carriers' systems under section 338 of the Communications Act of 1934, as amended (Act).⁶ The Bureau also rejected the Petition for Declaratory Ruling because

¹ Application for Review of Michael Karr d/b/a WVUX-LD (filed Nov. 22, 2019).

² *In the Matter of Michael Karr d/b/a WVUX-LD*, Memorandum Opinion and Order, 34 FCC Rcd 9562 (MB 2019) (Order).

³ DIRECTV and DISH Joint Opposition filed December 9, 2019 (Opposition). WVUX-LD filed a reply to the Opposition on December 19, 2019 (Reply).

⁴ Order, 34 FCC Rcd at 9562, para. 1.

⁵ *Id.* at 9563, para. 3.

⁶ *Id.* at 9564, para 6 (citing 47 U.S.C. § 338).

LPTV stations have “absolutely no carriage rights” on satellite carriers’ systems under the clear statutory text, and, thus, there was no controversy or uncertainty to terminate.⁷

3. In its AFR, WVUX-LD tees up two questions for review: “(1) Whether Satellite Providers Must Carry Qualified Low Power Stations; and (2) Whether Satellite Providers are Entitled to Treat Must Carry Qualified Low Power Stations Differently Than Cable Providers Must Treat Them.”⁸ WVUX-LD reiterates its request for the Commission to issue a declaratory ruling that confirms its assertion that, as a qualified LPTV station under section 614 of Title VI of the Act, which governs cable systems,⁹ it is entitled to mandatory carriage under section 338 of Title III of the Act, which governs satellite systems, and the Commission’s rules.

4. In their Joint Opposition, DIRECTV and DISH contend that WVUX-LD fails to address the Bureau’s factual findings and conclusions of law.¹⁰ Furthermore, DIRECTV and DISH argue that WVUX-LD has failed to provide any Commission precedent that would support its assertion that the Bureau erred in its conclusion.¹¹ Because WVUX-LD offers no new arguments or legal support for the filing of its AFR, DIRECTV and DISH maintain that WVUX-LD fails to satisfy the Commission’s standards for prevailing in an application for review and the AFR must be denied.¹²

5. In reply, WVUX-LD asserts that although section 338(a)(1) indicates that LPTV and Class A stations do not have carriage rights, the statute does not explicitly mention “qualified low power stations”, and this omission should be viewed as evidence of Congress’ desire to exclude “qualified low power stations” from the carriage limitations of that section.¹³ According to WVUX-LD, for equality of treatment and clarification of the rights of qualified low power stations, the Commission should grant its AFR and order the relief sought.¹⁴

III. DISCUSSION

6. We deny the AFR because it fails to show any error in the Bureau’s analysis of the statute, Commission rules, relevant precedent, or policy. Accordingly, we uphold the staff decision for the reasons below.

7. Although WVUX-LD disagrees with the Bureau, it does not demonstrate the legal analysis in the Bureau’s Order was in error. WVUX-LD makes an unsupported assertion that “[t]he Order is in conflict with the statutes, rules and Commission policy which has not previously been resolved by the Commission.”¹⁵ However, as the Bureau’s Order explains, WVUX-LD “is not entitled to mandatory carriage on DIRECTV and DISH because an LPTV station is not entitled to mandatory carriage on satellite carriers under the Act.”¹⁶ As the Order further explains, section 338 limits mandatory

⁷ *Id.* at 9564-65, para. 7.

⁸ AFR at 1-2.

⁹ 47 U.S.C. § 534(h)(2) (defining the term “qualified low power station” to mean “any television broadcast station conforming to the rules established for Low Power Television Stations contained in part 74 of title 47, Code of Federal Regulations,” provided it satisfies certain additional statutory criteria relevant to cable carriage); *see also* 47 CFR 76.55(d) (defining “qualified low power station”).

¹⁰ Opposition at 2.

¹¹ *Id.*

¹² *Id.* at 3.

¹³ Reply at 2.

¹⁴ *Id.* at 2-3.

¹⁵ AFR at 2.

¹⁶ Order, 34 FCC Rcd at 9564, para. 6.

carriage on a satellite system to a “television broadcast station” and this term has the “meaning given such term in section 325(b)(7) of this title.”¹⁷ Section 325(b)(7), in turn, defines a “television broadcast station” as one that is “licensed ... under subpart E of part 73 of title 47, Code of Federal Regulations,” and explicitly provides that it “does not include a low-power or translator television station.”¹⁸ WVUX-LD, as a qualified low-power television station, is not licensed under subpart E of part 73 of title 47 of the Code of Federal Regulations; rather, it is licensed under subpart G of part 74 and must “conform [] to the rules established for Low Power Television Stations contained in part 74 of title 47, Code of Federal Regulations.”¹⁹ Although Title VI provides for cable carriage of “qualified” low power television stations in limited circumstances, there is no similar provision mandating carriage for low power stations in the Title III satellite context. We thus uphold the Bureau’s determination that “WVUX-LD’s status as an LPTV station is fatal to its request for satellite mandatory carriage” under the terms of the statute.²⁰

8. Further, WVUX-LD disregards the instances cited by the Bureau in which the Commission has clearly stated that LPTV stations do not have mandatory carriage rights on satellite providers, and fails to explain why the Bureau’s reliance on those decisions was in error.²¹ WVUX-LD also argues that “[t]here is no legitimate reason to treat cable providers and satellite carriers differently with regard to qualified low power television that could pass constitutional muster.”²² With respect to

¹⁷ 47 U.S.C. §§ 338(a)(1); 338(k)(10); *Implementation of the Satellite Home Viewer Improvement Act of 1999: Broadcast Signal Carriage Issues*, CS Docket No. 00-96, Notice of Proposed Rulemaking, 16 FCC Rcd 1918, 1976, para. 136 (2000); *Expanding the Economic and Innovation Opportunities of Spectrum through Incentive Auctions*, GN Docket No. 12-268, MB Docket No. 15-537, First Order on Reconsideration and Notice of Proposed Rulemaking, 30 FCC Rcd 6668, 6682, para. 37 (2015) (“A television broadcast station is defined as an over-the-air commercial or noncommercial television broadcast station licensed by the Commission. Low-power stations, including Class A stations, do not have DBS carriage rights.”); *Implementation of the Commercial Advertisement Loudness Mitigation (CALM) Act*, MB Docket No. 11-93, Notice of Proposed Rulemaking, 26 FCC Rcd 8281, 8287 para. 2(d)(1) (2011) (“the term television broadcast station has the meaning given such term in section 325 of the Communications Act of 1934 (47 USC 325).”).

¹⁸ 47 U.S.C. § 325(b)(7). The mandatory carriage rights of LPTV stations on cable systems, including the criteria for becoming “qualified,” are set forth in section 614(h)(2) of the Act. 47 U.S.C. § 534(h)(2); Order, 34 FCC Rcd at 9563, para. 2 (citing 47 U.S.C. § 534(h)(2)) (explaining that some LPTV stations have cable carriage rights and explaining that, under very narrow circumstances an LPTV station can become “qualified” and therefore eligible for mandatory carriage on a cable system if it meets certain statutory criteria); 47 CFR § 76.55(d).

¹⁹ 47 U.S.C. § 534(h)(2) (defining “Qualified Low Power Station” for the purposes of carriage on a cable system).

²⁰ Order, 34 FCC Rcd at 9564, para. 6.

²¹ *Id.* at 9564, n.18 (citing *Implementation of the Satellite Home Viewer Improvement Act of 1999, Broadcast Signal Carriage Issues*, CS Docket No. 00-96, Notice of Proposed Rulemaking, 15 FCC Rcd 12147, 12153-54, para. 12 (2000) (“Section 338(h)(7) [now Section 338(k)(10)] defines the term, television broadcast station, as having the meaning given such term in [s]ection 325(b)(7). Section 325(b)(7) defines television broadcast station, as an over-the-air commercial or noncommercial television broadcast station licensed by the Commission under subpart E of part 73 of title 47, Code of Federal Regulations, except that such term does not include a low-power or translator station” and noting that “unlike cable operators, satellite carriers have no obligation to carry low power stations in any instance”); *Innovation in the Television Broadcast Bands, Channel Sharing and Improvements to VHF*, ET Docket No. 10-235, Notice of Proposed Rulemaking, 25 FCC Rcd 16498, 16509, para. 33 (2010) (“[L]ow power broadcasters do not have DBS carriage rights.”). Further, WVUX-LD’s reliance on a statement in a General Accounting Office (GAO) report to Congress is equally unavailing. AFR at 8 (quoting GAO’s statement in its report that “Federal law requires cable and satellite operators to carry the signal of qualified LPTV stations serving their markets.”). The inaccurate statement in the GAO report does not override the statutory limitation that no low power television stations are entitled to insist on carriage by satellite carriers. *See* 47 U.S.C. §§ 325(b)(7); 338(a)(1); 338(k)(10).

²² AFR at 8.

mandatory carriage, however, Congress decided to treat satellite carriers differently than cable operators, as it has in many other instances based on the technical differences between the two systems.²³

9. We also reject WVUX-LD's argument that "qualified low power stations" do not fall within the statutory exclusion of section 338(a)(3) of the Act.²⁴ That provision, entitled "Low Power Station Carriage Optional," specifies that certain LPTV stations *do not* have satellite carriage rights. It states that "no low power television station whose signals are provided under section 119(a)(14) of title 17, United States Code, shall be entitled to insist on carriage under this section, regardless of whether the satellite carrier provides secondary transmissions of the primary transmissions of other stations in the same local market. . . ."²⁵ When section 338(a)(3) was added to the Act, Congress also added the following definition of "low power television station" as used in section 338(a)(3)—"a low power television station as defined under section 74.701(f) of title 47, Code of Federal Regulations, as in effect on June 1, 2004. For purposes of this paragraph, the term 'low power television station' includes a low power television station that has been accorded primary status as a Class A television licensee under section 73.6001(a) of title 47, Code of Federal Regulations."²⁶ This definition extends to WVUX-LD because a "qualified low power station," established under section 614(h)(2) of the Act,²⁷ by definition "conform[s] to the rules established for Low Power Television Stations contained in part 74 of title 47, Code of Federal Regulations."²⁸

10. WVUX-LD asserts that under the definition of "low power television station" used for purposes of section 338(a)(3), LPTV and Class A stations were specifically disqualified, while qualified low power stations were not.²⁹ WVUX-LD maintains, without further argument or support, that a "qualified" LPTV station was silently applied by Congress to the Title III satellite carriage context.³⁰ We

²³ Compare, e.g., 47 U.S.C. § 534(h)(1)(C) with 47 U.S.C. § 338(l)(3)(A) (unlike cable operators, satellite providers need not implement a market modification determined to be technically or economically infeasible); 47 U.S.C. § 534(a) with 47 U.S.C. § 338(a)(1) (cable operators must carry all local broadcast signals, whereas satellite providers need only carry local broadcasters when it provides local-into-local service in a market); 47 CFR § 76.64(f)(3) with 47 CFR § 76.66(d)(vii) (cable default for failure to elect carriage is mandatory carriage, whereas satellite default is retransmission consent).

²⁴ 47 U.S.C. § 338(a)(3); see also AFR at 6-7.

²⁵ 47 U.S.C. § 338(a)(3). Section 119 of the Copyright Act, enacted as part of the Satellite Home Viewer Act (SHVA) of 1988, Pub.L. 100-667, 102 Stat. 3935 (1988), provides a statutory license for satellite television providers retransmitting out-of-market or "distant" signals. 17 U.S.C. § 119. Section 119(a)(14) of the Copyright Act, 17 U.S.C. § 119(a)(14), was enacted in the Satellite Home Viewer Extension and Reauthorization Act of 2004 (SHVERA), P.L. 108-447, 118 Stat. 2809, 3400 (2004), as part of the provisions governing a satellite carriers' compulsory copyright license to carry distant signals. The Satellite Television Extension and Localism Act of 2010 (STELA), P.L. 111-175, 124 Stat. 1218, 1223-24 (2010), renumbered section 119(a)(14) of the Copyright Act to section 119(a)(13). Subsequently, the Further Consolidated Appropriations Act of 2020, P.L. 116-94, 133 Stat. 2534, 3202 (2019), repealed section 119(a)(13) (formerly 119(a)(14)). There was no conforming amendment made to section 338(a)(3) of the Communications Act, which continues to refer to "section 119(a)(14) of title 17, United States Code." See 47 U.S.C. § 338(a)(3). Thus, WVUX-LD's argument fails for the additional reason that the provision on which it relies now includes a cross-reference to a statutory provision that has recently been repealed.

²⁶ 47 U.S.C. § 338(k)(5); see also SHVERA, P.L. 108-447, 118 Stat. 2809, 3415-16. The definition of "low power TV station" contained in Section 74.701(f) was adopted in 1982 and remains unchanged. See 47 FR 21468-01, 21497 (1982).

²⁷ 47 U.S.C. § 534(h)(2).

²⁸ *Id.*

²⁹ Reply at 2.

³⁰ See AFR at 6 ("The fact that qualified low power stations are not mentioned in Section 338 must be a deliberate omission....").

find no indication supporting WVUX-LD's view in the language of section 338 (which does not differentiate for purposes of the must carry exclusion between "qualified" LPTV stations that exists solely in the Title VI cable context, and other LPTV stations as defined by Commission rule) or the legislative history. WVUX-LD attempts to create mutually exclusive categories where none were recognized by Congress. In any event, whether or not WVUX-LD falls within the specific exclusion from satellite must carry rights in section 338(a)(3), it is not entitled to mandatory carriage rights under section 338(a)(1) because, as explained above, it is not a "television broadcast station" as defined by the Act.³¹ Nor has WVUX-LD cited any other statutory provision affording it a right to carriage by satellite providers.

11. Finally, WVUX-LD's assertion that the Commission has authority to order carriage of "qualified" LPTV stations by satellite providers pursuant to section 338(f) of the Act is equally unsupported.³² Section 338(f) of the Act authorizes the Commission to adjudicate complaints that a satellite provider has failed in its obligation to carry a broadcaster entitled to carriage by that satellite provider.³³ As the Bureau's Order clearly explained, and as we affirm herein, Congress did not create a distinction for "qualified" LPTV stations in the satellite carrier context. Accordingly, WVUX-LD is not entitled to remedial action authorized under section 338(f).³⁴

12. Upon review of the entire record and finding no basis in the AFR to modify the Bureau's Order, we conclude that WVUX-LD has failed to demonstrate that the Bureau erred. We thus uphold the Bureau's decision for the reasons stated in the Order.

IV. ORDERING CLAUSE

13. **ACCORDINGLY, IT IS ORDERED** that, pursuant to section 5(c)(5) of the Communications Act of 1934, as amended, 47 U.S.C. § 155(c)(5), and section 1.115(b) of the Commission's rules, 47 CFR § 1.115(b), the Application for Review of WVUX-LD, Fairmont, West Virginia, **IS DENIED**.

14. **IT IS FURTHER ORDERED** that, should no petitions for reconsideration or petitions for judicial review be timely filed, MB Docket No. 18-274 **SHALL BE TERMINATED**, and its docket closed.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

³¹ 47 U.S.C. §§ 325(b)(7); 338(a)(1); 338(k)(10).

³² Reply at 3.

³³ 47 U.S.C. § 338(f).

³⁴ WVUX-LD's remaining arguments are equally unavailing. WVUX-LD restates the following three policy arguments from the Complaint and Petition: 1) local options for public viewers who subscribe to satellite will be limited if must carry rules do not apply to satellite carriers, especially in rural areas like the Clarksburg-Weston DMA; 2) not being carried on DBS will harm Nielsen ratings; 3) if the must-carry rule do not apply to satellite carriers, then the satellite industry will decide the carriage criteria rather than the Commission. AFR at 2, 9. These policy arguments cannot overcome the statutory requirements of section 338 and our implementing rules. WVUX-LD also argues that it is not technically infeasible for Dish and DIRECTV to carry its station, based upon the filings made in another proceeding. *See Monongalia County, West Virginia and Preston County, West Virginia, Petitions for Modification of the Satellite Television Markets of WDTV, Weston, West Virginia, and WBOY-TV and WVFX, Clarksburg, West Virginia*, Memorandum Opinion and Order, DA 18-113 (MB, 2018). Because we find that WVUX-LD is not entitled to carriage, we need not reach the issue of technical feasibility.