

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

In the matter of:
Dan Reynolds
v.
TCA Cable Partners d/b/a Cox Communications
Request for Carriage
CSR-6230-M

MEMORANDUM OPINION AND ORDER

Adopted: December 22, 2003

Released: December 23, 2003

By the Deputy Chief, Policy Division, Media Bureau:

I. INTRODUCTION

1. Dan Reynolds, licensee of low power television station K07XL, Mountain Home, Arkansas ("Reynolds") filed the above-captioned complaint against TCA Cable Partners d/b/a Cox Communications ("Cox") for its failure to carry K07XL on Cox's cable system serving Mountain Home, Arkansas. Cox filed a motion to dismiss the complaint and an opposition to which Reynolds replied. Cox also filed a motion to file a supplemental pleading to which Reynolds replied.

2. Cox contends in its first motion that the complaint should be dismissed, pursuant to Section 76.7 of the Commission's rules, because Reynolds has failed to satisfy governing statutory and regulatory prerequisites and therefore has failed to invoke the Commission's jurisdiction. As discussed below, we disagree with Cox's arguments regarding Reynolds' procedural compliance, and accordingly deny Cox's motion to dismiss. Cox also filed a motion to file a supplemental opposition, pursuant to Sections 76.7(c)(1) and 76.7(d) of the Commission's rules. Cox's motion is based on the "discovery" that the station "may not be in compliance" with the Commission's rules regarding interference applicable to low power television stations. Section 76.7(c)(1) applies to reply comments in the normal pleading cycle, as opposed to the instant supplemental pleading. Section 76.7(d) permits the filing of additional pleadings "upon a showing of extraordinary circumstances." We do not find such a showing here. Cox's motion is based on information which is speculative and conclusory in regard to the alleged interference. Cox has neither established in its motion that the issue could not have been addressed in the normal pleading cycle, nor justified that there is any substantive basis for the allegation of interference. Accordingly, Cox's motion to file a supplemental pleading in this matter is denied. For the reasons

1 47 C.F.R. § 76.7.

2 47 C.F.R. §§ 76.7(c)(1), 76.7(d).

3 Motion to File Additional Pleading at 1. See 47 U.S.C. § 534(h)(2)(C), 47 C.F.R. 76.55(d)(3).

4 47 C.F.R. § 76.7(d).

5 We also note that Cox has provided no evidence of correspondence to either Reynolds or the Commission regarding Cox's claim of interference.

discussed below, we grant Reynolds' complaint.

## II. BACKGROUND

3. Both the Communications Act of 1934, as amended, and the Commission's rules require the carriage of "qualified" low power television ("LPTV") stations in certain limited circumstances.<sup>6</sup> An LPTV station that conforms to the rules established for LPTV stations in Part 74 of the Commission's rules will be considered "qualified" if: (1) it broadcasts at least the minimum number of hours required pursuant to 47 C.F.R. Part 73; (2) it adheres to Commission requirements regarding non-entertainment programming and employment practices, and the Commission determines that the programming of the LPTV station addresses local news and informational needs that 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) it complies with interference regulations consistent with its secondary status; (4) it is located no more than 35 miles from the cable system's headend and delivers to the principal headend an over-the-air signal of good quality; (5) the community of license of the station and the franchise area of the cable system were both located outside the largest 160 Metropolitan Statistical Areas ("MSAs") on June 30, 1990, and the population of such community of license on that date did not exceed 35,000;<sup>7</sup> and (6) there is no full power television broadcast station licensed to any community within the county or other political subdivision (of a State) served by the cable system.<sup>8</sup>

## III. DISCUSSION

4. In support of his complaint, Reynolds states that the station has been on the air on a full-time basis since July 15, 2003, and satisfies the criteria for low power television stations set forth in Section 76.55 of the Commission's rules.<sup>9</sup> Specifically, Reynolds states that: (1) the station broadcasts 24 hours a day; (2) the station meets all of the obligations applicable to full power television stations under Part 73 of the Commission's rules, and broadcasts programming that addresses local news and informational needs of the area; (3) the station complies with the interference regulations required under Part 74 of the Commission's rules; (4) the station is located no more than 35 miles from Cox's principal headend for Mountain Home, Arkansas and delivers a good quality over-the-air signal to the headend; (5) Mountain Home, K07XL's city of license, and the franchise area of the cable system are both located outside of the largest 160 metropolitan statistical areas, and the population of Mountain Home, the only community located in Baxter County, did not exceed 35,000 on June 30, 1990; and (6) there are no full-power television broadcast stations licensed to any community within Baxter County.<sup>10</sup>

5. Reynolds states that on May 21, 2003, the station sent a letter to Cox requesting carriage on the system.<sup>11</sup> The letter informed Cox that the station would begin broadcasting "within the next 30 days," discussed signal strength issues, and requested placement on the lower tier of channels on the

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<sup>6</sup>47 U.S.C. § 534(c)(1); 47 C.F.R. § 76.56(b)(3).

<sup>7</sup>Data on Metropolitan Statistical Areas and population figures for the community of license are determined by the Office of Management and Budget as of June 30, 1990.

<sup>8</sup>47 U.S.C. § 534(h)(2); 47 C.F.R. § 76.55(d).

<sup>9</sup> Petition at 2-4.

<sup>10</sup>*Id.* at 1-2.

<sup>11</sup> *Id.* at 5, Exhibit D.

system. On June 16, 2003, Cox rejected the station's request.<sup>12</sup> On July 18, 2003, the station informed Cox it had begun broadcasting on July 15, 2003, and requested reconsideration of Cox's denial of mandatory carriage.<sup>13</sup> Reynolds states that the station provides the only local television programming to Mountain Home and broadcasts substantial local informational and public affairs programming<sup>14</sup> not adequately represented by the full power broadcast stations carried on the cable system.<sup>15</sup>

6. In response, Cox filed a Motion to Dismiss and Opposition to Mandatory Carriage Complaint ("Opposition"). Cox contends that the complaint should be dismissed based on Reynolds' failure to comply with statutory and Commission requirements. Specifically, Cox contends that Reynolds' May 21, 2003 letter was no more than an initial must carry election, filed approximately sixty days prior to the date that the station began broadcasting.<sup>16</sup> Cox argues that the system's response to the election notice has no bearing on the Commission's procedures for must carry complaints.<sup>17</sup> Cox continues that the Commission's rules state that a new station cannot acquire mandatory carriage rights earlier than ninety days after its initial election notice.<sup>18</sup> Accordingly, Cox contends that Reynolds could not have obtained must carry rights until August 19, 2003, four days after the filing date of the complaint.<sup>19</sup> Cox continues that Section 614(d)(1) of the Act<sup>20</sup> establishes two prerequisites before any carriage complaint can be submitted to the Commission. First, the broadcaster must notify the cable operator of the alleged failure to comply with the must carry rules and identify its reasons for believing that the operator is obligated to carry the signal. Second, the broadcaster must afford the cable operator thirty days to respond to the demand for carriage.<sup>21</sup> Cox contends that Reynolds did not comply with these prerequisites, although Cox does not state with specificity what event should have triggered the thirty day period in which the cable operator had to respond. Cox also contends that Reynolds never cited Section 76.61 of the rules in any correspondence.<sup>22</sup> Accordingly, Cox argues that the complaint should be dismissed on procedural grounds.

7. Cox argues that even if the Commission does not dismiss the complaint on procedural grounds, Reynolds has not established that the station is entitled to mandatory carriage rights. Cox contends that the station has not satisfied the programming standards applicable to low power stations. Cox argues that the station provides only two examples of local programming, "Community Focus" and "Bulletin Board." Cox argues that Reynolds has failed to provide any programming logs or other

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<sup>12</sup> *Id.* at Exhibit E. In that letter, Cox's Vice President of System Operations for the Arkansas region stated, "As you know, there is no must carry obligation for low-power television stations. At this time, we respectfully decline your request for carriage."

<sup>13</sup> *Id.* at Exhibit F.

<sup>14</sup> Reynolds cites the half-hour program "Community Focus," broadcast four times a day (6 days a week), which presents area people, local events and topics "that effect the lives of those who live in the Mountain Home area." *Id.* at 3. In addition, Reynolds cites a station "Bulletin Board", broadcast 13.5 hours a week, which consists of text messages that change every 20-30 seconds about local events, non-profit fund-raising events, public service organization contact information and local public service announcements. *Id.* at 3, Exhibit A.

<sup>15</sup> *Id.* at 3.

<sup>16</sup> Opposition at 2.

<sup>17</sup> *Id.* at 7, citing *Acadiana Cable Advertising, Inc.*, 18 FCC Rcd 6506 at para. 4 (2003).

<sup>18</sup> *Id.* at 4.

<sup>19</sup> *Id.* at 6.

<sup>20</sup> 47 U.S.C. § 534(d)(1).

<sup>21</sup> Opposition at 4, citing 47 U.S.C. § 534(d)(1).

<sup>22</sup> *Id.* at 5.

evidence to establish that “Community Focus” is bona fide local programming.<sup>23</sup> Cox also contends that the “Bulletin Board” programming does not qualify as a “program service” that may be counted in assessing the station’s compliance with low power station requirements, as “Bulletin Board” consists of nothing more than still pictures accompanied by unrelated audio.<sup>24</sup> In addition, Cox argues that the station remains unqualified for carriage because the eleven full power stations carried on the system more than adequately serve the community’s local news and information needs.<sup>25</sup>

8. In its Reply to Motion to Dismiss and To Opposition to Mandatory Carriage Complaint (“Reply”), Reynolds argues that the Commission has no basis on which to dismiss the complaint. Reynolds states that there is no requirement in Section 76.61 of the Commission’s rules that a broadcaster explicitly note the rule section in a must carry demand.<sup>26</sup> Reynolds also contests Cox’s suggestion that only program logs will suffice in qualifying the bona fides of local programming. Reynolds argues that the program schedule supplied in the complaint performs the same evidentiary function as program logs, and that the program descriptions and schedule information are similar to those provided by other low power stations in similar Commission proceedings.<sup>27</sup> Reynolds states that the format of “Bulletin Board” has been modified so that the text of the local announcements is now continually moving and the aural transmissions are related, in that they are a vocal reading of the text on the screen, satisfying the *Lankenau* test.<sup>28</sup> Reynolds argues that although the station began broadcasting with sufficient local programming to satisfy the standard for low power stations, it is normal for new stations to incrementally add locally produced programming and the station has done so.<sup>29</sup> In addition to “Community Focus” and “Bulletin Board,” the station has added two new regularly scheduled programs that provide local information and local sports programming: “The Court Show,” which covers civil and criminal cases from the Baxter County court system;<sup>30</sup> and “The Shane Patrick Show,” a weekly, one hour highlight show that features the Mountain Home High School football coach discussing the team’s previous game.<sup>31</sup> The station plans a similar program for the basketball season, featuring the Mountain Home High School basketball coach.

9. Reynolds contends in its Reply that Cox’s claim that eleven full power stations provide 120 hours of local programming tailored to meet the local information needs of Mountain Home viewers is “almost entirely unsupported puffery.”<sup>32</sup> Reynolds argues that only one of the stations provides some

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<sup>23</sup> *Id.* at 9.

<sup>24</sup> *Id.* at 11, citing 47 C.F.R. § 73.1740(2)(iii); *cf. Lankenau Small Media Network, Inc.*, 13 FCC Rcd 4497, in which the former Cable Services Bureau held that continuously moving text weather and news announcements accompanied by aural transmissions that were related to the visual broadcasts constitutes programming under Section 73.1740(2)(iii) of the rules. Cox argues that “Bulletin Board” fails the *Lankenau* test.

<sup>25</sup> *Id.* at 12-14.

<sup>26</sup> Reply at 3.

<sup>27</sup> *Id.* at 8, citing *Complaint of Vision 3 Broadcasting*, 14 FCC Rcd 20632 (1999).

<sup>28</sup> *See supra* n. 24 (discussing the *Lankenau* decision).

<sup>29</sup> *Id.* at 12.

<sup>30</sup> “The Court Show” commenced broadcasting on September 20, 2003 and runs on Mondays at 7:00 p.m., Wednesdays at 11:00p.m., Fridays at 7:00p.m. and 11:00 p.m., and Sundays at 2:00 a.m. *Id.* at 13.

<sup>31</sup> Broadcast of “The Shane Patrick Show” commenced on September 11, 2003, and the program airs on Thursdays at 4:00, 7:00 and 11:00 p.m., and Fridays at 4:00 p.m. *Id.*

<sup>32</sup> *Id.* at 14-15. Reynolds contends that Cox provides no program schedules or local program information for 2 of the stations (KWBS and KWBM); that three of the stations (KTHV, KARK, and KATV), are located in Little Rock, Arkansas, more than 100 miles from Mountain Home and in a different market; and that five of the stations are licensed to Springfield, Missouri, 80 miles from Mountain Home and in a different state. Reynolds argues that Cox

(continued...)

news reports regarding events in Mountain Home or Baxter County, but that these reports are “obviously randomly event-driven, and the few total minutes of such news reports are not a substitute for *regularly-scheduled* local informational programming broadcast on the Station.”<sup>33</sup>

10. We find that Cox’s procedural arguments lack merit. First, we disagree with Cox’s contention that a new station must wait 90 days (when the election of must carry becomes effective) before filing a must carry complaint. As the Commission has stated, a must carry complaint must be filed within 60 days of an “affirmative action” by a cable operator which directly affects the rights and interests of the station.<sup>34</sup> Here, Reynold’s letter dated May 21, 2003 served both as an election of must carry and a demand for carriage.<sup>35</sup> Contrary to Cox’s assertions, Section 76.61 of the Commission’s rules does not require the station to explicitly mention the rule section in correspondence with the cable operator.<sup>36</sup> Cox responded to Reynold’s letter on June 16, 2003 and denied the station’s request for carriage.<sup>37</sup> The content of Cox’s letter indicates that Cox considered Reynold’s May 21 letter to be a demand for carriage and acted accordingly, albeit with information that is incorrect with regard to carriage rights of low-power television stations. Cox’s letter of May 21 is clearly an “affirmative action” affecting the rights and interests of the station. Once this affirmative act occurred, Reynolds had grounds to file a complaint with the Commission.<sup>38</sup> Even if we were to consider Reynold’s May 21 letter as an election letter and not a demand for carriage, it is clear that the parties have raised arguments relative to the must carry status of the station on Cox’s cable system, and as such, we would, in any event, have treated this as a formal must carry complaint and would not dismiss Reynold’s complaint as untimely filed.<sup>39</sup>

11. We also find Cox’s arguments regarding program content to be without merit. We find that Reynolds’ has adequately described “Community Focus” as a regularly scheduled program addressing the needs of local residents, and has supplied documentation in the form of program schedules.<sup>40</sup> In addition, Reynolds has substantiated that “Bulletin Board” conforms to the *Lankenau* standard, and cannot be excluded in analyzing local programming broadcast on the station. Further, we agree that a new station may be expected to add new programming as it moves forward, and Reynolds has established that it has added several more programs of local interest. We also find that, of the full power stations carried by the cable system, only one station, KYTV, has provided random news stories about Mountain Home. This sporadic coverage does not establish that the cable system is providing

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provides no specific information about these 10 stations regarding programming addressing the local informational needs of Mountain Home viewers.

<sup>33</sup> *Id.* at 15 (emphasis in original).

<sup>34</sup> See 47 C.F.R. § 76.7(a)(4)(iii); *Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, 8 FCC Rcd 2965, 2995 (1993).

<sup>35</sup> Reynolds letter clearly is an election of must-carry in that it is the first correspondence with the cable operator and states, “We are formally writing this official request for ‘Must-Carry’ on the Cox cable system” serving Mountain Home. In addition, the letter also discusses issues associated with a demand for carriage. Specifically, the letter addresses signal strength issues and informs Cox that if the station’s signal “happens to be unacceptable to your specifications, we will provide you with a receiving antenna tuned specifically to channel 7 to receive a proper signal.” The letter also requests the station to be placed on the lower tier of channels on the system within 45 days of the station’s “launch date as set out by FCC regulations.” Petition at Exhibit D.

<sup>36</sup> See 47 C.F.R. § 76.61.

<sup>37</sup> Petition at Exhibit E.

<sup>38</sup> See *Johnson Broadcasting, Inc.* 9 FCC Rcd 3574 (1994).

<sup>39</sup> See *Frances S. Smith*, 18 FCC Rcd 9970 (2003).

<sup>40</sup> Petition at Exhibit A.

programming of local interest sufficient to deny carriage of K07XL.

#### IV. ORDERING CLAUSES

12. Accordingly, **IT IS ORDERED**, pursuant to Section 614 of the Communications Act of 1934, as amended, 47 U.S.C. § 534, and Sections 76.55(d) and 76.56(b)(3) of the Commission's rules, 47 C.F.R. §§ 76.55(d), 76.56(b)(3), that the complaint filed by Dan Reynolds **IS GRANTED**. TCA Cable Partners d/b/a Cox Communications **IS ORDERED** to commence carriage of K07XL within sixty (60) days of the release date of this order.

13. **IT IS FURTHER ORDERED** that K07XL shall notify TCA Cable Partners d/b/a Cox Communications, in writing, of its channel position election within thirty (30) days of the release date of this order, pursuant to Sections 76.57 and 76.64(f) of the Commission's rules, 47 C.F.R. §§ 76.57, 76.64(f).

14. **IT IS FURTHER ORDERED** that the Motion to Dismiss and Motion to File Additional Pleadings, filed by TCA Cable Partners d/b/a Cox Communications, **ARE DENIED**.

15. This action is taken pursuant to authority delegated by Section 0.283 of the Commission's rules.<sup>41</sup>

FEDERAL COMMUNICATIONS COMMISSION

Steven A. Broeckaert  
Deputy Chief, Policy Division  
Media Bureau

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<sup>41</sup>47 C.F.R. § 0.283.