

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

In re:

Complaints of Maine Public
Broadcasting Corporation
against A-R Cable Services
d/b/a Cablevision

CSR 4398-M

Petitions for Declaratory Ruling and
Requests for Carriage

MEMORANDUM OPINION AND ORDER

Adopted: September 15, 1995; Released: September 15, 1995

By the Commission:

INTRODUCTION

1. A-R Cable Services - ME, Inc. d/b/a Cablevision (hereinafter "Cablevision") has filed an "Application for Review" requesting that the Commission reverse an action taken pursuant to delegated authority by the Cable Services Bureau in *Memorandum Opinion and Order*, DA 95-192, released March 7, 1995.¹ Maine Public Broadcasting Corporation ("MPBC"), licensee of translator station W39BQ, Lewiston, Maine, filed an opposition to the Application for Review to which Cablevision filed a reply. In their pleadings, the parties raise three substantive issues: (1) whether W39BQ is a low power television station or a translator station; (2) whether government-ordered carriage of W39BQ abridges Cablevision's First Amendment rights; and (3) whether mandatory carriage causes irreparable injury.

2. In the referenced *Memorandum Opinion and Order*, the Cable Services Bureau found that W39BQ was a qualified noncommercial educational translator television station² and, based upon the facts presented, was entitled to assert signal carriage rights on Cablevision's Lewiston, Maine cable systems. Cablevision was required to commence carriage of W39BQ's signal within 45 days of the release date of the *Order*.

¹ Cablevision also filed an "Emergency Petition for Stay" requesting that the Commission temporarily stay enforcement of the Bureau's order. Maine Public Broadcasting Corporation opposed this request. However, this petition was subsequently withdrawn by the operator shortly after the official pleading cycle came to a close.

² See 47 C.F.R. §76.55(a)(1)-(3).

³ We note that Cablevision has filed a petition with the federal district court in Maine seeking a temporary restraining order ("TRO") to prevent the enforcement of the Cable Service Bureau's *Memorandum Opinion and Order*. *A-R Cable Services Me Inc., dba Cablevision v. FCC* (filed April 21, 1995). On May 10, 1995, the Court, by order of U.S. District Court Judge D. Brock Hornby, denied Cablevision's request for a TRO. See *A-R Cable*

SUMMARY OF PLEADINGS

3. Cablevision asks the Commission to reverse the requirement that it commence carriage of W39BQ on Cablevision's cable systems serving Lewiston, Auburn, Sabattus, the Lisbons, Oxford and Mechanic Falls, Maine (the "Lewiston Systems").³ Cablevision argues that there are two reasons why the Bureau's decision was incorrect. First, the operator claims the Bureau erred in finding that W39BQ is a qualified noncommercial translator station that is entitled to carriage on the Lewiston Systems. Cablevision asserts that W39BQ is licensed as a low power television station and not as a translator station and argues that stations that are licensed as LPTV facilities but operate merely as translators do not qualify for mandatory carriage under Section 615 of the 1992 Cable Act because they are not "qualified" noncommercial educational stations. In support of this proposition, Cablevision cites a portion of the legislative history of Section 615 which states that a noncommercial educational translator "must deliver an adequate signal under subsection (g)(4) of this section and cannot be licensed as a low power television station under the Commission's Rules."⁴ Cablevision argues in the alternative, that the *Memorandum Opinion and Order* should be modified to provide that W39BQ may not assert mandatory carriage rights until the next election cycle⁵ because the station elected to assert must carry rights upon December 3, 1993, as an LPTV station rather than a translator facility. The operator asserts that W39BQ elected to operate as a translator for the purpose of asserting its signal carriage rights and that such "manipulation" of the signal carriage rules should not be "countenanced" particularly where it would cause harm to the cable operator.

4. Second, Cablevision argues that a substantial question currently exists as to whether the must carry provisions will be found constitutional upon remand in the *Turner* case.⁶ The operator also maintains that even if the must carry requirements are deemed constitutional in *Turner*, they would violate Cablevision's First Amendment rights as applied in this case. Cablevision argues that compelling Cablevision to transmit the signal of W39BQ on the Lewiston Systems "will impair its First Amendment rights by reducing the number of cable channels over which it may exercise unfettered editorial discretion to select the mix of programming to be carried on the systems." Cablevision asserts that it should not have to bear the significant expense and disruption of services associated with adding W39BQ to the Lewiston Systems absent a final determination in the *Turner* case.

5. In relation to its constitutional claim, the operator also argues that the public interest would not be served by forcing it to carry W39BQ because the station is not quali-

Services-Me., Inc. v. FCC, Civ. No. 95-159-P-H (D. Me. May 10, 1995). In the same order, Judge Hornby noted that Chief Judge Torruella had convened a three judge court to hear the merits of Cablevision's substantive claims.

⁴ H.R. Rep. No. 102-628, 102d Cong., 2d Sess. at 104 (1992).

⁵ The election cycle Cablevision ostensibly refers to is found at 47 C.F.R. §76.64(f)(1)-(5). This section of the Commission's rules requires commercial television stations to make elections between retransmission consent and must carry according to a specific schedule. The first election must have been made by June 17, 1993 and the next election must be made by October 1, 1996.

⁶ See *Turner Broadcasting System, Inc. v. FCC*, 114 S. Ct. 2445 (1994).

fied for carriage and MPBC already has a voice on the Lewiston systems through its licensee, WCB, another full power noncommercial educational broadcast station. Moreover, granting the requested relief will not harm W39BQ because there has been no evidence presented to suggest that the station is in financial jeopardy and in need of carriage on the Lewiston Systems. Finally, Cablevision submits that MPBC is using "LPTV station" W39BQ to expand the coverage area of its non-local licensee WMEA into a region beyond that which it would ordinarily serve. According to the operator, this is neither permitted by the must carry provisions nor appropriate under the First Amendment.

6. Cablevision also contends that equitable considerations merit deferral of MPBC's carriage demands. The operator states that if it were forced to comply with the Bureau's order, it would be required to delete another programming service because the Lewiston Systems are completely "channel locked" and have no capacity to add new programming services. However, in a subsequent filing, Cablevision indicates that a portion of the Lewiston system served from a separate headend (Mechanic Falls) "has some excess channel capacity and would not have to delete programming in order to add W39BQ to its line-up." With respect to the other operations, according to Cablevision, the addition of W39BQ would cause potentially significant financial losses, subscriber disruption, and loss of goodwill in the community at a time when it is facing new competition. Cablevision asserts that if it had to delete Lifetime, or any other cable programming service, it would incur approximately \$6,500 in immediate out-of-pocket expenses associated with the purchase of necessary equipment and publicizing its revised channel line-up. Cablevision maintains that this figure will increase by about \$6,500 if Cablevision is forced to notify customers about the channel realignment through a separate mailing rather than as part of its regular monthly billing process. Moreover, other financial losses would almost certainly be sustained depending upon which programming service were deleted. Cablevision states that it would lose approximately \$44,000 per year due to subscriber "churn" and approximately \$50,000 per year from lost advertising revenue. In addition, Cablevision argues that its subscribers would be subject to much confusion due to further channel restructuring if it had to restore a deleted channel.

7. Maine Public Broadcasting Corporation, in its opposition to Cablevision's Application for Review, asserts that the Bureau's decision was correct. MPBC first argues that Cablevision's claim concerning W39BQ's status is inaccurate because the station's legal status is defined by the nature of its programming, not, as the operator believes, by the station's original application or authorization. MPBC maintains that W39BQ qualifies as a translator under applicable Commission rules because it only retransmits the programming of WMEA and does not originate any programming. Moreover, the Commission clearly recognizes W39BQ as a translator station. MPBC, in this regard, references a September 2, 1994 letter from the Chief, Low Power Television Branch, Video Services Division, Mass Media Bureau, Federal Communications Commission. That letter specifically states that the Commission recognizes

station W39BQ as a television translator station. MPBC also claims that Cablevision's constitutional arguments are without merit because the Supreme Court did not stay the must carry provisions of the Cable Television Consumer Protection and Competition Act of 1992 (the "1992 Cable Act")⁷ or the Commission's rules. MPBC also opposes Cablevision's request that the *Order* be modified to provide that W39BQ may not assert carriage rights until the next election cycle arguing that the must carry election cycle applies only to commercial stations choosing between signal carriage and retransmission consent and not to noncommercial educational stations like W39BQ which do not have that option. Taken together, MPBC argues, these factors make it unlikely that Cablevision will prevail on the merits and that the matter was correctly decided by the Bureau in its original decision.

8. MPBC also argues that Cablevision fails to show it will incur irreparable injury. MPBC states that the financial losses Cablevision asserts might happen if it had to delete a cable programming channel, such as Lifetime, is not sufficiently documented and therefore such losses are speculative and conjectural. Moreover, Cablevision neglects to show how the deletion of some other programming service would fail in minimizing its financial losses. MPBC also argues that grant of the Application for Review will have a detrimental impact on W39BQ. MPBC asserts that the station has been entitled to carriage since its February 23, 1994, conversion to TV translator status and consequently has lost, and continues to lose, immeasurable viewer support as a result of Cablevision's delays in commencing carriage. Finally, MPBC claims that the public interest would be "substantially harmed" because cable subscribers in the Lewiston service area would be deprived of access to W39BQ's "unique and valuable" noncommercial educational programming.

9. Cablevision's reply contains essentially the same definitional and constitutional arguments that it presented in its Application for Review. However, the operator also contends that not only is W39BQ licensed as an LPTV station, it also is being operated as one. Cablevision explains that on May 26, 1994, more than a month before MPBC asserted signal carriage rights on the Lewiston systems, it asked the Commission for authority to feed programming directly from its Lewiston studio to W39BQ's transmitter site, rather than receiving WMEA's signal directly off-the-air. Cablevision further states that W39BQ admitted that "this type of signal delivery is not permitted for TV translators and would convert the station[] into [an] LPTV station[]." Cablevision makes reference to MPBC's literal interpretation of Sections 74.701 and 74.731 of the Commission's rules where the licensee seems to believe that a station that receives direct programming feeds from the studio "is deemed to be [engaging in] program origination which renders the receiving Part 74 station an LPTV station."⁸ The operator continues to argue that MPBC asked for permission to "retain" its status as translator because it recognized that such a conversion "would negate its attempts to achieve mandatory carriage on the Lewiston systems." Cablevision also argues that the Commission's rules allow a translator to convert to an LPTV station upon proper notification under 47 C.F.R. §74.732(e) but neither

⁷ Pub. L. No. 102-385, 106 Stat. 1460 (1992).

⁸ See Request of MPBC for Permission to Use Alternative Signal Delivery Method for TV Translator Stations W30BF.

Orrington [Bangor], Maine and W39BQ, Lewiston, Maine, filed May 26, 1994 ("Alternative Signal Delivery request") at 2. (Copy attached to Reply as Exhibit 1.)

this provision nor any other rule explicitly allows an LPTV station to convert its status to that of a translator. Cablevision also notes that MPBC's alternative signal delivery request suggests that if W39BQ retained the signal delivery method required of translator stations, it may not have been able to provide the Lewiston systems with the requisite good quality signal and therefore would not qualify for carriage. Cablevision concludes that these arguments demonstrate that W39BQ is not entitled to mandatory carriage rights and that the Bureau's decision should be reversed.

DISCUSSION

10. We will deny Cablevision's Application for Review and conclude that no grounds exist for reversing the Bureau's decision. We first note that Cablevision did not previously make the argument that W39BQ's license as an LPTV station was the reason that it is not a qualified translator station. Indeed, in its opposition of December 13, 1994, Cablevision makes specific reference to W39BQ as a translator station and states that "Cablevision has reviewed the signal of W39BQ and has confirmed that the station currently is being operated to translate the signal of WMEA-TV." Section 1.115(c) of the rules, which governs applications for review of actions taken pursuant to delegated authority, provides that "No application for review will be granted if it relies on questions of fact or law upon which the designated authority has been afforded no opportunity to pass." Cablevision has made no effort to satisfy this requirement and its petition, insofar as it relies on such facts or arguments, will be denied consistent with the requirements of these rules. For the purpose of industry guidance, however, we set forth below our analysis of the applicable statutory and rules provisions.

11. Turning to the merits of the Applicant's case, Cablevision essentially argues that the Bureau has misapplied the noncommercial carriage provisions of the 1992 Cable Act and the rules. Under Section 615 of the 1992 Cable Act, cable television operators are obliged to carry the signals of "qualified" noncommercial educational television stations. Section 615(l)(1), in turn, defines the term "qualified" to include "the translator of any noncommercial educational television station with five watts or higher power serving the franchise area." Cablevision contends that W39BQ is now, or was on some critical date, a low power television station rather than a translator station and is thus not qualified for carriage. Our records, however, indicate that W39BQ is a translator station qualified for carriage and was so on the date of the initial filing for carriage in this proceeding. See letter from Chief, Low Power Television Branch, Video Services Division, Mass Media Bureau, Federal Communications Commission to Counsel for Maine Public Broadcasting

Corporation (dated September 2, 1994). That communication states "the Commission will recognize station W30BF and W39BQ as television translator stations."⁹

12. The legal status of a translator station is defined by the nature of its programming, following an appropriate declaration by the licensee, as either rebroadcast or origination, not by the station's original application or authorization.¹⁰ An LPTV operating under a TV translator mode of service is one that retransmits a television broadcast station and originates programming in any amount greater than 30 seconds per hour and/or operates a subscription service.¹¹ A translator only retransmits the programming of its primary station and does not originate programming.¹² Since W39BQ only retransmits the programming of WMEA-TV, Biddeford, Maine, and does not originate any programming, it is a translator station. Furthermore, we note that while W39BQ is receiving a direct microwave feed from MPBC's Lewiston studio rather than receiving WMEA's signal directly off-the-air, this signal delivery method is permissible and does not convert the station into an LPTV station.¹³

13. The Commission does not issue separate authorizations for LPTV and TV translator stations. Therefore, the change of status from LPTV to a translator, as W39BQ had requested, does not require the issuance of a new authorization because the Commission issues the same authorization for both classes of stations. Moreover, neither Section 74.732(e), nor any other Commission rule, raise any bar to an LPTV station's conversion to translator status as long as certain requirements set forth in the rules are met. To allay any further confusion over the issue, we now take the opportunity to clarify that Section 74.732(e) is bi-directional permitting an LPTV station to become a translator and a translator to switch to LPTV station status upon proper notification to the Commission. That a change in status may have been influenced by the potential for cable carriage is not relevant to application of the rules. We do not find the cited legislative history in paragraph 3 above, to be to the contrary. The station involved is operating as a translator station and thus is licensed as a translator rather than a low power television station.

14. We are also not persuaded by Cablevision's request to modify the *Memorandum Opinion and Order* to defer W39BQ's carriage rights "until the next election cycle." The rules governing election cycles do not apply to noncommercial stations. Under the statute, commercial television broadcast stations may, on a periodic cycle set forth in the 1992 Cable Act, select either mandatory signal carriage or carriage under the retransmission consent provisions. This choice, under Section 325 of the Communications Act of 1934 (the retransmission consent requirement), applies only to commercial stations and not to noncommercial educational television stations like W39BQ. Thus, we find no basis to grant Cablevision's request in this regard.

⁹ Attached as Exhibit 3 to April 13, 1995 filing of Maine Public Broadcast Corporation in this proceeding.

¹⁰ This has been the Mass Media Bureau's interpretation of the Commission's rules regarding translator status for more than a decade. See generally, *An Inquiry into the Future Role of Low Power Television Broadcasting and Television Translators in the*

National Telecommunications System, 51 RR2d 476, 519 (1982).

¹¹ See 47 C.F.R. §74.701(f).

¹² See 47 C.F.R. §74.731.

¹³ See *Amendment of Subparts F and G of Part 74 and Subpart B of Part 78 to Provide for the Use of FM Microwave by Television Translator Relay Stations, and to Provide for the Operation of Television Translator Stations Using Modulation of Direct Video and Audio Feed*, 77 FCC 2d 920, 928 (1980).

15. We also find Cablevision's constitutional argument to be without merit and deny the request for a stay of the rules until the *Turner* case is finally resolved. As the Bureau noted in its *Memorandum Opinion and Order*, the Supreme Court did not stay the statute's must carry provisions or our rules while the case is on remand to the District Court.¹⁴ Thus, while the case is pending, the must-carry provisions of the 1992 Cable Act remain in effect, as do the Commission's must-carry rules. Cablevision also has not introduced evidence that, as applied, the must carry rules result in any unique injury in this instance. We believe deferral of carriage requests under the circumstances described by Cablevision would run contrary to the public interest because it would undermine the protections Congress explicitly afforded to noncommercial broadcasters like W39BQ. That is, granting Cablevision's request would allow cable operators to skirt their statutory duties and would have the ultimate effect of stripping noncommercial television stations of their statutory rights.

16. We need not reach Cablevision's irreparable harm arguments since we resolve the matter on other grounds. However, even if these issues were addressed, the harms that Cablevision complains about are of the type that generally occur when cable operators comply with the statute's signal carriage requirements. Cablevision's arguments with respect to the costs and difficulties of complying with the rules do not present facts that are unique to its situation.

ORDER

17. Accordingly, IT IS ORDERED that, the Application for Review filed on April 6, 1995, by A-R Cable Services - ME, Inc., IS DENIED, in accordance with Section 615(j)(3) (47 U.S.C. §535) of the Communications Act of 1934, as amended.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

¹⁴ See *Broadcast Signal Carriage Issues*, 9 FCC Rcd 6723-24 (1994) citing *Turner Broadcasting Systems v. FCC*, 114 S. Ct at 2451.