

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

In the Matter of )
America-CV Station Group, Inc. ) CSR-8703-M
Licensee of Stations WJPX, San Juan, ) Docket No. 12-250
and WIRS, Yauco, Puerto Rico )
v. )
Liberty Cablevision of Puerto Rico, Inc. )

MEMORANDUM OPINION AND ORDER

Adopted: January 3, 2013

Released: January 3, 2013

By the Senior Deputy Chief, Policy Division, Media Bureau:

I. INTRODUCTION

1. America-CV Station Group, Inc., ("America-CV"), licensee of commercial broadcast television stations WJPX, Channel 24, San Juan, Puerto Rico and WIRS, Channel 42, Yauco, Puerto Rico, filed the above captioned must carry complaint pursuant to Sections 76.7, 76.56, 76.57 and 76.61 of the Commission's rules, seeking to ensure carriage of these stations on cable systems operated by Liberty Cablevision of Puerto Rico, Inc. ("Liberty"). Liberty filed an opposition to this complaint, to which America-CV has filed a reply and Liberty, a surreply. For the reasons discussed below, we grant America-CV's complaint.

II. BACKGROUND

2. Pursuant to Section 614 of the Communications Act of 1934, as amended (the "Act"), and the implementing rules adopted by the Commission, commercial television broadcast stations, such as WJPX and WIRS, are entitled to assert mandatory carriage rights on cable systems located within their market. A station's market for this purpose is its designated market area, or DMA, as defined by the Nielsen Company. The Commission has clarified that "broadcast stations may assert their carriage and channel

1 47 C.F.R. §§ 76.7, 76.56, 76.57 and 76.61(a)(1).

2 See Must Carry Complaint by America-CV Station Group, Inc. (CSR-8703-M), filed Aug. 27, 2012 ("Petition").

3 See Motion Requesting Extension of Time to Answer Complaint by Liberty Cablevision of Puerto Rico, Inc., filed Sept. 27, 2012; Opposition to Must Carry Complaint by Liberty, filed Oct. 26, 2012 ("Opposition"); Reply to Opposition to Must Carry Complaint by America-CV, filed Nov. 8, 2012 ("Reply"). In addition, Liberty filed a Motion for Leave to File Surreply to Reply to Opposition to Must Carry Complaint and Surreply ("Surreply"), filed Nov. 19, 2012, w

positioning rights at any time so long as they have not elected retransmission consent.”<sup>6</sup> Section 614 of the Act and Section 76.57 of the Commission's rules provide commercial television stations with four possible channel positioning options to which they may assert their rights. Pursuant to Section 76.57, a commercial broadcast station may elect to be carried on: (1) the channel number on which the station is broadcast over the air; (2) the channel number on which the station was carried on July 19, 1985; or, (3) the channel number on which the station was carried on January 1, 1992.<sup>7</sup> A broadcast station may be carried on any other channel number mutually agreed upon by the station and the cable operator.<sup>8</sup>

3. Liberty operates cable television systems on the island of Puerto Rico, which the Commission treats as comprising a single television market.<sup>9</sup> America-CV is the licensee of the two Puerto Rico stations at issue in this matter, WJPX operating out of the capital, San Juan, and WIRS, licensed to the city of Yauco.<sup>10</sup> Historically, WJPX and WIRS first aired Caribévision and subsequently the AmericaTévé network, with WJPX broadcast over the air on analog Channel 24 and then digital channel 24.1.<sup>11</sup> WIRS first operated as a satellite of WJPX, and although Liberty carried WJPX on its system on cable channel 24, it was excused from carrying WIRS because the two stations aired identical programming.<sup>12</sup>

4. America-CV argues Liberty has essentially tried to cripple its launch of the MundoFox Network in Puerto Rico on its channels.<sup>13</sup> Recently, WJPX and WIRS became affiliates of the new MundoFox television network, and on August 13, 2012, WJPX began airing MundoFox programming on channel 24.1 and moved its AmericaTévé programming to 24.2.<sup>14</sup> America-CV complains however that Liberty continues to carry WJPX's AmericaTévé programming on cable channel 24 and has not commenced carrying America-CV's new MundoFox programming from channel 24.1 – its “primary stream.”<sup>15</sup> Although WIRS also commenced carrying MundoFox programming on August 13, 2012, it placed this new programming on channel 42.2 and it continues to broadcast AmericaTévé programming

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§ 534(h)(1)(C). Section 76.55(e)(2) of the Commission's rules specifies that a commercial broadcast television station's market is its Designated Market Area as determined by Nielsen Media Research. 47 C.F.R. § 76.55(e)(2).

<sup>6</sup> *Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Broadcast Signal Carriage Issues*, MM Docket No. 92-259, Clarification Order, 8 FCC Rcd. 4142, 4144 ¶ 15 (1993).

<sup>7</sup> See 47 C.F.R. § 76.57(a). In its 2008 Declaratory Order concerning the carriage of digital broadcast television signals, the Commission stated that in digital broadcasting for purposes of channel positioning, a station's over-the-air broadcast channel number is no longer identified by reference to its over-the-air radio frequency, but instead to its Major Channel Number as carried in its PSIP. See *Carriage of Digital Television Broadcast Signal: Amendment to Part 76 of the Commission's Rules*, CS Docket No. 98-120, Declaratory Order, 23 FCC Rcd. 14254, 14258 ¶¶ 15-16 (2008).

<sup>8</sup> See 47 C.F.R. § 76.57(d).

<sup>9</sup> It comprises a single market even though it does not appear on the Nielsen Company's DMA list. See Complaint at 2 & n.1, citing *Paxson Comm. of San Juan, Inc.*, 16 FCC Rcd 14139, 14140 ¶ 4 (2001).

<sup>10</sup> Complaint at 1 & 3 n.4.

<sup>11</sup> See *id.* at 2 & 3.

<sup>12</sup> *Id.* at 3. America-CV notes that Section 614(b)(5) of the Communications Act and Section 76.56(b)(5) of our rules state that a cable operator is not required to carry the signal of any local commercial television station that substantially duplicates the signal of another local commercial television station or to carry the signals of more than one local commercial television station affiliated with a particular broadcast network. See 47 U.S.C. § 534(b)(5); 47 C.F.R. § 76.56(b)(5).

<sup>13</sup> Reply at 7.

<sup>14</sup> Complaint at 2.

<sup>15</sup> *Id.* at 2-3.

over the air on its “primary stream,” channel 42.1.<sup>16</sup> However, Liberty does not carry WIRS on a cable channel at all, according to America-CV, even though the station and the operator’s system share the same local market.<sup>17</sup> America-CV states Liberty cannot argue it is carrying WIRS by virtue of carrying that station’s AmericaTévé programming on cable channel 24 because this is the channel on which WJPX’s primary stream should be airing,<sup>18</sup> and America-CV argues it is entitled to choose which of its streams is “primary” and entitled to mandatory carriage.<sup>19</sup>

5. America-CV did not make a carriage election for either WJPX or WIRS last year during the October 2011 election cycle. Thus, both stations are must carry stations by default under Section 76.64 of our rules.<sup>20</sup> However, on June 19, 2012, America-CV did send Liberty a carriage demand letter for WIRS in which it stated that WIRS’ programming was about to change and diverge from that of station WJPX as of August 1, 2013, ending Liberty’s exemption from carriage of both stations under Section 76.56(b)(5) of the Commission’s rules.<sup>21</sup> The letter also sought carriage for WIRS on its virtual channel number – which it assumed was channel 41, or in the alternative on channel 42, which it called its over-the-air RF channel number. In actuality, 41 is WIRS’ current RF channel number while channel 42 is WIRS’ major channel number as contained in its PSIP.<sup>22</sup> America-CV asserts Liberty received its letter on June 25 but never responded.<sup>23</sup> Discussions between America-CV and Liberty took place from August 6, 2012 until August 14, 2012, when Liberty’s counsel informed America-CV that he was no longer authorized to represent Liberty, and communications ended.<sup>24</sup>

6. America-CV asserts WJPX provides a good quality signal to Liberty’s cable system headend where it has received WJPX’s signal for many years,<sup>25</sup> but it concedes WIRS’ signal may not currently be strong enough to reach the headend.<sup>26</sup> However, America-CV argues that because WJPX carries AmericaTévé programming on channel 24.2, the same programming carried on WIRS’ primary stream, it is entitled to deliver WIRS’ programming as part of WJPX’s multicast transmission as an alternative means of delivery pursuant to 76.55(c)(3) of our rules.<sup>27</sup> Additionally, it has offered delivery via fiber as

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<sup>16</sup> *Id.* at 3.

<sup>17</sup> *Id.* at 3 & 5.

<sup>18</sup> *Id.* at 5.

<sup>19</sup> *Id.* at 2-3. America-CV argues it did not inform Liberty when it changed the programming on channel 24.1 from AmericaTévé to MundoFox because no regulation or statute links mandatory carriage to program content, and a broadcast licensee is not required to inform cable operators of changes in program content when it is not requesting any change as to which signal stream should be carried. Reply at 3-4.

<sup>20</sup> Complaint at 2.

<sup>21</sup> *Id.* at 3 and Exhibit 2, Letter from Marcos Crespo, Operations Manager, WIRS to Naji Khoury, General Director, Liberty PR, June 19, 2012, at 1-2 (“Demand Letter”).

<sup>22</sup> *Id.* at Exhibit 2, Demand Letter at 2; Reply at 7 n.12. America-CV noted Liberty currently carries the FX Network on cable channel 42. See Complaint at 6 n.15.

<sup>23</sup> Complaint at 3 & n.6 (citing Exhibit 2, USPS Track and Confirm printout showing delivery on June 25, 2012).

<sup>24</sup> See *id.* at 4 & n.8.

<sup>25</sup> See *id.* at 4.

<sup>26</sup> Reply at 5 & n.8 (stating that WIRS holds a granted construction permit to increase its power, which it asserts should improve its signal at Liberty’s headend).

<sup>27</sup> See Complaint at 4-5. America-CV argues Liberty’s ability to historically carry channel 24.1 via over-the-air pickup demonstrates the sufficiency of the channel 24.2 signal. See *id.* at 5. To support its argument that a non-primary stream of WJPX may be used as an alternative method to deliver WIRS’ primary stream, America-CV cites *Jovon Broad. Corp. v. RCN Corp.*, 18 FCC Rcd 8145 (MB 2003). In this case, a station was able to use its identical digital secondary transmission of its programming as an alternative method for delivering a good quality signal to a

an alternative, to which Liberty has not responded, but which offer it argues should also be acceptable under our rules.<sup>28</sup> Therefore, America-CV requests we order Liberty to fulfill its obligations and carry Channel 24.1, WJPX's alleged primary stream (now consisting of MundoFox programming) on Liberty cable channel 24, and Channel 42.1, WIRS' primary stream (now consisting of AmericaTévé programming), on cable channel 42, as delivered via channel 24.2.<sup>29</sup> Finally, America-CV argues no notice to subscribers pursuant to Section 76.1601 of the rules should be required prior to restoring WJPX's 'primary stream' to cable channel 24.<sup>30</sup>

7. Liberty responds that America-CV's complaint results in Liberty's forced carriage of both of the programming feeds of WJPX through the subterfuge of switching WJPX's primary feed to MundoFox programming and claiming carriage rights for WIRS' primary feed, which consists of AmericaTévé programming.<sup>31</sup> Liberty notes WJPX had historically identified AmericaTévé programming as its primary stream, and America-CV gave Liberty no notice of its intent to move this AmericaTévé programming from channel 24.1 to 24.2, so Liberty continued to place WJPX's AmericaTévé programming on its cable channel 24.<sup>32</sup> Liberty argues for dismissal on the grounds that America-CV has no basis to complain that WJPX's primary programming stream is not carried until it designates that stream as primary.<sup>33</sup> Furthermore, Liberty argues it cannot carry WIRS because it fails to deliver a good quality signal to Liberty's headend,<sup>34</sup> and Liberty argues American-CV may not rely on WJPX's secondary stream as an alternative delivery mechanism for WIRS' primary stream.<sup>35</sup>

#### IV. DISCUSSION

8. We will grant America-CV's petition and order Liberty to carry WJPX's programming on cable channel 24 and WIRS's programming on its major channel number of 42, or any other channel mutually agreeable to the parties. We find that America-CV's June 19th letter was a proper must carry

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cable system's headend where its analog signal could not be received. *See Jovon*, 18 FCC Rcd at 8147 ¶ 9 (“[A] station may generally use any delivery means at its disposal to provide a good quality signal to the cable operator's headend. As long as WJYS-TV transmits exactly the same content over its digital signal as is contained in its analog signal, and it pays the cost of delivering such a signal to the principal headend, it may do so in accordance with the Commission's rules and policies.”).

<sup>28</sup> Reply at 6. America-CV only made this offer on October 17, 2012. Liberty asserts in its surreply that it eventually received America-CV's emails offering to deliver its signal via fiber, though these arrived as 'junk mail' in its inbox and America-CV states Liberty has thus far not responded. Reply at 6; Surreply at 2.

<sup>29</sup> *See* Complaint at 5. As noted *supra* at ¶ 5, America-CV sought carriage in its Demand Letter on channel 41, or in the alternative on channel 42. Although it does not relinquish its right to carriage on cable Channel 42, America-CV states it would be willing to entertain a proposal by Liberty for carriage of WIRS on a different channel as long as WIRS is positioned in a desirable channel neighborhood. *Id.* at 6 & n.16.

<sup>30</sup> *Id.* at 6.

<sup>31</sup> Opposition at 4.

<sup>32</sup> *Id.* at 2.

<sup>33</sup> *Id.* at 2-3.

<sup>34</sup> *Id.* at 3. Although Liberty does not provide us with the necessary documentation, it asserts it performed tests according to the 'Blonder Tongue model AQDATSC' at its principal headend located in Humacao, PR, and was not able to detect WIRS' Channel 42.1 over-the-air signal – proving, it asserts, that WIRS is not able to provide a good quality signal in accordance with Section 76.55(c)(3) of our rules. *See id.* at 4 & n.7. American-CV argues, however, that these signal strength test results have not been placed in the record and the claims based on them should not be recognized. Reply at 5 n.7.

<sup>35</sup> Opposition at 5. America-CV distinguishes *Jovon Broad. Corp.* on the ground that it involved a single station utilizing its digital stream to deliver its identical analog stream – whereas here, two stations are involved with different programming. *Id.* at 6.

demand letter. That letter's invocation of channel positioning rights on channel 41 was misplaced, however, as WIRS' channel positioning rights attach to its major channel number as carried in its PSIP, namely channel 42.<sup>36</sup> Nevertheless, there appears to be no dispute that Liberty and WIRS serve the same local market and that WIRS has default must carry rights with respect to Liberty's systems. Nor has Liberty submitted signal strength studies to support a showing that WIRS does not deliver a good quality signal to Liberty's cable system headend. America-CV appears to concede that WIRS' signal is currently not strong enough to place a good quality signal over Liberty's headend. We find that use of another station's multicast channel (*i.e.*, WJPX's 24.2) could be a possible method for delivering WIRS as could the use of fiber. America-CV has offered to implement either alternative method.

9. However, America-CV is incorrect that it could simply designate channel 24.1 as its "primary video" stream and merely replace the programming on that channel without notice. Both the Communications Act and the Commission's rules require cable systems to provide mandatory carriage to a commercial broadcast television station's "primary" video transmission.<sup>37</sup> In its *First Report and Order on the Carriage of Digital Television Broadcast Signals*, the Commission concluded that a digital broadcaster dividing its signal into several multicast streams may designate only one of its programming streams as its "primary video" stream entitled to mandatory carriage.<sup>38</sup> As the language of the Commission decisions on this issue make clear, the concept of primary is tied to a "programming stream" and not to the channel number on which it is carried. The language contained in both the *First* and *Second Report and Order* make clear that a broadcaster "must elect" which programming stream is its primary video. Merely replacing the programming stream contained on a channel with other programming cannot function as an election because it gives no notice to a cable system to notify its subscribers. AmericaCV merely commenced transmission of MundoFox on channel 24.1 and placed AmericaTévé programming on channel 24.2 without giving Liberty any prior notice that it was electing MundoFox programming as its primary programming stream for mandatory carriage.

10. Furthermore, although America-CV has argued no notice to subscribers was necessary in this matter because its changes to channel programming did not amount to deletions or repositionings, we disagree.<sup>39</sup> Section 614(b)(9) of the Act provides a cable operator may not delete or reposition a local commercial television station without first having provided 30 days prior notice to that station, and a deletion or repositioning cannot occur "during a period in which major television ratings services measure the size of audiences of local television stations."<sup>40</sup> This is mirrored in Sections 76.1601 and 76.1603(c) of the Commission's rules which require 30 day notice to be provided to subscribers of a cable system

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<sup>36</sup> See *supra* n.7. Of course, this does not bar the parties from carriage of the station on a channel position mutually agreeable to both parties.

<sup>37</sup> See 47 U.S.C. § 534(b)(3)(A) ("A cable operator shall carry in its entirety, on the cable system of that operator, the primary video, accompanying audio, and line 21 closed caption transmission of each of the local commercial television stations carried on the cable system"); see also 47 C.F.R. § 76.62(e).

<sup>38</sup> See *Carriage of Digital Broadcast Signals, Amendment to Part 76 of the Commission's Rules*, CS Docket No. 98-120, First Report and Order and Further Notice of Proposed Rule Rulemaking, FCC 01-22, 16 FCC Rcd 2598, 2622 ¶ 57 (2001) ("*First Report and Order*") ("[W]e conclude that "primary video" means a single programming stream and other program-related content ... [I]f a digital broadcaster elects to divide its digital spectrum into several separate, independent and unrelated programming streams, only one of these streams is considered primary and entitled to mandatory carriage. The broadcaster must elect which programming stream is its primary video, and the cable operator is required to provide mandatory carriage to only such designated stream."). The Commission subsequently affirmed this conclusion on reconsideration. *Carriage of Digital Broadcast Signals, Amendment to Part 76 of the Commission's Rules*, CS Docket No. 98-120, Second Report and Order and First Order on Reconsideration, 20 FCC Rcd 4516, 4532 ¶ 33 & 4537 ¶ 44 (2005) ("*Second Report and Order*").

<sup>39</sup> Reply at 4 & 8. America-CV concedes notice might be necessary with respect to the replacement of programming on channel 41 or 42. See *id.* at 8; see also Complaint at 6 & n.15.

<sup>40</sup> 47 U.S.C. § 534(b)(9).

prior to deleting or repositioning a station on that system, or prior to any other rate or service change.<sup>41</sup>

11. We find that Liberty could not put MundoFox network programming on channel 24 and delete AmericaTévé programming or reposition it onto channels 41 or 42 (which may or may not also require repositioning the FX channel, currently on channel 42), without first giving its subscribers 30 days advance notice, as these amounted to the service changes anticipated by the rules discussed above. In order to provide 30 days' notice, it was necessary for Liberty to receive notice of AmericaCV's election to change WJPX's primary video programming stream 30 days prior to August 13th, or at least by July 14, 2012. No such notice was ever provided by America-CV to Liberty. America-CV's June 25th demand letter concerned a change in programming for WIRS, and this letter could have given Liberty 30 days, or until July 25, 2012, to inform subscribers that it would start carrying WIRS or to state its reasons for not carrying it.<sup>42</sup> However, WIRS could not provide a good quality signal to Liberty's headend, and Liberty could not have known of America-CV's intention to use WJPX's secondary stream to deliver WIRS until it knew of WJPX's intent to put AmericaTévé programming on its secondary stream, which it only learned of on August 13th. Therefore, because Liberty did not have sufficient time to inform its subscribers of America-CV's programming changes, it did not err in failing to carry these stations. However, given that these stations' carriage rights are now clarified, Liberty must now notify its subscribers and start carrying these stations.

## V. ORDERING CLAUSES

12. Accordingly, **IT IS ORDERED** that pursuant to Section 614 of the Communications Act of 1934, as amended, 47 U.S.C. § 534, the must carry complaint filed by America-CV Station Group, Inc., licensee of commercial broadcast television stations WJPX, Channel 24, San Juan, Puerto Rico and WIRS, Channel 42, Yauco, Puerto Rico, seeking to ensure carriage of these stations on cable systems operated by Liberty Cablevision of Puerto Rico, Inc. **IS GRANTED.**

13. **IT IS FURTHER ORDERED** that Liberty Cablevision **MUST COMMENCE CARRIAGE** of WJPX and WIRS within 60 days of this order, subject to WIRS's delivery of a good quality signal to Liberty's relevant cable system headend and to Liberty's subscribers receiving 30 days' notice concerning these service changes.

14. This action is taken under authority delegated by Section 0.283 of the Commission's rules.<sup>43</sup>

FEDERAL COMMUNICATIONS COMMISSION

Steven A. Broecker  
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<sup>41</sup> 47 C.F.R. § 76.1601 & 47 C.F.R. § 76.1603(c).

<sup>42</sup> See 47 C.F.R. § 76.61(a)(2). Further, Liberty could not commence carriage of WIRS in July if it involved a repositioning, because, as the Note to Section 76.1601 clarifies, no deletions or repositionings are to occur during a period in which ratings services measure audience sizes, as audiences are typically measured "during the four national four-week ratings periods – generally including February, May, July and November – commonly known as audience sweeps." 47 C.F.R. § 76.1601, Note 1.

<sup>43</sup> 47 C.F.R. § 0.283.