

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

In the Matter of:)	
)	
SAH Acquisition Corporation II)	
)	CSR-5358-M
v.)	
)	
Charter Communications)	
)	
Request for Mandatory Carriage of Television)	
Station KCNS-TV, San Francisco, California)	

MEMORANDUM OPINION AND ORDER

Adopted: December 15, 2000

Released: December 19, 2000

By the Chief, Consumer Protection and Competition Division, Cable Services Bureau:

I. INTRODUCTION

1. SAH Acquisition Corporation II (“SAH”), licensee of television broadcast station KCNS-TV, San Francisco, California (“KCNS” or “the Station”), has filed a must carry complaint claiming that Charter Communications (“Charter”)¹ has failed to commence carriage of KCNS on its system serving Gilroy, California and the surrounding areas (“cable communities”).² Charter filed an Opposition. On March 24, 2000, SAH filed an untimely Reply to Charter’s Opposition, which we will accept.³

¹ This Complaint was initially filed against Falcon Communications Corporation. Since then, the cable system in question was sold to Charter Communications. Reply at 2. Therefore, Falcon’s name will be substituted with Charter’s, its successor-in-interest.

² According to SAH, Charter’s Gilroy system serves the following communities: City of Gilroy (CA0101), Santa Clara County (CA0103), and City of Morgan Hill (CA0184), in Santa Clara County, California; Hollister (area)(CA0102), San Benito (area)(CA0721), and City of San Juan Bautista (CA0812), in San Benito County, California; and Oak Hills (area)(CA0622), La Mesa Village (CA0745), Rancho Tierra Grande (area)(CA0844), Prunedale (area)(CA0890), Las Lomas/Pajaro (area)(CA1013), Carmel Highlands (area)(CA1048), Laguna Seca (area)(CA1049), Aromas (area)(CA1118), Monterey County (N)(CA1189), Castroville (area)(CA1190), Monterey County (CA1287), and Elkhorne (area)(CA1386), in Monterey County, California. Complaint at Exhibit 1.

³ The ongoing upgrade of the Gilroy system, which Charter mentions in its Opposition, appears to have been completed during the pendency of this proceeding. After the upgrade was completed, SAH filed a reply when it came into possession of new information regarding the Gilroy system. Section 1.65 of the Commission’s rules requires applicants to furnish additional information to the Commission if and when it becomes available. 47 C.F.R. § 1.65. Accordingly, we will accept SAH’s filing.

II. BACKGROUND

2. Section 614(h)(1)(C) of the Communications Act, as amended by the Telecommunications Act of 1996, provides that a station's market shall be determined by the Commission by regulation or order, using, where available, commercial publications which delineate television markets based on viewing patterns.⁴ Until January 1, 2000, Section 76.55(e) of the Commission's rules provided that Arbitron's "Areas of Dominant Influence," or ADIs, published in the "1991-1992 Television Market Guide," be used to implement the mandatory carriage rules. Effective January 1, 2000, however, Section 76.55(e) requires that a commercial broadcast television station's market be defined using Nielsen Media Research's Designated Market Areas ("DMAs"). For the must carry/retransmission consent elections that took place on October 1, 1999, commercial television stations were required to make their elections based on DMAs.⁵

III. DISCUSSION

3. SAH maintains that KCNS is entitled to mandatory carriage on the Gilroy, California cable system because the Station is a qualified local commercial station as defined under the Commission's must carry rules.⁶ SAH explains that KCNS is licensed to San Francisco, California, which is in the San Francisco-Oakland-San Jose DMA. SAH states that Charter operates a cable television system serving Gilroy and the surrounding areas, which are also within the San Francisco-Oakland-San Jose DMA.⁷ SAH also contends that because KCNS is located within the same DMA as Gilroy, it is entitled to mandatory carriage on that system.⁸

4. In support of its request, SAH states that by letter dated October 5, 1998, it informed Charter that SAH was the new licensee of KCNS and requested mandatory carriage on the Gilroy system.⁹ SAH notes that in the same letter, it indicated to Charter that the Station was prepared to provide the necessary equipment to deliver a good quality signal to Charter's Gilroy headend.¹⁰ SAH claims that Charter did not respond to the October 5th letter in violation of Section 76.62(a)(2) of the Commission's rules, which requires cable operators to respond within 30 days of such requests.¹¹ According to SAH, on November 11, 1998, it sent a second letter to Charter asking for its reasonable cooperation in measuring the Station's signal strength for carriage.¹² SAH asserts that on November 17, 1998, Charter denied mandatory carriage rights to KCNS because the Gilroy system had already met its maximum complement of one-third of its activated channels for broadcast television signals.¹³

⁴ See 47 U.S.C. § 534(h)(1)(C).

⁵ See *Definition of Markets for Purposes of the Cable Television Broadcast Signal Carriage Rules*, Order on Reconsideration and Second Report and Order, 14 FCC Rcd 8366 (1999) ("Modification Final Report and Order").

⁶ Complaint at 4.

⁷ *Id.*

⁸ *Id.* at 5.

⁹ *Id.* at 1-2.

¹⁰ *Id.* at 2 and 5; Exhibit 3.

¹¹ 47 C.F.R. § 76.62(a)(2).

¹² Complaint at 2.

¹³ *Id.* at 3.

5. In opposition, Charter notes that the Gilroy system is an integrated system straddling two DMAs– the San Francisco-Oakland-San Jose DMA and the Monterey-Salinas DMA. Charter argues that as a result, the Gilroy headend cannot carry KCNS as SAH requests because the system cannot technically segregate channels between portions of the San Francisco-Oakland-San Jose DMA and those from the Monterey-Salinas DMA.¹⁴ In support, Charter cites *Pacific FM, Inc. San Francisco, California* (“*Pacific FM*”)¹⁵ and *Paxson San Jose License, Inc. vs. Falcon Cable* (“*Paxson San Jose*”),¹⁶ where two other commercial television broadcast stations sought carriage on the Gilroy system. Charter points out that in those cases, the Cable Services Bureau (the “Bureau”) denied mandatory carriage rights to the petitioners, after it determined that the Gilroy system was an integrated system. Charter notes further that the Bureau also found that the Gilroy system was already carrying sufficient local commercial television broadcast stations to meet the requirements of Section 614(b)(1)(B) and, therefore, had reached its quota of must carry signals.¹⁷ Charter argues that as a result of the Bureau’s findings, which were made after examining essentially the same facts as in this case, the instant complaint should be dismissed.¹⁸ Finally, Charter states that, in the future, when its system upgrade is completed, carriage of KCNS may be feasible.¹⁹

6. SAH in reply contends that it has come into possession of new information that indicates that the Gilroy system is now capable of segregating the KCNS signal and keeping it solely within the San Francisco-Oakland-San Jose DMA without straddling the Monterey-Salinas DMA.²⁰ SAH maintains that KCNS’s Chief Engineer, during a visit to the Gilroy headend microwave transmit site, personally observed that Charter has made significant changes to the signal distribution system at that headend.²¹ The Chief Engineer notes that four separate microwave feeds that allowed the system to relay separate signals to the cable communities in question. He also relates that the headend’s Head Technician confirmed that the microwave feeds “were relaying signals separately to the communities of Gilroy, Morgan Hill, Hollister and Spring Hill.”²²

7. SAH maintains that the Gilroy headend can add the KCNS signal to its list of must carry stations because despite Charter’s assertions concerning meeting the statutory carriage of one-third its activated channels, Charter Gilroy’s channel line-up indicates otherwise.²³ SAH contends that while the Gilroy system has 35 activated channels, it is no longer obligated to carry 4 of the 13 must carry stations it carries because they are now out-of-market, non-must carry stations.²⁴ SAH argues that, as a result, Charter cannot include those four stations as part of its mandatory statutory one-third limit of must carry

¹⁴ Opposition at 3.

¹⁵ 10 FCC Rcd 3479 (1995).

¹⁶ 11 FCC Rcd 6915 (1996).

¹⁷ Opposition at 2.

¹⁸ *Id.* at 1-2.

¹⁹ *Id.* at 4.

²⁰ Reply at 1-3.

²¹ *Id.* at 1 and Exhibit 1.

²² *Id.*

²³ Reply at 2.

²⁴ *Id.* SAH notes that television stations KION, KSBW, KCBA and KSMS are licensed to communities in the Monterey-Salinas DMA. Reply, Exhibits 3 and 4.

stations the Gilroy system is required to carry.²⁵ SAH states that the Chief Engineer also observed “thirty-two (32) separate microwave transmitters that process and feed separate signal complements to the four separate microwave dishes.”²⁶ Based on these observations, SAH asserts that Gilroy is no longer a technically integrated system, unable to segregate television broadcast signals between the two DMAs. Rather, SAH maintains that the Gilroy system can now filter out signals from and between the two DMAs, allowing carriage of the KCNS signal in the San Francisco-Oakland-San Jose DMA cable communities, but not in those in the Monterey-Salinas DMA.²⁷ Based on this information, SAH requests that Charter be ordered to start carrying the KCNS signal on channel 38, or a channel mutually agreeable to both parties, on the Gilroy and Morgan Hill cable systems.²⁸ Finally, SAH asserts that signal measurements taken with permission from Charter during the visit to the Gilroy site, revealed a reading of +27.4dBmv, which, according to SAH, shows that KCNS delivers a good quality signal to the Charter headend in question.²⁹

8. We grant SAH’s complaint. We find that SAH’s undisputed representations demonstrate that KCNS is a local full power commercial television station qualified for carriage on Charter’s cable system serving Gilroy, California and the cable communities in the San Francisco-Oakland-San Jose DMA portion of the system. Under the Commission’s must carry rules, cable operators have the burden of showing that a commercial station located in the same television market as a cable operator is not entitled to carriage.³⁰ Charter has presented no evidence that KCNS is not entitled to carriage on its Gilroy system. Furthermore, SAH claims that KCNS delivers a good quality signal to Charter’s Gilroy headend as shown by the signal strength readings it presented. In any event, KCNS has made a commitment to acquire and install all the necessary equipment needed to provide Charter with a good quality signal.³¹

9. Charter’s reliance on *Paxson San Jose* and *Pacific FM* is misplaced because the facts concerning the Gilroy system appear to have changed since the time that those two *Orders* were released. Based on the undisputed information SAH submitted, it appears that the Gilroy system is no longer technically incapable of segregating the over-the-air signals it receives from local television stations and distribute them to cable communities solely within the DMA the stations belong to. Also, because the system is now non-integrated, Charter’s reliance on the Bureau’s determination that the Gilroy system is not required to carry any additional local stations entitled to mandatory carriage is also misplaced. In *Paxson San Jose*, the Bureau stated that “[a] cable system, like Falcon’s, that operates in more than one

²⁵ Reply at 3.

²⁶ *Id.* at 4.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.* and Exhibit 1. Section 76.55(c)(3) of the Commission’s rules provides that an UHF television broadcast station, able to deliver a signal level of -45dBm to a cable system’s principal headend, is entitled to mandatory carriage on that system. 47 C.F.R. § 76.55(c)(3). The +27.4dBmv reading equals -21.35dBm. See *Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, Broadcast Signal Carriage Issues (“*Must Carry Order*”), 8 FCC Rcd 2065, 2989 (1993).

³⁰ See *Id.* at 2990.

³¹ Pursuant to the Commission’s rules, a station’s failure to provide the requisite over-the-air signal quality to a cable system’s principal headend will not foreclose its carriage if the station, at its own expense, provides a cable operator with specialized equipment to improve the station’s signal to an acceptable quality at the cable system’s principal headend. *Id.* at 2991. See also 47 U.S.C. § 534(h)(1)(B)(iii).

ADI may segregate its signal to ensure that only local signals are carried by the system in their proper [DMAs], but is not required to do so if its not technically feasible.”³² Now that the Gilroy system apparently is technically capable of filtering out television broadcast signals between DMAs, Charter cannot include local and out-of-market stations to satisfy the statutory one-third channel capacity requirement for each DMA. In that regard, the Commission has stated that “if the cable operator is technically capable of segregating the channels provided to each community served, it may select, for must-carry purposes, from among those qualified commercial stations that are in the [DMA] in which each particular community is located.”³³ Charter’s Gilroy, California channel line-up shows that the system is carrying four stations from the Monterey-Salinas DMA. Because of the material changes in the nature of the cable system, those four stations are no longer considered local stations for must carry purposes in the portion of the system serving the San Francisco-Oakland-San Jose DMA. The four stations are located in San Benito and Monterey counties, which are in the Monterey-Salinas DMA. In the *Must Carry Order*, the Commission has stated that “each broadcast television station will be considered local in those counties listed in the same [DMA] to which it is assigned.”³⁴

10. Finally, concerning SAH’s channel positioning request for KCNS, we find that it has properly requested carriage on channel 38 on Charter’s cable system, the same channel number on which it is broadcast over-the-air. Under the Commission’s rules, cable operators must comply with the channel positioning requirements absent a compelling technical reason.³⁵

IV. ORDERING CLAUSES

11. Accordingly, **IT IS ORDERED**, pursuant to Section 614 of the Telecommunications Act of 1934, as amended (47 U.S.C. § 534), that the complaint filed by SAH Acquisition Corporation II **IS GRANTED**. Charter Communications **IS ORDERED** to commence carriage of television station

³² 11 FCC Rcd at 6917.

³³ *Must Carry Order*, 8 FCC Rcd at 2975-76.

³⁴ 8 FCC Rcd at 2975.

³⁵ 47 C.F.R. § 76.57; *See Must Carry Order*, 8 FCC Rcd at 2988.

KCNS-TV on channel 38 of its Gilroy, California headend microwave transmit site serving the City of Gilroy (CA0101), Santa Clara County (CA0103) and City of Morgan Hill (CA0184), within sixty (60) days from the date of this *Order*.

12. This action is taken pursuant to authority delegated under Section 0.321 of the Commission's rules.³⁶

FEDERAL COMMUNICATIONS COMMISSION

Deborah E. Klein, Chief
Consumer Protection and Competition Division
Cable Services Bureau

³⁶ 47 C.F.R. § 0.321.