

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

In the Matter of: )
Johnson Broadcasting, Inc. )
v. ) CSR-5742-M
DIRECTV, Inc. )
Request for Mandatory Carriage of )
Television Station KNWS-TV, )
Katy, TX )

MEMORANDUM OPINION AND ORDER

Adopted: December 4, 2001

Released: December 5, 2001

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. Johnson Broadcasting, Inc. ("Johnson"), licensee of commercial television station KNWS, Channel 51, Katy, TX ("KNWS" or the "station") filed the above-captioned must carry complaint against DIRECTV, Inc. ("DIRECTV"), pursuant to Section 338 of the Communications Act of 1934, as amended (the "Act"), and Section 76.66 of the Commission's rules for its refusal to carry the signal of KNWS on its satellite system. KNWS states that DIRECTV is providing "local-into-local" satellite service in the Houston, TX market, which is the designated market area ("DMA") where station KNWS operates, pursuant to the statutory copyright license. In its complaint, KNWS alleges that DIRECTV has failed to meet its must carry obligations under the Commission's satellite broadcast signal carriage rules. KNWS requests that the Commission order DIRECTV to carry the station's signal on DIRECTV's satellite system. DIRECTV filed an opposition to the complaint and Johnson filed a reply. For the reasons set forth below, we deny KNWS' complaint.

1 47 C.F.R. § 76.66.

2 Cable Special Relief and Show Cause Petitions, Report No. 0014 (Sept. 28, 2001).

3 See 17 U.S.C. § 122(a); 47 U.S.C. § 339. A satellite carrier provides "local-into-local" satellite service when it retransmits a local television signal back into the local market of that television station for reception by subscribers. 47 C.F.R. § 76.66(a)(6).

4 Under Section 76.66(m)(3) of the Commission's rules, a local television broadcast station that disputes a response by a satellite carrier that it is in compliance with its must carry obligations may obtain review of such denial or response by filing a "complaint" with the Commission in accordance with Section 76.7. 47 C.F.R. § 76.66(m)(3). Although styled a "complaint," a carriage complaint filed against a satellite carrier is treated by the Commission as a petition for special relief for purposes of the Commission's pleading requirements. See 1998 Biennial Regulatory Review: Part 76 - Cable Television Service Pleading and Complaint Rules, 14 FCC Rcd 418 (1999). Responsive pleadings filed in this context, therefore, must comply with the requirements set forth in Section 76.7(b)(1).

## II. BACKGROUND

2. Section 338 of the Act, adopted as part of the Satellite Home Viewer Improvement Act of 1999 (“SHVIA”),<sup>5</sup> requires satellite carriers, by January 1, 2002, to carry on request all local television broadcast stations’ signals in local markets in which the satellite carrier carries at least one local television broadcast signal pursuant to the statutory copyright license.<sup>6</sup> For the initial election cycle, broadcast stations were required to notify satellite carriers by July 1, 2001, of their mandatory carriage election for carriage to commence by January 1, 2002.<sup>7</sup> A station’s market for satellite carriage purposes is its DMA, as defined by Nielsen Media Research.<sup>8</sup> In November 2000, the Commission adopted rules to implement the provisions contained in Section 338.<sup>9</sup>

3. Whenever a local television broadcast station believes that a satellite carrier has failed to meet its obligations under Section 338 of the Act or our implementing regulations, such station shall first notify the carrier, in writing, of the alleged failure and identify its reasons for believing that the satellite carrier has failed to comply with its obligations.<sup>10</sup> Within 30 days after such written notification, the satellite carrier must respond in writing and comply with its obligations or state its reasons for believing that it is already doing so.<sup>11</sup> If Commission action is needed, as KNWS alleges here, a broadcast station may file a complaint with the Commission within 60 days after the satellite carrier submits a final rejection of the station’s carriage request.<sup>12</sup> If a satellite carrier provides no response to a must carry election, the 60 day period commences after the time for responding as required by the rule has elapsed.<sup>13</sup> Below, we consider the complaint filed by Station KNWS.

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<sup>5</sup> See Pub. L. No. 106-113, 113 Stat. 1501, 1501A-526 to 1501A-545 (Nov. 29, 1999).

<sup>6</sup> See 47 U.S.C. § 338.

<sup>7</sup> See 47 C.F.R. § 76.66(c)(3); see also 76.66(c)(4) (“Except as provided for in paragraphs 76.66(d)(2) and (3), local commercial television broadcast stations shall make their retransmission consent-mandatory carriage election by October 1<sup>st</sup> of the year preceding the new cycle for all election cycles after the first election cycle.”).

<sup>8</sup> A DMA is a geographic area that describes each television market exclusive of others, based on measured viewing patterns. See 17 U.S.C. § 122(j)(2)(A)-(C); see also *Implementation of the Satellite Home Viewer Improvement Act of 1999: Broadcast Signal Carriage Issues; Retransmission Consent Issues*, 16 FCC Rcd 1918, 1934 (2000) (“*DBS Must Carry Report & Order*”); 47 C.F.R. § 76.66(e) (“A local market in the case of both commercial and noncommercial television stations is the designated market area in which a station is located, and (i) in the case of a commercial television broadcast station, all commercial television broadcast stations licensed to a community within the same designated market area within the same local market; and (ii) in the case of a noncommercial educational television broadcast station, the market includes any station that is licensed to a community within the same designated market area as the noncommercial educational television broadcast station.”).

<sup>9</sup> See generally *DBS Must Carry Report & Order*, 16 FCC Rcd at 1918 *et seq.* The Commission later affirmed and clarified its carriage rules. See *Implementation of the Satellite Home Viewer Improvement Act of 1999: Broadcast Signal Carriage Issues*, 16 FCC Rcd 16544 (2001) (“*DBS Must Carry Reconsideration Order*”).

<sup>10</sup> See 47 U.S.C. § 338(f)(1); see also 47 C.F.R. § 76.66(m)(1).

<sup>11</sup> See 47 C.F.R. § 76.66(m)(2).

<sup>12</sup> See *id.* § 76.66(m)(6); *DBS Must Carry Reconsideration Order*, 16 FCC Rcd 16544, at ¶ 60. A television station seeking a finding on the facts and a resulting determination of whether it is entitled to carriage pursuant to Section 76.66 of our rules may file a complaint with the Commission. If, however, a television station that is not being carried seeks damages or other form of monetary or injunctive relief under Section 338(a) of the Act or Section 501(f) of the Copyright Act, then the United States District Court is the exclusive forum for adjudicating the merits of its claim. *DBS Must Carry Report & Order*, 16 FCC Rcd at 1974.

<sup>13</sup> See *DBS Must Carry Reconsideration Order*, 16 FCC Rcd 16544, at ¶ 60.

### III. DISCUSSION

4. In support of its Complaint, KNWS states that DIRECTV wrongfully denied its request for mandatory carriage because of its mistaken belief that the KNWS carriage request was late-filed.<sup>14</sup> KNWS admits that it posted its election letter via certified mail, return receipt requested on Monday, July 2, 2001, one day past the election deadline established in Section 76.66(c)(3).<sup>15</sup> KNWS argues that this mailing was nonetheless timely in light of the fact that July 1, 2001, fell on a Sunday when the United States Post Office normally is closed for business.<sup>16</sup> KNWS suggests that Section 1.4 of the Commission's rules, which sets forth principles governing the computation of time in determining deadlines established by the Commission, controls in the instant situation.<sup>17</sup> Specifically, KNWS cites Section 1.4(j), which states that, "unless otherwise provided ... if, after making all the computations provided for in this section, the filing date falls on a holiday, the document shall be filed on the next business day."<sup>18</sup> Subsection (e)(1) further provides that for the purposes of calculations under Section 1.4, Sunday shall be considered a holiday.<sup>19</sup> On this basis, KNWS believes that Section 1.4(j) provided it with an additional day to mail its election letter.

5. In its Opposition, DIRECTV seeks summary dismissal of KNWS' Complaint on jurisdictional grounds, arguing that the exclusive remedy for the failure of a satellite carrier to meet its carriage obligations under Section 338(a)(1) of the Communications Act is a civil action in federal district court.<sup>20</sup> DIRECTV additionally contends that KNWS' Complaint should be dismissed for failure to comply with the July 1, 2001, election deadline set forth in Section 76.66(c)(3) since KNWS did not post its election letter until July 2, 2001. DIRECTV argues that the Commission has strictly enforced must carry and retransmission consent election deadlines in the cable television context.<sup>21</sup> DIRECTV further notes that the Commission reiterated the importance of meeting established election deadlines in the *DBS Must Carry Report & Order*.<sup>22</sup> In response to KNWS' interpretation of Section 1.4, DIRECTV asserts that the provision governs deadlines for documents to be filed with the Commission, not election notices to be sent to satellite carriers.<sup>23</sup>

6. In reply, KNWS asks that the Commission disregard DIRECTV's Opposition as late-filed.<sup>24</sup> In the alternative, KNWS argues that DIRECTV should be barred from making its jurisdictional argument because the Commission resolved that issue in the *DBS Must Carry Report & Order*.<sup>25</sup> KNWS also reiterates its earlier interpretation of Section 1.4.<sup>26</sup>

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<sup>14</sup> Complaint at 1.

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

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

<sup>17</sup> Complaint at 2.

<sup>18</sup> *Id.*, citing 47 C.F.R. § 1.4(j).

<sup>19</sup> 47 C.F.R. § 1.4(e)(1).

<sup>20</sup> Opposition at 1-4.

<sup>21</sup> *Id.* at 5-6.

<sup>22</sup> *Id.* at 4-6.

<sup>23</sup> *Id.* at 7.

<sup>24</sup> Reply at 1-2; see also Opposition to Unauthorized Motion to Accept Motion to Strike and Motion for Sanction (filed by KNWS on Nov. 26, 2001).

<sup>25</sup> Reply at 2-3.

<sup>26</sup> *Id.* at 3-4.

7. Based on the record, we deny KNWS' request for mandatory carriage. As an initial matter, we note that DIRECTV's Opposition was timely filed. Under Section 76.7(b)(1), DIRECTV's Opposition was due October 18, 2001, twenty days following the public notice of KNWS' Complaint on September 28, 2001.<sup>27</sup> Due to increased security concerns at the Commission's headquarters location in Washington, DC, the Commission temporarily suspended the acceptance of hand-delivered or messenger-delivered paper filings on October 18, 2001.<sup>28</sup> The due date for all filings due at the Commission on October 18 or October 19, 2001, was extended to October 22, 2001.<sup>29</sup> As such, DIRECTV was timely when it filed its Opposition with the Commission on October 22, 2001.

8. We agree with KNWS, however, that we need not consider the jurisdictional issue raised by DIRECTV given that it was considered and resolved by the Commission in the *DBS Must Carry Report & Order*.<sup>30</sup> The determinative issue in this matter is whether the station's posting of its must carry election notice on July 2, 2001, constituted compliance with the deadline established in Section 76.66(c)(3). It did not.

9. KNWS argues that Section 1.4 of the Commission's rules extends the Section 76.66(c)(3) election deadline since July 1, 2001, fell on a Sunday. The express purpose of Section 1.4 is to "detail the method for computing the amount of time within which persons or entities must act in response to deadlines established by the Commission."<sup>31</sup> In the instant situation, no such computation was necessary because the Commission's deadline was a specific pre-determined date. Furthermore, Section 1.4(j) clearly states that it applies to filing dates falling on a holiday "unless otherwise provided."<sup>32</sup> By selecting Sunday, July 1, 2001, as the election deadline, the Commission expressly superceded Section 1.4(j). As such, KNWS' election notice was not timely.

10. The Commission made it clear in the *DBS Must Carry Report & Order* that each broadcaster was obligated to "notify a satellite carrier, by July 1, 2001, of its carriage intentions if it is located in a market where local-into-local service is provided."<sup>33</sup> Broadcasters were similarly made aware of the requirement that election notices were to be sent by certified mail, return receipt requested.<sup>34</sup> The *DBS Must Carry Report & Order* was released on November 30, 2000, a full eight months prior to the election deadline. As such, broadcasters were given ample time to prepare and mail their notices before July 1, 2001. In the cable television must carry context, we stated our concern that:

Given the large number of broadcasters and cable operators involved ... [we recognize] the potential for confusion and dispute surrounding the initial must-carry/retransmission consent election. Thus the rules and process for making the election, including in particular the requirement that such notifications be sent by a date certain via certified mail, were specifically designed to provide certainty and avoid embroiling the

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<sup>27</sup> 47 C.F.R. § 76.7(b)(1); *see supra* Notes 2 and 4.

<sup>28</sup> *See* Public Notice, *FCC Announces Change in Filing Location for Paper Documents*, DA 01-2436 (rel. Oct. 17, 2001).

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

<sup>30</sup> *DBS Must Carry Report & Order*, 16 FCC Rcd at 1974; *see also supra* Note 12.

<sup>31</sup> 47 C.F.R. § 1.4(a).

<sup>32</sup> 47 C.F.R. § 1.4(j).

<sup>33</sup> *DBS Must Carry Report & Order*, 16 FCC Rcd at 1931; *see also* 47 C.F.R. § 76.66(c)(3).

<sup>34</sup> *DBS Must Carry Report & Order*, 16 FCC Rcd at 1932.

Commission in disputes of this type.<sup>35</sup>

11. The same rationale holds true in the satellite context. Although amendments made to Section 76.66(d) in the *DBS Must Carry Reconsideration Order* made the obligation to mail notices by the election date more explicit, the *DBS Must Carry Report & Order* was clear with respect to this requirement.<sup>36</sup> Stations failing “to request carriage by the established deadlines [are] not entitled to mandatory carriage under [Section] 338 for the duration of the election cycle.”<sup>37</sup>

#### IV. ORDERING CLAUSES

12. Accordingly, **IT IS ORDERED**, pursuant to Section 338 of the Communications Act, as amended, 47 U.S.C. § 338, and Section 76.66 of the Commission’s rules, 47 C.F.R. § 76.66, that the must carry complaint filed by Johnson, licensee of commercial television station KNWS, Katy, TX, against DIRECTV **IS DENIED**.

13. This action is taken by the Chief, Cable Services Bureau, pursuant to authority delegated by Section 0.321 of the Commission’s rules, 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

W. Kenneth Ferree  
Chief, Cable Services Bureau

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<sup>35</sup> *Gannon University Broadcasting, Inc.*, 10 FCC Rcd 8619, 8620 (1995).

<sup>36</sup> *DBS Must Carry Reconsideration Order*, 16 FCC Rcd 16544, at ¶ 70 (clarifying that election notices must be mailed prior to or on July 1, 2001, not received before that date).

<sup>37</sup> *DBS Must Carry Report & Order*, 16 FCC Rcd at 1929.