

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

In the Matter of:
KDTV License Partnership, G.P.
v.
City of San Bruno, California
Channel Positioning Complaint
CSR-5618-M

MEMORANDUM OPINION AND ORDER

Adopted: March 7, 2001

Released: March 8, 2001

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

I. INTRODUCTION

1. KDTV License Partnership, G.P., license of television broadcast station KDTV(TV), San Francisco, California (the "Station" or "KDTV"), filed the above-captioned complaint against the City of San Bruno, California (the "City") for its failure to carry KDTV on channel 14 of its cable system serving the City of San Bruno, California (the "cable community")

II. BACKGROUND

2. Pursuant to Section 614 of the Telecommunications Act and implementing rules adopted by the Commission in Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Broadcast Signal Carriage Issues ("Must Carry Order"), commercial television broadcast stations are entitled to assert mandatory carriage rights, including certain channel position rights, on cable systems located within the station's market.

3. Section 614(b)(6) of the Act and Section 76.57 of the Commission's rules provide commercial television stations with three channel positioning options. The 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.

1 Complaint at 2.

2 8 FCC Rcd 2965, 2976-2977 (1993).

3 47 U.S.C. § 534(b)(6); 47 C.F.R. § 76.57.

4 47 U.S.C. § 534(b)(6); 47 C.F.R. § 76.57(a).

any other channel number mutually agreed upon by the station and the cable operator.⁵

III. DISCUSSION

4. In support of its complaint, KDTV states that it is a full power commercial television station licensed to San Francisco, California, which is in the San Francisco-Oakland-San Jose Designated Market Area (“DMA”).⁶ KDTV is currently carried on channel 18 on the City’s municipally-owned cable system. KDTV indicates that as early as June 15, 1993, it elected mandatory carriage on the City’s cable system and requested that the City begin carriage of KDTV on channel 14, the channel number on which the Station broadcasts over-the-air.⁷ KDTV’s June 15, 1993 letter read in part: “KDTV ... provides written notice ... that it elects must carry status ... [and] prefer[s] to have the signal of our station carried on cable channel 14.”⁸ KDTV notes that in 1996 and 1999, in compliance with the Commission’s rules, KDTV made similar must carry elections, and requested the City to begin carriage of KDTV on channel 14.⁹ According to KDTV, it also met with the City in February 1997 in an attempt to secure KDTV’s carriage on channel 14.¹⁰ KDTV asserts that during the February 1997 meeting, the City stated that it could not carry KDTV on channel 14 because another station had been historically carried on that channel.¹¹

5. KDTV points out that in October 1998, it again contacted the City to discuss the repositioning of KDTV in connection with a rebuild of the cable system.¹² KDTV maintains that at that time, the City stated that carriage of broadcast stations on their over-the-air channels would avoid viewer confusion, and thus, it would reposition KDTV to channel 14 and KCNS to channel 38.¹³ KDTV states that despite the City’s statements, the City did not reposition the stations.¹⁴ KDTV argues that it is entitled to be carried on its over-the-air channel position because it has made an affirmative election to be carried on channel 14 and has, through the years, affirmed that election and endeavored to protect its

⁵ 47 U.S.C. § 534(b)(6); 47 C.F.R. § 76.57(c).

⁶ Section 614(h)(1)(C) of the Communications Act, as amended by the Telecommunications Act of 1996, provides that a station’s market be determined by the Commission by regulation or order using, where available, commercial publications which delineate television markets based on viewing patterns. *See* 47 U.S.C. § 534 (h)(1)(C). 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 “1992-1992 *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 DMAs. For the must carry/retransmission consent elections that took effect on October 1, 1999, commercial television stations were required to make their elections based on DMAs. *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*”).

⁷ Complaint at 2 and Exhibit A.

⁸ *Id.*

⁹ Complaint at 2.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.* *See* Exhibit C.

¹⁴ Complaint at 2.

channel positioning rights.¹⁵ In that regard, KDTV points out that KCNS acquired channel 14 by default and asserts that KCNS has made no effort to protect its rights with respect to carriage on channel 14.¹⁶ KDTV states that when the City failed to meet its channel positioning obligations pursuant to KDTV's must carry election for the period effective October 1, 1999, it notified the City of its obligation to carry KDTV on channel 14.¹⁷ According to KDTV, the City reiterated its refusal to carry KDTV on channel 14, arguing that it could not reposition KDTV to the requested channel because KCNS had not authorized the City to relocate KCNS' signal to another channel on the system in question.¹⁸

6. In opposition, the City maintains that it has been unable to reposition KDTV to channel 14 because the system in question has carried KCNS, another must carry station, on channel 14 since 1993 when it inquired "about being positioned on a number of channels."¹⁹ KCNS' letter dated May 10, 1993 reads, in relevant part:

KCNS is requesting information regarding TV-38's channel position on your cable system on July 19, 1985 and January 1, 1992. We would also like to know what channel positions are available on your system, *i.e.* 3, 6, 8, 10, 12, 13, 15, 16, 17, 18, 19, 21, 22, 23, 24, 25, 27, 28, 29, 30, 31, 33, 34, 35, 37.²⁰

The City states that when KDTV first exercised its must carry rights in 1993, KCNS had already been assigned channel 14 on the system, and that therefore, KCNS has priority over the channel position in question.²¹ The City argues that even if KCNS did not elect a specific channel position, even as recently as 1999, its channel election has been "implicit and intended."²² The City maintains that KDTV is properly being carried on channel 18 because that is the channel on which the Station was carried on July 19, 1985.²³ It states that although cable operators are "usually" required to comply with a station's channel positioning election, the Communications Act and the Commission's rules are silent as to what station has priority when one station seeks to reposition itself on a cable channel already occupied by another must carry station.²⁴ In addition, the City argues that the Commission has declined to adopt a formal priority structure to resolve conflicting channel positioning requests.²⁵ Finally, the City asserts that KDTV's conclusion that it is entitled to carriage on channel 14 because it made an affirmative election for carriage on that channel is unjustified and is not supported by the Commission's rules.²⁶

¹⁵ *Id.* at 5.

¹⁶ *Id.*

¹⁷ *Id.* at 3.

¹⁸ *Id.* and Exhibit C.

¹⁹ Opposition at 1-2.

²⁰ Exhibit B.

²¹ Opposition at 1, 4 and 5.

²² *Id.* at 5. See Exhibit D.

²³ According to the City, pursuant to Section 76.57(a) of the Commission's rules, channel 18 is KDTV's proper channel position.

²⁴ Opposition at 4.

²⁵ *Id.*, citing the Commission's *Must Carry Order*, 8 FCC Rcd 2965, 2986 (1993).

²⁶ Opposition at 4-5.

7. In reply, KDTV reiterates its argument that pursuant to the Communications Act and the Commission's rules, KDTV has a right to be carried on channel 14 of the City's cable system, which is also KDTV's over-the-air channel.²⁷ KDTV argues that KCNS has failed to take any affirmative action to elect carriage on channel 14, and maintains that the City cannot shield itself behind the argument that it has an agreement to carry KCNS on channel 14 in perpetuity.²⁸

8. We disagree with the City's arguments that KDTV need not be repositioned to its over-the-air channel because another must carry station has been carried on channel 14 since 1993. The City incorrectly assumes that the simple fact that channel 14 was assigned to KCNS a month before KDTV elected must carry status and requested carriage on channel 14 gives KCNS superior channel positioning rights over KDTV. In that regard, the City believes that in the event of a channel positioning conflict between broadcast stations; the first-in-time to be assigned to a channel position should have priority over the assigned channel in perpetuity. We disagree. First-in-time channel positioning assignment is not enough. To preserve its must carry channel positioning rights, a television broadcast station has to do more than simply inquire about channel positions that may be available on a given cable television system. It has to affirmatively seek to protect or enforce those rights by making an election. The City's reliance on the fact that the Commission declined to adopt a formal priority structure for resolving conflicting channel positioning claims in its *Must Carry Order* is flawed. The Commission has in fact discussed a comparable first-in-time rule with regard to "default" must carry stations (*i.e.* those stations, such as KCNS, which did not affirmatively elect must carry status). In its *Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Broadcast Signal Carriage Issues* ("*Must Carry Clarification Order*"), the Commission determined that, in the event of a conflict, stations making affirmative carriage elections have channel-positioning priority over default stations.²⁹ The reason for assigning such priority was that those making an election were the first to take action to enforce their rights.³⁰ Specifically, the Commission said:

In the *Report and Order* we declined to establish any rules governing conflict among must-carry stations' requests for specific channels. We now conclude that such rules are necessary to resolve conflicts between local commercial stations that affirmatively elected carriage and those receiving carriage by default. Specifically, in the event of such a conflict, the request from the local commercial station [that] made the affirmative election should be given priority. We believe this approach is fair to all parties since the default must carry station could have protected its channel positioning rights by affirmatively electing must carry and a specific channel position.³¹

9. In the instant case, the record shows that KCNS became a must carry station by default as it did not affirmatively elect must carry status in 1993. As noted above, in its May 10, 1993 letter KCNS only inquired about the availability of channels on the City's system. It did not make a must carry election or demand carriage on channel 14 or any other specific channel position. Even as recently as September 1999, KCNS failed to make an election or demand. KDTV on the other hand, affirmatively

²⁷ Reply at 1-2.

²⁸ *Id.* 2-5.

²⁹ 8 FCC Rcd 5083, 5084 (1993). *See also* 47 C.F.R. § 76.56(b)(7) and § 76.57(e).

³⁰ *Must Carry Clarification Order*, 8 FCC Rcd at 5084.

³¹ *Id.* *See* 47 C.F.R. § 76.57(e).

elected mandatory carriage on the system in question on June 15, 1993, and specifically requested to be carried on channel 14, its over-the-air channel. In addition, through the years, KDTV has tried, albeit unsuccessfully, to protect and enforce its channel positioning rights. In view of the above, we grant KDTV's channel positioning complaint.

IV. ORDERING CLAUSES

10. Accordingly, **IT IS ORDERED**, pursuant to Section 0.321 of the Commission's rules (47 C.F.R. § 0.321), that the channel positioning complaint, KDTV License Partnership, G.P. against the City of San Bruno, California, **IS GRANTED**.

11. **IT IS FURTHER ORDERED**, that the City of San Bruno, California **SHALL COMMENCE CARRIAGE** of KDTV(TV) on channel 14 throughout its municipal system serving San Bruno, California, within 90 days of the release of this *Order*.

12. This action is taken pursuant to authority delegated under Section 0.321 of the Commission's rules.³²

FEDERAL COMMUNICATIONS COMMISSION

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

³² 47 C.F.R. § 0.321.