

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

In the Matter of:
North Pacific International Television, Inc.
v.
DIRECTV, Inc.
Request for Mandatory Carriage of
KHCV(TV), Seattle, Washington
CSR-5735-M

MEMORANDUM OPINION AND ORDER

Adopted: January 15, 2002

Released: January 17, 2002

By the Deputy Chief, Cable Services Bureau:

I. INTRODUCTION

1. North Pacific International Television, Inc. ("North Pacific"), licensee of commercial television station KHCV(TV), Seattle, Washington ("KHCV" 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, and Section 76.66 of the of the Commission's rules for its refusal to carry the signal of KHCV on its satellite system. KHCV states that DIRECTV is providing "local-into-local" satellite service in the Seattle, Washington market, which is the designated market area ("DMA") where station KHCV operates, pursuant to the statutory copy license. In its complaint, KHVC alleges that DIRECTV has failed to meet its must carry obligations under the Commission's satellite broadcast signal carriage rules. KHCV requests that the Commission order DIRECTV to carry the station's signal on DIRECTV's satellite system. DIRECTV filed an answer to the complaint and KHCV filed a reply and a "Motion for Extension of Time" regarding the filing of that pleading. DIRECTV also

1 47 U.S.C § 338; 47 C.F.R. § 76.66.

2 The Commission issued a Public Notice on September 21, 2001. See Special Relief and Show Cause Petitions, Report No. 0013 (released September 21, 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 KHCV cites good cause for filing its motion and states that DIRECTV consented to the extension of time request. KHCV's request is hereby granted.

filed a “Motion to Accept Supplemental Filing, Motion for Summary Dismissal, and Sur-Reply” (“sur-reply”).⁵ For the reasons set forth below, we deny KHCV’s complaint.

II. BACKGROUND

2. Section 338 of the Act, adopted as part of the Satellite Home Viewer Improvement Act of 1999 (“SHVIA”),⁶ 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.⁷ 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, 2002.⁸ A station’s market for satellite carriage purposes is its DMA, as defined by Nielsen Media Research.⁹ In November 2000, the Commission adopted rules to implement

⁵ 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 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. *See* 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). Section 76.7(d) states that “[e]xcept as provided in this section, or upon a showing of extraordinary circumstances, additional motions or pleadings by any party will not be accepted.” In its additional pleading, “Motion to Accept Supplemental Filing, Motion for Summary Dismissal, and Sur-Reply,” DIRECTV states that it filed this pleading because it has determined that because of the arguments raised in KHCV’s complaint and reply, the Commission does not have jurisdiction to consider KHCV’s allegations. DIRECTV also asserts that KHCV raises new facts and arguments for the first time in its reply pleading, thereby necessitating this supplemental pleading. We will consider DIRECTV’s supplemental pleading to the extent that it may address new arguments raised by KHCV. DIRECTV also sent a letter to the Cable Services Bureau Chief addressing issues raised in a letter sent to Congress by KHCV’s counsel regarding a hearing on Multi-Channel Video Competition. (*See* December 12, 2001 Letter to W. Kenneth Ferree, Chief, Cable Services Bureau from Gary Epstein, Esq. and James Barker, Esq.). KHCV responded by arguing that DIRECTV’s letter is an unauthorized pleading because the KHCV letter referenced by DIRECTV was sent to Congress and should not be made part of the record in the instant must carry proceeding. (*See* December 14, 2001 Letter to W. Kenneth Ferree, Chief, from Peter Tannenwald, Esq.). We agree and will not incorporate the letter as part of this proceeding.

⁶ *See* Pub. L. No. 106-113, 113 Stat. 1501, 1501A-526 to 1501A-545 (Nov. 29, 1999).

⁷ *See* 47 U.S.C. § 338.

⁸ *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 1st of the year preceding the new cycle for all election cycles after the first election cycle.”).

⁹ 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.”).

the provisions contained in Section 338.¹⁰

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.¹¹ 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.¹² If Commission action is needed, as KHCV 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.¹³ 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.¹⁴ Below, we consider the complaint filed by Station KHCV.

III. DISCUSSION

4. In support of its complaint, KHCV states that KHCV's counsel sent on its behalf to DIRECTV a certified letter on June 19, 2001, return receipt requested, electing mandatory carriage of KHCV on DIRECTV's system serving the Seattle DMA.¹⁵ KHCV asserts that DIRECTV failed to respond to its letter by July 19, 2001 and such failure to respond is considered a refusal of the request.¹⁶ KHCV notes that following denial of carriage, a broadcaster has 60 days to file a complaint.¹⁷ KHCV states that it had until September 17, 2001 to file a complaint and its complaint is therefore timely filed.¹⁸

¹⁰ 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*").

¹¹ See 47 U.S.C. § 338(f)(1); see also 47 C.F.R. § 76.66(m)(1).

¹² See 47 C.F.R. § 76.66(m)(2).

¹³ 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.

¹⁴ See *DBS Must Carry Reconsideration Order*, 16 FCC Rcd 16544, at ¶ 60.

¹⁵ Complaint at 2, Exhibit 1 (Letter from Kevin M. Walsh, Esq. to Ms. Toby Berlin, Vice President, DIRECTV dated June 19, 2001).

¹⁶ Complaint at 3. KHCV notes that according to Section 76.66(m)(2) of the Commission's rules, a satellite carrier has 30 days to respond in writing to the notification of a full-power television station that it is either electing between mandatory carriage or retransmission consent or, in the case of noncommercial stations, requesting carriage. KHCV asserts that the rule differs from the *DBS Must Carry Report and Order* in that the latter allowed satellite carriers until August 1, 2001 to respond to television station notifications in the first election cycle. See *DBS Must Carry Report and Order*, 16 FCC Rcd at 1931-1932.

¹⁷ See 47 C.F.R. § 76.7(c)(5); see also *DBS Must Carry Report & Order*, 16 FCC Rcd at 1975.

¹⁸ KHCV notes that it arguably had until 60 days after August 1, 2001 to file its complaint. See n.16, *supra*.

5. KHCV argues that DIRECTV is obligated to carry KHCV in the Seattle DMA. KHCV states that each satellite carrier providing local-into-local service is obligated to carry every local commercial television station in the particular DMA that made a timely election between mandatory carriage and retransmission consent, unless the station's programming is duplicative of the programming of another station carried by the carrier in the DMA.¹⁹ KHCV notes that, generally, one commercial television station's programming is duplicative of another's if the stations simultaneously broadcast identical programming for more than 50 percent of the broadcast week.²⁰ KHCV further notes that if the station's programming is duplicative, the satellite carrier may choose which duplicating signal it will carry.²¹ In the instant case, KHCV asserts that DIRECTV must carry the station because no other full-power commercial station in the Seattle DMA simultaneously broadcasts programming identical to KHCV's programming more than 50 percent of the broadcast week.²²

6. With regard to signal quality, KHCV states that because DIRECTV did not respond to its mandatory carriage election, it does not know the exact signal strength of KHCV's signal at DIRECTV's local receive facility.²³ Nonetheless, KHCV asserts that it is confident that it does provide a good quality signal to DIRECTV pursuant to the Commission's rules.²⁴ KHCV also states that, if for any reason, the signal of KHCV does not meet Commission requirements at the DIRECTV receive site, KHCV pledges to provide DIRECTV's local receive facility in the Seattle DMA with a good quality signal at its sole expense.²⁵

7. In its answer, DIRECTV asserts that it has no record of receiving KHCV's must carry election notice.²⁶ According to DIRECTV, although KHCV contends that a letter attached as an exhibit to its complaint was sent to DIRECTV via certified mail, return receipt requested,²⁷ KHCV provides no receipt or other evidence that the letter was both mailed and actually received by DIRECTV.²⁸ DIRECTV also asserts that it does not have any record of any inquiry or follow-up by KHCV to confirm whether DIRECTV in fact had received KHCV's must carry election notice.²⁹ Accordingly, DIRECTV argues that in the absence of any evidence that DIRECTV was properly and timely notified of KHCV's must carry election, KHCV's complaint should be dismissed.³⁰

¹⁹ *DBS Must Carry Report and Order*, 16 FCC Rcd at 1926.

²⁰ *Id.* at 1950.

²¹ *Id.* KHCV also notes that more complex tests are employed if the duplicating stations are network affiliates or if the stations are in different states. *Id.* at 1951.

²² Complaint at 4.

²³ *Id.*

²⁴ See 47 C.F.R. § 76.55(c)(3). KHCV bases its assertion on the fact that all of Seattle is within the 80 dBu principal city contour of KHCV. Complaint at 4, Exhibit II (map of KHCV's 80 dBu contour).

²⁵ Complaint at 4.

²⁶ DIRECTV Answer at 1.

²⁷ See Complaint at 1, Exhibit 1.

²⁸ DIRECTV Answer at 1.

²⁹ *Id.* at 5.

³⁰ *Id.* at 6.

8. In its reply, KHCV argues that it has met its burden of proof that KHCV's carriage request was timely sent to DIRECTV. In support, KHCV refers to a signed copy of its satellite carriage request sent to DIRECTV on June 19, 2001, via certified mail, return receipt requested.³¹ In addition, KHCV supplies in its reply the Declaration of its counsel, Kevin M. Walsh, in which he states that he drafted the carriage request and delivered it to his administrative assistant, instructing her to sign the letter on his behalf and send it to DIRECTV via certified mail, return receipt requested, which according to the declarant is standard office procedure.³² KHCV also states that the administrative assistant's supervisor witnessed the assistant sending certified mail to ensure that she followed standard office procedures when doing so.³³ KHCV further argues that under the Commission's own rules, "service by mail is complete upon mailing."³⁴ KHCV also argues that circumstantial evidence concerning usual office procedure can establish proof of mailing.³⁵

9. KHCV also argues that even if DIRECTV somehow failed to receive KHCV's carriage request, DIRECTV now is well aware of KHVC's desire to be carried.³⁶ KHCV further contends that DIRECTV has not claimed that it would be harmed if it were required to carry KHCV.³⁷ Additionally, KHCV asserts that the carrier would not incur additional copyright fees by carrying KHCV,³⁸ and DIRECTV has not claimed that it lacks the capacity to carry KHCV.³⁹ Further, KHCV argues that Congress and the Commission never intended a satellite carrier to shirk its responsibilities based upon a technicality even if one exists, which KHCV asserts that it does not concede.⁴⁰ KHCV contends that carriage only should be denied when the station does not meet its basic carriage qualifications.⁴¹

10. In its sur-reply, DIRECTV seeks summary dismissal of KHCV's 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.⁴² DIRECTV also argues that KHCV for the first time in its reply raises new facts and arguments

³¹ Reply at 1, citing Complaint at 1, Exhibit I.

³² Reply at 2, Exhibit A. KHCV also argues that it must be noted that the administrative assistant signed the letter, which is evidenced by the fact that she put her initials next to counsel's name. According to KHCV, it would be illogical for the administrative assistant to sign but not actually send the letter.

³³ See Declaration of Tracy L. Trynock, Director of Administration for the law firm of Irwin, Campbell & Tannenwald, P.C., dated October 23, 2001, attached as part of Exhibit A, KHCV Reply.

³⁴ Reply at 2; see 47 C.F.R. § 1.47(f).

³⁵ Reply at 2, citing *United States v. Bowman*, 783 F.2d 1192, 1197 (5th Cir. 1986); *United States v. Ledesma*, 632 F.2d 670, 675 (7th Cir. 1980) ("Testimony as to office practice is sufficient proof of mailing."), *cert. denied*, 449 U.S. 998 (1980).

³⁶ Reply at 3, 6.

³⁷ *Id.*

³⁸ See 17 U.S.C. § 122.

³⁹ Reply at 3, 6.

⁴⁰ *Id.* at 6.

⁴¹ *Id.*

⁴² Sur-Reply at 4; 47 U.S.C. § 338.

surrounding its failure to request mandatory carriage on a timely basis.⁴³ In that regard, DIRECTV argues that the declarations of KHCV's counsel and that of the law firm's Director of Administration do not constitute sufficient proof to show that KHCV's must carry election letter was mailed and received by DIRECTV.⁴⁴

11. Based on the record, we deny KHCV's request for mandatory carriage. As an initial matter, we note 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*.⁴⁵ With regard to the substantive issues raised in KHCV's complaint, the Commission made clear in the *DBS Must Carry Report & Order* that local stations are required to make elections and requests for carriage, in writing, sent to the satellite carrier's principal place of business by certified mail, return receipt requested.⁴⁶ We also stated that contacting a carrier by certified mail is the notification method required to ensure that broadcast stations are able to demonstrate that they submitted their elections by the required deadline and that they are received by the satellite carrier.⁴⁷

12. KHCV claims that it sent DIRECTV its election request by certified mail. However, DIRECTV has no record of ever receiving that request. Moreover, KHCV provides no proof, such as a date-stamped certified mail receipt demonstrating that its election request was sent to DIRECTV or a certified mail postal card evidencing that the letter had been delivered to DIRECTV. KHCV instead argues that the standard operating mailing procedures at the law firm acting on its behalf should be accepted as proof that the mailing of its election request materials occurred. KHCV submits declarations from the attorney who drafted the election request and the supervisor of the administrative assistant who was instructed to mail the election request. However, there is no declaration from the individual who mailed the documents.⁴⁸ In addition, although KHCV argues that standard operating procedure is evidence of mailing, the cases KHCV offers for support can be distinguished from the circumstances here. In those cases, the mailing of the documents at issue was accomplished by ordinary mail and there was no requirement that the materials sent be delivered by certified mail.⁴⁹ It was under those circumstances that the court found that circumstantial evidence was sufficient to establish proof of mailing. Under the Commission's rules, there is a specific requirement for election requests to be sent by certified mail, return receipt requested.⁵⁰ Standard office practice is not sufficient to adduce that election request documents are actually mailed. Without evidence of mailing, KHCV's statement that its election request was sent certified mail and received by DIRECTV is conjecture.

13. Requiring that notification be accomplished by certified mail provides assurance that satellite carriers are aware of their carriage obligations. Satellite carriers must contend with hundreds of

⁴³ *Id.* at 2.

⁴⁴ *Id.* at 5.

⁴⁵ *DBS Must Carry Report & Order*, 16 FCC Rcd at 1974; *see also supra* n.13.

⁴⁶ *Id.*, 16 FCC Rcd at 1932.

⁴⁷ *DBS Must Carry Reconsideration Order*, 16 FCC Rcd at 16576.

⁴⁸ According to the Declaration of Tracy L. Trynock, Director of Administration for the law firm of Irwin, Campbell & Tannenwald, P.C., the firm no longer employs that individual.

⁴⁹ *United States v. Bowman*, 783 F.2d 1192 (5th Cir. 1986) and *United States v. Ledesma*, 632 F.2d 670 (7th Cir. 1980) are cases involving mail fraud.

⁵⁰ *See* 47 C.F.R. § 76.66(d)(1)(ii).

election requests from local stations and configuring satellite systems requires some degree of certainty in order to enable satellite carriers to fulfill their obligations.⁵¹ Satellite carriers should not be subject to election and carriage requests that fail to meet the requirements of the Commission's rules. This bright line approach in the Commission's rules was designed to avoid these particular types of arguments raised by KHCV. Given KHCV's failure to provide the proof required by the Commission's rules, we deem that it has not adequately established that its election was mailed or received. We believe that the *DBS Must Carry Report & Order* and the Commission's rules are clear with respect to the election requirements.

IV. ORDERING CLAUSES

14. Accordingly, **IT IS ORDERED**, that DIRECTV, Inc.'s Motion to Accept Supplemental Filing **IS GRANTED** to the extent indicated herein and DIRECTV's Motion for Summary Dismissal **IS DENIED**.

15. Further, **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 North Pacific International Television, Inc., licensee of commercial station KHCV, Seattle, Washington, against DIRECTV, Inc. **IS DENIED**.

16. 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

William H. Johnson
Deputy Chief, Cable Services Bureau

⁵¹ See *DBS Must Carry Report & Order*, 16 FCC Rcd at 1929.