

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

In the Matter of:)
North Pacific International Television, Inc.)
v.) CSR-5738-M
EchoStar Satellite Corporation)
Request for Mandatory Carriage of)
Television Station KHCV-TV,)
Seattle, WA)

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, Channel 45, Seattle, WA ("KHCV" or the "station") filed the above-captioned must carry complaint against EchoStar Satellite Corporation ("EchoStar"), pursuant to Section 338 of the Communications Act of 1934, as amended, and Section 76.66 of the Commission's rules, 47 C.F.R. § 76.66, for its refusal to carry the signal of KHCV on its satellite system.1 KHCV states that EchoStar is providing "local-into-local" satellite service in the Seattle, WA market, the designated market area ("DMA") where station KHCV operates, pursuant to the statutory copyright license.2 In its complaint, KHCV alleges that EchoStar has failed to meet its must carry obligations under the Commission's satellite broadcast signal carriage rules and regulations. KHCV requests that the Commission order EchoStar to carry the station's signal on EchoStar's satellite system. EchoStar filed an opposition to the complaint and KHCV filed a reply.3 In addition, EchoStar filed a Supplemental Response to which

1 The Commission issued a Public Notice on September 28, 2001. Cable Special Relief and Show Cause Petitions, Report No. 0014 (Sept. 28, 2001).

2 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).

3 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. See 47 C.F.R. § 76.66(m)(3). Although generally styled by parties as a "complaint," we note that a carriage complaint filed against a satellite carrier is treated by the Commission as a petition for special relief for purposes of complying with the Commission's pleading requirements. See In the Matter of 1998 Biennial Regulatory Review: Part 76 - Cable Television Service Pleading and Complaint Rules, CS Docket No. 98-54, Report and Order, 14 FCC Rcd 418 (1999). Responsive pleadings filed in this context, therefore, must comply with the requirements set forth under Section 76.7(b)(1).

KHCV replied.⁴ For the reasons set forth below, we deny KHCV's complaint.

II. BACKGROUND

2. Section 338 of the Communications Act of 1934, adopted as part of the Satellite Home Viewer Improvement Act of 1999 ("SHVIA"),⁵ requires satellite carriers, by January 1, 2002, to carry upon 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.⁶ For the initial election cycle, broadcast stations must notify a satellite carrier by July 1, 2001 of mandatory carriage election for carriage to commence by January 1, 2002.⁷ A station's market for satellite carriage purposes is its DMA, as defined by Nielsen Media Research.⁸ A DMA is a geographic area that describes each television market exclusive of others, based on measured viewing patterns. In November 2000, the Commission, in *Implementation of the Satellite Home Viewer Improvement Act of 1999: Broadcast Signal Carriage Issues; Retransmission Consent Issues*, adopted rules to implement the provisions contained in Section 338.⁹

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 failed to comply with such obligations.¹⁰ Within 30 days after such written notification, the satellite carrier shall respond in writing and comply with such obligations or state its reasons for believing that it is in compliance with such obligations.¹¹ If Commission action is necessitated, as the station alleges here, a broadcast station may file a complaint with the Commission within 60 days after the satellite carrier submits a final rejection of a broadcast station's carriage request.¹² If a satellite carrier

⁴ EchoStar provides information on the procedures of the United States Post Office concerning certified mail. KHCV requests that the Commission not accept EchoStar's Supplemental Response. We will consider EchoStar's supplemental pleading to the extent that it may address new arguments raised in KHCV's reply.

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

⁶ See 47 U.S.C. § 338.

⁷ 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.").

⁸ 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*, CS Docket Nos. 00-96 & 99-363, Report and Order, 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.").

⁹ See generally *DBS Must Carry Report & Order*, *supra*. The Commission affirmed and made clarifications to its carriage rules in a reconsideration proceeding. See *Implementation of the Satellite Home Viewer Improvement Act of 1999: Broadcast Signal Carriage Issues*, CS Docket No. 00-96, Order on Reconsideration, 16 FCC Rcd 16544 (2001) ("*DBS Must Carry Reconsideration Order*").

¹⁰ See 47 U.S.C. § 338(f)(1). See also 47 C.F.R. § 76.66(m)(1).

¹¹ See 47 C.F.R. § 76.66(m)(2)

¹² See 47 C.F.R. § 76.66(m)(6); *SHVIA Must Carry Reconsideration Order*, 16 FCC Rcd 16544, at ¶ 60. If a television station seeks a finding on the facts and a resulting determination of whether it is entitled to carriage (continued...)

provides no response to a must carry election, the 60 days commences after the time for responding as required by the rule has elapsed.¹³ Below, we consider the complaint filed by Station KHCV.

III. DISCUSSION

4. In support of its Complaint, Station KHCV asserts that EchoStar wrongfully denied its request for mandatory carriage. KHCV states that on June 19, 2001, it elected mandatory carriage on EchoStar's system serving the Seattle DMA. Because EchoStar failed to respond to KHCV's carriage request by July 19, 2001, KHCV considered the lack of response as a refusal of its carriage request.¹⁴ Following the denial of carriage and within the time period set forth pursuant to Section 76.66(m)(6), KHCV filed this complaint.¹⁵ KHCV argues that no other commercial station in the Seattle DMA simultaneously broadcasts programming identical to KHCV's programming for more than 50 percent of the broadcast week.¹⁶ Moreover, the station asserts that it is confident that KHCV provides a good quality signal to EchoStar's local receive facility, and if it does not, pledges to provide a good quality signal at its sole expense.¹⁷ KHCV also states that EchoStar is obligated to carry KHCV and that grant of KHCV's request for carriage would serve the public interest by helping to create a more diverse competitive communications landscape.¹⁸

5. In its Opposition, EchoStar argues that KHCV is not entitled to carriage rights on the EchoStar system because KHCV failed to make a proper must carry election by July 1, 2001.¹⁹ EchoStar points out that Section 76.66(d)(1)(ii) requires that must carry elections be made in writing and sent to the satellite carrier's principal place of business, by certified mail, return receipt requested.²⁰ EchoStar asserts that although KHCV states that it mailed its election request by certified mail, EchoStar has no record of receipt of such a letter.²¹ When asked to provide a copy of the return receipt, EchoStar states that KHCV was unable to do so, and instead claimed that an employee at the law firm representing KHCV recalled sending the election to EchoStar by certified mail, return receipt requested.²² EchoStar asserts that requiring television stations to comply with the procedural rules regarding notification is necessary to provide a measure of control because it must deal with hundreds of separate station requests and resolve carriage issues under tight time constraints.²³ Moreover, EchoStar points out that the Bureau's conclusion in *Gannon University Broadcasting, Inc.* ("Gannon") should govern the dispute

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pursuant to Section 76.66 of our rules, then it may file a complaint with the Commission. If, however, a television station is not being carried and seeks damages and other specific forms of monetary or injunctive relief under either 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 complaint. *DBS Must Carry Report & Order*, 16 FCC Rcd at 1974.

¹³ See *DBS Must Carry Reconsideration Order*, 16 FCC Rcd at 16574.

¹⁴ Complaint at 3.

¹⁵ 47 C.F.R. § 76.66(m)(6).

¹⁶ Complaint at 4.

¹⁷ *Id.*

¹⁸ *Id.* at 4-5.

¹⁹ EchoStar Response at 2.

²⁰ *Id.* at 3.

²¹ *Id.*

²² *Id.*

²³ *Id.* at 4-5.

here.²⁴ EchoStar states that in *Gannon*, the Bureau concluded that the rules and process in connection with making a carriage election, including the requirement that notifications be sent to the carrier by a date certain via certified mail, were specifically designed to provide certainty and avoid embroiling the Commission in notification disputes.²⁵ EchoStar also asserts that KHCV's programming consists of "wall to wall" infomercials, that the station provides no local news or public affairs programming, and that KHCV should not be considered a local station.²⁶

6. In reply, with regard to the election notification purportedly sent to EchoStar, KHCV argues that a signed copy of KHCV's must carry election and satellite carriage request was sent to EchoStar on June 19, 2001, via certified mail, return receipt requested.²⁷ KHCV asserts that the election carriage request was prepared by its attorney who thereafter instructed his administrative assistant to sign the letter on his behalf and send the letter to EchoStar, via certified mail, return receipt requested.²⁸ KHCV contends that such preparation is standard office procedure for the mailing of documents and avers that in several cases courts have concluded that usual office procedure is sufficient circumstantial evidence to establish proof of mailing.²⁹ Moreover, KHCV states that EchoStar's assertion that *Gannon* supports the position that the KHCV's election should be discarded is misplaced.³⁰ KHCV argues that in *Gannon* although the Commission dismissed a complaint filed by a television station after a cable operator failed to accept the station's retransmission consent election because it was mailed a day late, the station automatically was granted must carry status as a default result.³¹ KHCV points out that an opposite result would occur in its case and that KHCV would be denied carriage for the next four years.³² KHCV moreover states even if it is assumed that its carriage request was not received, carriage on EchoStar's system serving the Seattle market should be provided because EchoStar in fact has actual knowledge of the station's request now.³³ KHCV also states that it is a licensed local television station operating within the Seattle DMA and that under the Commission's satellite carriage provisions EchoStar is obligated to carry KHCV.³⁴ In addition, KHCV asserts that the station broadcasts a wide range of programs, including public affairs, children's, religious, and shop-at-home programming.³⁵

7. Based on the record, we deny KHCV's request for mandatory carriage. The Commission made it 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

²⁴ *Id.*, citing *Gannon University Broadcasting, Inc.*, 10 FCC Rcd 8619 (CSB 1995).

²⁵ *Gannon*, 10 FCC Rcd at 8621.

²⁶ EchoStar Response at 2.

²⁷ KHCV Reply at 3.

²⁸ *Id.*

²⁹ *Id.*, 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), *cert. denied*, 449 U.S. 998 (1980).

³⁰ KHCV Reply at 4.

³¹ *Id.* We note that in the satellite carriage context, in the absence of a specific request for carriage by the relevant election deadline, a broadcaster is deemed to have elected retransmission consent and cannot assert a demand for carriage until the next election cycle. See *DBS Must Carry Reconsideration Order*, 16 FCC Rcd at 16576.

³² KHCV Reply at 4.

³³ *Id.*

³⁴ *Id.* at 2.

³⁵ *Id.*

mail, return receipt requested.³⁶ 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.³⁷

8. KHCV claims that it sent EchoStar its election request by certified mail. However, EchoStar has no record of ever receiving that request. Moreover, KHCV has not produced the date-stamped certified mail receipt as proof that it mailed its election to EchoStar on or before July 1, 2001. 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 affidavits from the attorney who drafted the election request and the supervisor of the administrative assistant who was instructed to mail the election request.³⁸ However, there is no affidavit from the individual who mailed the documents.³⁹ 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 *Bowman* and *Ledesma* the mailing of the documents at issue was accomplished by ordinary mail and there was no requirement that the materials be delivered by certified mail.⁴⁰ 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.⁴¹ Standard office practice is not sufficient to adduce that election request documents are actually mailed. KHCV's statement that its election request was sent certified mail and received by EchoStar is conjecture.

9. Requiring that notification be accomplished by certified mail provides assurance that satellite carriers are aware of their carriage obligations. EchoStar must contend with hundreds of election requests from local stations and configuring its satellite systems requires some degree of certainty to enable it to fulfill its obligations.⁴² It 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 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. Despite the clear requirements of our rules that local stations use this notification method for delivery of their election request and retain proof of delivery, KHCV failed to do so. We believe that the *DBS Must Carry Report & Order* and the Commission's rules are clear with respect to the election requirements.

³⁶ *DBS Must Carry Report & Order*, 16 FCC Rcd at 1932.

³⁷ *DBS Must Carry Reconsideration Order*, 16 FCC Rcd at 16576.

³⁸ In his declaration regarding standard mailing procedures in his law firm's offices, the attorney representing KHCV states that he instructed the administrative assistant to send the election request letter to DIRECTV. The election request was supposed to be mailed to EchoStar.

³⁹ According to the affidavit, the firm no longer employs that individual.

⁴⁰ *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.

⁴¹ See 47 C.F.R. § 76.66(d)(1)(ii).

⁴² See *DBS Must Carry Report & Order*, 16 FCC Rcd at 1929.

IV. ORDERING CLAUSES

10. 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 North Pacific International Television, Inc., licensee of commercial television station KHCV, Seattle, WA, against EchoStar Satellite Corporation **IS DENIED**.

11. 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