

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

In the matter of)	
)	
Television Apogeo de Tucson)	
)	CSR-6033-M
v.)	
)	
EchoStar Communications Corporation)	
)	
Request for Mandatory Carriage of Television)	
Station KHRR-TV, Tucson, Arizona)	
)	
And)	
)	
Brazos Valley Public Broadcasting Foundation)	CSR-6042-M
)	
v.)	
)	
EchoStar Communications Corporation)	
)	
Request for Mandatory Carriage of Television)	
Station KWBU-TV, Waco, Texas)	

MEMORADUM OPINION AND ORDER

Adopted: March 27, 2003

Released: March 28, 2003

By the Deputy Chief, Media Bureau:

I. INTRODUCTION

1. Television Apogeo de Tucson, LLC, (“Apogeo”) licensee of television broadcast station KHRR-TV, Tucson, Arizona and Brazos Valley Public Broadcasting Foundation (“Brazos Valley”), licensee of noncommercial educational station KWBU-TV, Waco, Texas have filed complaints against EchoStar Communications Corporation (“EchoStar”) pursuant to Section 338 of the Communications Act, as amended, and Section 76.66 of the Commission’s rules. The complaints are based on EchoStar’s refusal to carry the stations’ signals on its satellite system.¹ Both stations allege that EchoStar is providing “local-into-local” satellite service pursuant to the statutory copyright license in their respective designated market areas (“DMA”).² Both complaints allege that EchoStar has failed to meet its must

¹ 47 U.S.C. § 338; 47 C.F.R. § 76.66. On December 7, 2001, the U.S. Court of Appeals for the Fourth Circuit unanimously upheld the constitutionality of Section 338 of the Act, and Section 76.66 of the Commission’s rules. *See SBCA v. FCC*, 275 F.3d 337, 350 (4th Cir. 2002), *cert. denied*, 70 U.S.L.W. 3580 (U.S. June 17, 2002) (No. 01-1332).

² *See* 17 U.S.C. § 122(a); 47 U.S.C. § 338. 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).

carry obligations under the Commission's satellite broadcast signal carriage rules.³ Because the facts alleged in each complaint are very similar, we consolidate the proceedings and resolve both complaints in one order. For the reasons discussed below, we grant both complaints.

II. LEGAL BACKGROUND

2. Section 338 of the Act, adopted as part of the Satellite Home Viewer Improvement Act of 1999 (SHVIA),⁴ required satellite carriers, beginning 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.⁵ A station's market for satellite carriage purposes is its DMA, as defined by Nielsen Media Research.⁶ In November 2000, the Commission adopted rules to implement the provisions contained in Section 338.⁷

3. Under the Commission's broadcast signal carriage rules, each satellite carrier providing local-into-local service pursuant to the statutory copyright license is generally obligated to carry any qualified local television station in the particular DMA that made a timely election for mandatory carriage, unless the station's programming is duplicative of the programming of another station carried by the carrier in the DMA.⁸ In DMAs where a satellite carrier launches new local-into-local service, the carrier must notify local television stations in writing of its intent to provide such service at least 60 days in advance and identify the location of its local receive facility.⁹ Upon receipt of this notice, local television stations must request carriage within 30 days.¹⁰ If a satellite carrier denies a local station's carriage request, it must notify the station within 30 days of its receipt of the carriage request.¹¹ Otherwise, local television stations must be carried by the later of 90 days from the satellite carrier's

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 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).

⁴ See Pub. L. No. 106-113, 113 Stat. 1501, 1501A-526 to 1501A-545 (Nov. 29, 1999).

⁵ See 47 U.S.C. § 338.

⁶ 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 broadcast stations, is the designated market area in which a station is located, and [i]n 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) [i]n 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.").

⁷ See generally *DBS Must Carry Report & Order*, 16 FCC Rcd at 1918. 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").

⁸ See 47 C.F.R. § 76.66.

⁹ See 47 C.F.R. § 76.66(d)(2); see also *DBS Must Carry Report & Order*, 16 FCC Rcd at 1933.

¹⁰ See 47 C.F.R. § 76.66(d)(2).

¹¹ *Id.*

receipt of the station's election request or upon commencing local-into-local service in the new television market.¹²

III. FACTUAL BACKGROUND

4. KHRR-TV, Tucson, Arizona Apogeo's Complaint sets forth the following facts that EchoStar does not dispute.¹³ On June 6, 2001, Apogeo received a letter from EchoStar stating that it intends to launch local-into-local service in the Tucson DMA and designating a local receive facility (LRF) for such purpose.¹⁴ Apogeo responded on June 21, 2001 and stated that it elected mandatory carriage by EchoStar.¹⁵ On July 30, 2001 EchoStar notified the station as follows: "EchoStar Communications Corporation has decided not to carry local broadcast stations in Tucson (Sierra Vista) DMA, at this time, based on costs to EchoStar and other considerations. At such time as EchoStar intends to launch carriage of local broadcast stations in your DMA, we will notify you in accordance with FCC regulations pertaining to must carry."¹⁶ The next two communications from EchoStar announced changes in the location of the LRF in Tucson.¹⁷ On June 13, 2002, EchoStar sent a third letter clarifying that the previous LRF designation was sent "with the intent to launch local service in your market in the near future."¹⁸

5. On July 31, 2002, EchoStar started providing local-into-local service in the Tucson DMA without station KHRR-TV. The station contacted EchoStar by telephone and asked why it was not being carried.¹⁹ EchoStar responded by letter stating it refused to carry KHRR-TV because the station had not made a timely carriage election.²⁰

6. KWBU-TV, Waco Texas: Brazos Valley's Complaint sets forth facts very similar to those in Apogeo's Complaint.²¹ On June 6, 2001, KWBU-TV received a letter from EchoStar

¹² See 47 C.F.R. § 76.66(d)(2)(iii). See also *DBS Must Carry Reconsideration Order*, 16 FCC Rcd at 16577.

¹³ On November 19, 2002 Apogeo filed a complaint pursuant to Section 338 of the Communications Act and Section 76.66 of the Commission's Rules. EchoStar filed an opposition on December 24, 2002 and Apogeo filed a Reply on January 15, 2003 after requesting a short extension of time. We grant Apogeo's Request for Extension and consider its Reply in this Order.

¹⁴ Letter from Eric Sahl, Director of Programming, EchoStar Communications Corporation to General Manager, KHRR-TV, June 6, 2001.

¹⁵ Letter from General Manager, KHRR-TV to EchoStar, June 21, 2001.

¹⁶ Letter from Eric Sahl, Director of Programming, EchoStar Communications Corporation to KHRR-TV, July 30, 2001.

¹⁷ These were dated February 26, 2002 and May 31, 2002.

¹⁸ Letter from Eric Sahl, Director of Programming, EchoStar Corporation to General Manager, KHRR-TV, June 13, 2002.

¹⁹ Apogeo Complaint at 2-3.

²⁰ Letter from Eric Sahl, Director of Programming, EchoStar Communications Corporation to General Manager, KHRR-TV, September 9, 2002.

²¹ Brazos Valley filed its Complaint on November 25, 2002; EchoStar filed an Opposition on December 24, 2002; and Brazos Valley filed a Reply on January 3, 2003. Although Brazos Valley argues that EchoStar's Opposition was untimely filed, we disagree because Public Notice of the Complaint was issued on December 6, 2002, and the Opposition was filed within 20 days, as required by Section 76.7(b)(1) of the Commission's rules, on December 24, 2002. See *supra* n. 3.

announcing that it intended to launch local-into-local service in the Waco-Temple-Bryan DMA.²² The station responded to the June 6th letter on June 25, 2001 by requesting mandatory carriage.²³ On July 30, 2001, the station received a letter from EchoStar referenced as a “Notice of Decision to Not Launch Local Service” that stated “[A]t such time as EchoStar intends to launch carriage of local broadcast stations in your DMA, we will notify you in accordance with FCC regulations pertaining to must carry.”²⁴ EchoStar sent two subsequent letters pertaining to the location of the LRF for the Waco market²⁵ and sent a third letter on June 13, 2002 clarifying that the designation of a LRF for the Waco DMA was sent “with the intent to launch local service in your market in the near future.”²⁶

7. EchoStar began providing local broadcast service in the Waco DMA in August, 2002²⁷ and did not carry KWBU-TV. On September 17, 2002 Brazos Valley wrote to EchoStar indicating its opinion that EchoStar was in violation of its mandatory carriage obligations.²⁸ EchoStar responded on September 24, 2002 stating that the station’s election was not timely.²⁹

IV. DISCUSSION

8. The issue in both of these cases is whether the stations’ replies to EchoStar’s June 6, 2001 notice of intent to begin local service perfected the stations’ rights to mandatory carriage when EchoStar began service in each station’s DMA in the summer of 2002. We find that the stations reasonably believed that they had timely complied with their obligation to elect mandatory carriage and that EchoStar’s conduct between June 2001 and the summer of 2002 did not indicate otherwise.

9. The record in both cases demonstrates that the only valid notice of intent to commence service was sent by EchoStar on June 6, 2001 and that both stations responded to the notice in a timely fashion. EchoStar cannot claim that the letter it sent to both stations on July 30, 2001, referenced as a “Notice of Decision to Not Launch Local Service”, was in fact a Rejection Notice of the stations’ elections because, based on the language used, it was merely an indication that commencement of local-into-local service would be delayed. Even if this letter could be deemed a rejection, in both cases it was sent more than 30 days after the stations’ election carriage and thus was untimely.³⁰ We disagree with EchoStar’s assertion that by saying it would notify the stations “in accordance with FCC regulations pertaining to must carry” it was clear that the stations’ elections were extinguished. After making a timely election in response to a notification of intent to serve, our rules do not require a television station to continuously renew its mandatory election for carriage by a satellite carrier where a carrier decides to delay commencement of service to the market.³¹ The interim letters sent in the early part of 2002 merely designate LRFs, give no indication that they were new notices of intent to commence service in either

²² Letter from Eric Sahl, Director of Programming, EchoStar Communications Corporation to General Manager, KWBU-TV, June 6, 2001.

²³ Letter from KWBU to EchoStar Communications Corporation, June 25, 2001.

²⁴ Letter from Eric Sahl, Director of Programming, EchoStar Communications Corporation, July 30, 2001.

²⁵ These were dated February 26, 2002 and June 10, 2002.

²⁶ Letter from Eric Sahl, Director of Programming, EchoStar Communications Corporation, June 13, 2002.

²⁷ EchoStar began local-into-local service in the Waco market on August 21, 2002. EchoStar Opposition at 1.

²⁸ Letter from Counsel for Brazos Valley to EchoStar Communications Corporation, September 17, 2002.

²⁹ Letter from Eric Sahl, Director of Programming, EchoStar Corporation to Counsel for Brazos Valley, September 25, 2002.

³⁰ 47 C.F.R. § 76.66(d)(2)(iv) requires a satellite carrier to notify the station in writing of its reasons for refusing carriage within 30 days of the carriage request.

³¹ See 47 C.F.R. § 76.66(d)(2)(iii).

market, and in fact could reasonably be viewed by the stations as evidence that EchoStar was planning to carry their signals. In the June 13, 2002 letters sent to both stations, EchoStar, for the first time since June 2001, indicates that its recent designation of an LRF was sent with the intent to launch local service but further confuses the issue by attempting to backdate the notice, linking it to an earlier LRF designation. The stations reasonably concluded that they had complied with our rules and that EchoStar's subsequent correspondence required no response.³² Nothing in any of this correspondence indicated that previous must carry elections were void or that new carriage elections were expected. EchoStar could easily have made its notices clear. Instead, the stations received a series of confusing and ambiguous letters and could reasonably conclude that they had fulfilled their election obligations in a timely fashion. Under these circumstances, both stations are entitled to carriage.

10. EchoStar offers several legal arguments in both cases to support its assertion that it can refuse carriage of these stations. First, EchoStar analyzes the facts presented here under general contract law, concluding that no binding contract for carriage was created or remained between it and either of the two stations.³³ We agree with the stations³⁴ that these cases are governed by the Commission's comprehensive regulatory scheme and thus EchoStar's contract law arguments are irrelevant. Second, EchoStar claims that allowing stations to continue to maintain mandatory election rights when a satellite carrier delays instituting service will rob that carrier of its right to challenge a station's qualifications when it does begin service.³⁵ We do not find this argument persuasive. EchoStar could protect its rights to challenge the stations' qualifications in one of two ways. It could have reviewed the elections at the time they were made in June 2001. Alternatively, EchoStar could have been very clear in its announcement to delay service that it was withdrawing its initial notice and that it expected stations to affirmatively elect carriage again when it was ready to begin service. Finally, we disagree with EchoStar that our decision in favor of these stations would set a precedent that stations could elect carriage at any time, regardless of whether there was a notice of intent by a satellite carrier to serve a particular market, the the carrier would be obligated to honor those elections in perpetuity.³⁶ In these cases, the stations filed in response to a notice, not before a notice was sent and thus EchoStar's concerns are unjustified. Our decision has no bearing on a case in which a station prematurely sends a satellite carrier an election of mandatory carriage.

V. ORDERING CLAUSES

11. Accordingly, **IT IS ORDERED**, pursuant to Section 338(f) of the Communications Act, as amended, 47 U.S.C. § 338(f), and Section 76.66 of the Commission's rules, 47 C.F.R. § 76.66, that the mandatory carriage complaints of Television Apogeo de Tucson, licensee of commercial television station KHRR, Tucson, Arizona and Brazos Valley Public Broadcasting Foundation, licensee of noncommercial television station KWBU, Waco, Texas against EchoStar Communications Corporation **ARE GRANTED**.

³² See Brazos Valley Complaint at 8.

³³ Opposition to Apogeo at 4; Opposition to Brazos Valley at 4.

³⁴ Reply of Apogeo at 4; Reply of Brazos Valley at 5.

³⁵ Opposition to Apogeo at 6; Opposition to Brazos Valley at 6.

³⁶ See Opposition to Apogeo at 7; Opposition to Brazos Valley at 8.

12. **IT IS FURTHER ORDERED** that KHRR-TV and KWBU-TV are entitled to carriage by EchoStar in the Tucson and Waco Designated Market Areas, respectively, within 75 days from the date on which this Order is released.

13. This action is taken by the Deputy Chief, Media Bureau, pursuant to authority delegated by Section 0.283 of the Commission's rules, 47 C.F.R § 0.283.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Deputy Chief, Media Bureau