

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

In the Matter of :
Guenter Marksteiner
v.
EchoStar Communications Corporation
Request for Carriage of Station WHDT-DT
Stuart, Florida
CSR-5978-M

MEMORANDUM OPINION AND ORDER

Adopted: January 14, 2003

Released: January 17, 2003

By the Chief, Media Bureau:

I. INTRODUCTION

1. Guenter Marksteiner, licensee of television station WHDT--DT, Stuart, Florida (Ind. Ch. 59) ("WHDT-DT") filed the above-captioned complaint against EchoStar Communications Corporation ("EchoStar"), pursuant to Section 338 of the Communications Act, as amended ("Act"), and Section 76.66 of the Commission's rules, for its refusal to carry the high definition digital television signal of WHDT-DT on its direct broadcast satellite system. WHDT-DT states that EchoStar is providing "local-into-local" satellite service pursuant to the statutory copyright license in West Palm Beach-Ft. Pierce, the designated market area ("DMA") where WHDT-DT operates. In its complaint, WHDT-DT alleges that EchoStar has failed to meet its must carry obligations under the Commission's satellite broadcast signal carriage rules. Echostar filed an opposition to the complaint and WHDT-DT filed a reply. For the reasons discussed below, we dismiss WHDT-DT's complaint against Echostar.

II. BACKGROUND

2. Section 338 of the Act, adopted as part of the Satellite Home Viewer Improvement Act of

1 47 U.S.C. § 338; 47 C.F.R. § 76.66. The U.S. Court of Appeals for the Fourth Circuit 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. § 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). See also 1998 Biennial Regulatory Review: Part 76 - Cable Television Service Pleading and Complaint Rules, 14 FCC Rcd 418 (1999).

1999 (“SHVIA”),<sup>4</sup> requires 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.<sup>5</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. A station’s market for satellite carriage purposes is its DMA, as defined by Nielsen Media Research.<sup>6</sup> Under SHVIA, a television station asserting its right to carriage is required to bear the costs associated with delivering a good quality signal to the designated local receive facility of the satellite carrier.<sup>7</sup> To be considered a good quality signal for satellite carriage purposes, an analog television station must deliver to the local receive facility of a satellite carrier either a signal level of –45dBm for UHF signals or –49dBm for VHF signals at the input terminals of the signal processing equipment.<sup>8</sup> In November 2000, the Commission adopted rules to implement the analog carriage provisions contained in Section 338.<sup>9</sup> The Commission has considered, but not yet adopted, rules for the carriage of digital television signals by satellite carriers.<sup>10</sup>

3. In June 2000, WHDT-DT filed a related Petition for Declaratory Ruling asking the Commission to declare that a new digital-only (“DTV”) television station, that seeks carriage of a single channel of video programming on a cable system, is entitled to mandatory cable carriage under Section 614 of the Act. In the *WHDT-DT Order*, the Commission concluded that, pursuant to Section 614(a), WHDT-DT was entitled to cable carriage of its digital broadcast signal within the West Palm Beach-Ft. Pierce television market.<sup>11</sup> In a ruling limited to cable operators, the Commission held that broadcasters initiating DTV-only service were entitled to mandatory carriage for their digital signals consistent with applicable statutory and regulatory provisions.<sup>12</sup> The Commission stated that WHDT-DT was entitled to

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

<sup>5</sup> See 47 U.S.C. § 338.

<sup>6</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 broadcast stations is the designated market area in which a station is located, and (i) [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.”).

<sup>7</sup> See 47 C.F.R. § 76.66(g)(1).

<sup>8</sup> 47 C.F.R. § 76.66(g)(2). See *DBS Must Carry Reconsideration Order*, 16 FCC Rcd at 16559-61. These rules are similar to the good signal quality rules applicable to cable operators. See 47 C.F.R. § 76.55.

<sup>9</sup> See generally *DBS Must Carry Report & Order*, 16 FCC Rcd 1918. The Commission later affirmed and clarified its satellite 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 *Carriage of Digital Television Broadcast Signals, First Report and Order and Further Notice of Proposed Rulemaking*, 16 FCC Rcd 2598, 2658 (2001). See also *DBS Must Carry Report & Order*, 16 FCC Rcd at 1971-72 (stating that the Commission will consider digital broadcast signal carriage rules at the same time it considers such rules for cable operators).

<sup>11</sup> Section 614(a) provides that “[e]ach cable operator shall carry, on the cable system of that operator, the signals of local commercial television stations ... as provided by this section.” 47 U.S.C. § 534(a).

<sup>12</sup> *WHDT-TV-DT, Channel 59, Stuart, Florida: Petition for Declaratory Ruling that Digital Broadcast Stations have Mandatory Carriage Rights*, Memorandum Opinion and Order, 16 FCC Rcd 2692, 2698 (2001). Adelphia has

make its cable carriage election in accordance with the provisions of Section 76.64(f)(4) of the Commission's rules. The Commission also held that carriage of digital-only television stations in a converted analog format did not impinge the free speech rights of cable operators. The issue of digital broadcast signal carriage by satellite carriers was not raised, considered, nor addressed in the *WHDT-TV Order*.

### III. DISCUSSION

4. WHDT-DT states that it commenced over-the-air digital broadcast service on May 2, 2002, and is entitled to satellite carriage under Section 338 of the Act and Section 76.66 of the Commission's rules. The station asserts that it sent its mandatory carriage election letter to Echostar on June 4, 2002, and received a rejection letter from the satellite carrier on July 3, 2002.<sup>13</sup> According to WHDT-DT, Echostar rejected its carriage request on numerous procedural and substantive grounds arguing, *inter alia*, that there is no federal mandate for the carriage of a digital-only television station by satellite carriers.<sup>14</sup> WHDT-DT argues that all of Echostar's assertions contained in its rejection letter are incorrect and are based on "too narrow" a view of the applicable laws and policies. As for Echostar's argument that there are no existing DTV satellite carriage requirements, WHDT-DT posits that nothing in the Act limits the carry-one carry-all mandate to analog stations or exempts DTV stations from their statutory rights.<sup>15</sup> WHDT-DV argues that 12% of households in the West Palm Beach DMA subscribe to satellite service<sup>16</sup> and that if the station is not carried, those viewers who rely exclusively on satellite television service will not be able to receive the station's programming. WHDT-DT asserts that lack of satellite carriage affects the ability of the station's advertisers to reach consumers.

5. In its Opposition, Echostar argues that WHDT-DT's complaint is procedurally and substantively infirm and must be dismissed, or held in abeyance, until such time as the Commission adopts "constitutionally sustainable" rules requiring satellite carriage of high definition television signals.<sup>17</sup> Echostar asserts that the Commission has not yet promulgated a digital satellite carriage requirement. It adds that the details inherent in such a mandate are best resolved through a rulemaking, not an adjudicatory proceeding, especially where, as here, the station seeks carriage of its entire high definition signal, which may contain material that the Commission may not require to be carried.<sup>18</sup>

6. Echostar also argues that mandatory carriage of WHDT-DT would impose significant capacity burdens because it does not have the bandwidth to carry the station in a high definition format.<sup>19</sup> Echostar argues that requiring full HDTV carriage would require it to dedicate more than one-half of a transponder for carriage of a single television station, or the equivalent of an entire additional market worth of analog television signals. Echostar asserts that it dedicates, on average, 2.5 megabits per second

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sought reconsideration of the part of the Commission's *Order* that gives a television station the option of electing cable carriage for its digital signal in a converted analog format. This petition is pending before the Commission.

<sup>13</sup> WHDT-DT Complaint at 2-3.

<sup>14</sup> *Id.* at 6. The procedural arguments raised by the parties centered on whether the Station's election of must carry was valid and filed in accordance with the Commission's rules.

<sup>15</sup> *Id.*

<sup>16</sup> According the WHDT-DT, 84% of households in the West Palm Beach DMA subscribe to cable service. *Id.* at 10.

<sup>17</sup> Echostar Opposition at i.

<sup>18</sup> *Id.* at 6-7.

<sup>19</sup> *Id.* at 10.

to each analog signal it carries. Each transponder on the satellites serving the West Palm Beach DMA can carry 30 megabits per second, or approximately 10 analog television stations. Requiring carriage in full HDTV (19.4 megabits per second), therefore, would require it to dedicate more than one half of a transponder for carriage of WHDT-DT.<sup>20</sup> Echostar asserts that if carriage was mandated, there would not be enough capacity to continue local-into-local service in south Florida, potentially forcing it to withdraw service, to the detriment of its subscribers, in the West Palm Beach DMA.<sup>21</sup> Echostar adds that it offered to carry WHDT-DT in a down-converted analog format, as the station has agreed to be carried by Adelphia—the local cable operator serving many communities in the market, but that WHDT-TV has rejected this offer.<sup>22</sup>

7. In reply, WHDT-DT asserts that the arguments made by Echostar do not provide a valid basis for denying the carriage request. It argues that Section 338 of the Act requires carriage of digital-only television stations by satellite carriers even if the Commission has not yet implemented digital satellite carriage requirements.<sup>23</sup> WHDT-DT states that Echostar's satellites are physically capable of carrying HDTV signals and that it is in the public interest, and in the interest of a rapid digital transition, that its signal be carried in a high definition format.<sup>24</sup> WHDT-DT asserts that carriage of a single HDTV station will not curtail local-into-local service and, in any event, Echostar could, if it chose, decline to use the compulsory license and instead negotiate individual copyright licenses for carriage; if it pursued this option, it would be free to carry any stations it chooses.<sup>25</sup>

8. We find that WHDT-DT's complaint is premature and therefore dismiss it. We recognize that Section 338 of the Act establishes an obligation on satellite carriers to carry all local television signals in a given market if it decides to carry one local television signal using the statutory compulsory license. However, it is incumbent upon the Commission to implement the substance and scope of the Section 338 requirements. Such issues as material degradation limitations, good signal quality parameters, and the procedures for requesting and obtaining carriage must be decided before the digital signal carriage rights of television broadcast stations, with regard to satellite carriers, can be enforced. These matters have been raised but not resolved by the Commission. Given the absence of rules relating to the satellite carriage of digital television signals, the Commission lacks the basis to act on complaints such as the one brought by WHDT-DT. The station's complaint is dismissed without prejudice and may be refiled, if necessary, after digital satellite carriage rules are adopted by the Commission. In light of this resolution, we need not address in detail the procedural objections raised as to the timeliness of the WHDT-DT's carriage request. We note, however, that, pursuant to Section 76.66(d)(2), satellite carriers commencing local broadcast

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<sup>20</sup> *Id.* at 12.

<sup>21</sup> *Id.* Echostar states that it delivers the majority of local-into-local service in south Florida with a single spot beam transponder, and currently serves the Miami and West Palm Beach markets with that spot beam. Echostar asserts that it would introduce local-into-local service to the adjacent Ft. Myers DMA using that same spot beam, but if the Commission orders carriage of WHDT-DT, there would not be enough capacity to continue service to both West Palm Beach and Miami, let alone expand into Ft. Myers.

<sup>22</sup> *Id.* at 10. Echostar states that its subscribers can access WHDT-DT in an HDTV format regardless of whether Echostar places the signal on satellite. It explains that its current 6000 series of receivers are capable of picking up DTV stations over-the-air with the addition of a module, with a retail cost of \$149.00, and that future set top box models will include a built-in DTV tuner. Echostar states that WHDT-DT will be identified on the system's electronic program guide and subscribers with an HDTV set top box and connected antenna will be able to seamlessly tune directly to the station. *Id.* at 11.

<sup>23</sup> WHDT-DT Reply at 8.

<sup>24</sup> *Id.* at 14-15.

<sup>25</sup> *Id.* at 22.

signal distribution in a market, pursuant to a compulsory copyright license, are required to notify “local television stations” prior to doing so. Section 76.5(b) defines a “television station” as one “operating” on a channel regularly assigned to its community by the rules. Further, pursuant to Section 76.66(d)(3)(ii), new stations seeking carriage are required to request that carriage no later than “30 days after commencing broadcasting.”

#### IV. ORDERING CLAUSES

9. **IT IS ORDERED** that the must carry complaint filed by Guenter Marksteiner, licensee of digital television station WHDT-DT, Stuart, Florida, against EchoStar Communications Corporation, Inc. **IS DISMISSED** without prejudice.

10. This action is taken by the Chief, Media Bureau, pursuant to authority delegated by Section 0.283 of the Commission’s rules.<sup>26</sup>

FEDERAL COMMUNICATIONS COMMISSION

W. Kenneth Ferree  
Chief, Media Bureau

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<sup>26</sup> 47 C.F.R. § 0.283.