

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

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| In the Matter of : |) | |
| |) | |
| NBC Subsidiary (NH), Inc. |) | |
| |) | CSR-6149-M |
| v. |) | |
| |) | |
| Echostar Communications Corporation |) | |
| |) | |
| Request for Carriage of Station WNEU(TV) |) | |
| Merrimack, New Hampshire |) | |

MEMORANDUM OPINION AND ORDER

Adopted: July 18, 2003

Released: July 23, 2003

By the Deputy Chief, Media Bureau:

I. INTRODUCTION

1. NBC Subsidiary (NH), Inc. (“NBC”), licensee of television station WNEU(TV), Merrimack, N.H. (Ind. Ch. 60) (“WNEU” or “Station”) has filed a complaint against Echostar Communications Corporation (“Echostar”) pursuant to Section 338 of the Communications Act, as amended (“Act”).¹ Echostar filed an opposition to the complaint and WNEU filed a reply.² For the reasons discussed below, we find in favor of WNEU.

II. BACKGROUND

2. Section 338 of the Act, adopted as part of the Satellite Home Viewer Improvement Act of 1999 (“SHVIA”),³ requires satellite carriers, beginning 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.⁴ 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 Designated Market Area, or DMA, as defined by Nielsen Media Research.⁵ In November 2000, the Commission adopted rules to implement the carriage provisions contained in Section 338.⁶

¹47 U.S.C. § 338.

²NBC filed a supplement to its Reply on July 9, 2003.

³See Pub. L. No. 106-113, 113 Stat. 1501, 1501A-526 to 1501A-545 (Nov. 29, 1999).

⁴See 47 U.S.C. § 338.

⁵A 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).

⁶See *Implementation of the Satellite Home Viewer Improvement Act of 1999: Broadcast Signal Carriage Issues*;

III. DISCUSSION

3. NBC states that Echostar currently provides local-into-local satellite service in the Boston DMA, pursuant to the statutory copyright license.⁷ It further states that by letter dated June 22, 2001, Paxson Communications Corporation (“Paxson”), licensee of WPXB (now WNEU) timely notified Echostar that it was electing mandatory carriage. NBC adds that Paxson acknowledged in its must carry election that it may “choose not to enforce its must carry rights for the Stations depending on the status of the agreement between Paxson and Echostar during the term of the mandatory carriage election period and none of the Stations will exercise mandatory carriage until Echostar reaches a penetration rate of fifteen percent in such station’s DMA, as set forth in the agreement.”⁸ The agreement referenced in Paxson’s mandatory carriage election letter is a written agreement dated January 26, 1998 between PAX NET, Inc. and Echostar (“PAX/Echostar Agreement”).⁹ NBC states that in late 2002, it acquired WNEU and it maintains that it did not assume any obligations under the PAX/Echostar Agreement. Following the acquisition, on January 17, 2003, NBC notified Echostar of its decision to enforce its right to mandatory carriage of WNEU in the Boston DMA.

4. NBC states that by letter dated February 7, 2003, Echostar notified it of its refusal to carry WNEU. According to NBC, Echostar asserted that it is not obligated to carry WNEU because Paxson waived the right to mandatory carriage in the PAX/Echostar Agreement. The February 7th letter asserts that “[a]ny transfer in ownership of the station is subject to this waiver.”¹⁰ NBC argues that Paxson never waived its right to must carry, but rather included language in the Agreement stating that it “may choose not to enforce its must carry rights.”¹¹ NBC claims that the PAX/Echostar Agreement does not apply because NBC is the new owner and did not assume the obligations of its predecessor; moreover, the station now broadcasts Telemundo programming, not PAX NET programming.

5. Echostar asserts that Paxson made its election in 2001, and while it elected must carry, it also elected to maintain its contractual obligation in the PAX/Echostar agreement to waive its carriage rights in the Boston DMA until such time as Echostar’s penetration in the DMA exceeded 15 percent. Echostar argues that NBC cannot change course a year and a half later and try to enforce carriage rights that were bargained away in 2001, just because the Station has a new owner.¹² Echostar further argues that a change in programming does not change the regulatory status of a station any more than does a change in ownership; this is because a station’s carriage rights on DBS are based on its market assignment, not its

Retransmission Consent Issues, 16 FCC Rcd 1918, 1934 (2000) (“*DBS Must Carry Report & Order*”). 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*”).

⁷See 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).

⁸NBC Complaint at 2.

⁹On May 13, 2003, Paxson Communications Corporation and PAX NET, Inc. submitted to the Commission a copy of the January 26, 1998 letter agreement between Paxson and Echostar to aid the Commission in its resolution of the above-referenced carriage complaint. Paxson has requested that its letter agreement with Echostar be treated as confidential under 47 C.F.R. § 0.457(d)(1)(iv) of the Commission’s rules. We grant Paxson’s request.

¹⁰NBC Complaint at 2.

¹¹*Id.*

¹²Echostar Opposition at 2.

programming.¹³ Echostar adds that the Commission should continue its practice of not involving itself in contractual disputes between private parties. But, Echostar adds, if the Commission determines that as a new owner of station WNEU, NBC had the ability to make a new election, then it should conclude that the demand for carriage was not timely, and thus NBC is foreclosed from demanding carriage for the remainder of the current cycle.¹⁴

6. In Reply, NBC argues that while Paxson's must carry election for the Station is binding upon it as a matter of Commission law, the forbearance agreement between Paxson and Echostar is not.¹⁵ NBC asserts that because it did not assume any obligation under the PAX/Echostar Agreement, it is not bound by the terms of the contract. NBC asserts that the Commission has two options in this case: (1) it may exercise its authority to interpret the language of the must carry election notice and the PAX/Echostar Agreement, rule that the forbearance provision no longer applies, and order carriage of the Station or (2) it may rule that WNEU timely elected must carry and order Echostar to carry WNEU conditioned upon a determination by a court of competent jurisdiction (or other arbiter as the parties may agree) that the forbearance agreement set forth in the PAX/Echostar Agreement no longer applies to WNEU.¹⁶ As for Echostar's timeliness argument, WNEU argues that its predecessor timely elected must carry and that election carries over to the new owner of the Station and there is nothing in the Commission's rules precluding NBC from demanding carriage based upon the position that the PAX/Echostar Agreement had ceased to apply to WNEU.¹⁷

7. In a supplement to its Reply, NBC submits information alleging that Paxson's intent, in its agreement with Echostar, was to forbear, not waive, WNEU's carriage rights.¹⁸ NBC argues that there are no remaining issues of contract interpretation because Paxson has clarified the meaning of the PAX/Echostar agreement. NBC states that the conditional carriage proposal it advocated in its Reply need not be considered in light of this development.¹⁹

8. We find that WNEU is eligible for carriage on Echostar's satellite system serving the Boston DMA. The record indicates that Paxson made a timely carriage election to Echostar on June 22, 2001, nine days before the election deadline established in the Commission's rules. This election carries over to NBC as the new owner of the Station in question.²⁰ It does not matter if the Station has a new owner and broadcasts different programming, the controlling factor is that the subject station made a timely election. Because WNEU's predecessor-in-interest filed a timely request for carriage, the Station may now

¹³*Id.* at 4.

¹⁴ *Id.* at 7. Under Section 76.66(d)(3)(ii), a new station must make its election and carriage demand between 60 days prior to and within 30 days of commencing broadcasting. *See* 47 C.F.R. 76.66(d)(3)(ii).

¹⁵WNEU Reply at 3.

¹⁶*Id.* at 8.

¹⁷*Id.* at 9.

¹⁸ NBC Supplement at 2. NBC states that, on June 25, 2003, Paxson submitted a Declaration to the Commission confirming that Paxson did not waive WNEU's carriage rights, but merely agreed to forbear from enforcing them.

¹⁹*Id.* at 3.

²⁰In the cable carriage context, the Commission has consistently held that the change of ownership of a station does not change the carriage status of that station. *See, e.g., Univision Partnership of New Jersey v. Comcast Cablevision of Danbury, Inc.*, 17 FCC Rcd 16837, 16839 (2002); *Paxson San Jose License, Inc.*, 11 FCC Rcd 2954 (1996). Moreover, the Commission has also held that a change in a station's programming does not change its must carry status. *See, e.g., Sage Broadcasting Corp. v. Brownwood Cable Television Services, Inc.*, 17 FCC Rcd 10567, 10569 (2002); *Continental Cablevision of Jacksonville, Inc.*, 14 FCC Rcd 13783, 13785 (1999).

enforce its carriage rights under the procedures implemented by the Commission in Section 76.66 of the rules.²¹

9. We refrain from adjudicating any specific disputes concerning the private agreement between the parties, finding that they are contractual matters for the parties or the courts to resolve. Moreover, our decision is not intended to suggest any opinion as to whether NBC's assertion of carriage rights before the Commission is consistent with any contractual agreement under which it may be a successor in interest.

IV. ORDERING CLAUSES

10. 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 complaint of NBC Subsidiary (NH), Inc., licensee of commercial television station WNEU, Merrimack, N.H. **IS GRANTED**.

11. **IT IS FURTHER ORDERED** that WNEU is entitled to carriage by EchoStar in the Boston Designated Market Area within 75 days from the date on which this Order is released.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson,
Deputy Chief, Media Bureau

²¹*Accord, Paxson v. DirecTV*, 17 FCC Rcd 834 (CSB Jan. 14, 2002).