

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

In the Matter of :)	
)	
Telefutura Fresno LLC)	
)	CSR-6197-M
v.)	
)	
Echostar Communications Corporation)	
)	
Request for Carriage of Station KTFF(TV))	
Porterville, CA)	

MEMORANDUM OPINION AND ORDER

Adopted: October 31, 2003

Released: November 4, 2003

By the Deputy Chief, Media Bureau:

I. INTRODUCTION

1. Telefutura Fresno LLC, (a Univision subsidiary) licensee of television station KTFF(TV), Porterville, CA (Ind. Ch. 61) (“KTFF” 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 KTFF filed a reply. For the reasons discussed below, we find in favor of KTFF.

II. BACKGROUND

2. Section 338 of the Act, adopted as part of the Satellite Home Viewer Improvement Act of 1999 (“SHVIA”),² 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.³ 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.⁴ In November 2000, the Commission adopted rules to implement the carriage provisions contained in Section 338.⁵

¹47 U.S.C. § 338. In this *Memorandum Opinion and Order*, we refer to the Complainant as either Telefutura or Univision.

²See Pub. L. No. 106-113, 113 Stat. 1501, 1501A-526 to 1501A-545 (Nov. 29, 1999).

³See 47 U.S.C. § 338.

⁴A 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).

⁵See *Implementation of the Satellite Home Viewer Improvement Act of 1999: Broadcast Signal Carriage Issues*;

III. DISCUSSION

3. The Station states that Echostar currently provides local-into-local satellite service in the Fresno-Visalia (California) DMA, pursuant to the statutory copyright license.⁶ The Station states that on February 19, 2003, its parent, Univision, acquired KTFF from Paxson Communications Corporation (“Paxson”). According to the Station, Univision subsequently discovered that Echostar was not carrying KTFF’s signal as required by the Commission’s rules. The Station states that on April 2, 2003, Univision notified Echostar in writing of its obligation to carry the Station.

4. The Station states that by letter dated May 1, 2003, Echostar notified it of its refusal to carry KTFF. According to the Station, Echostar asserted that it is not obligated to carry KTFF because Paxson waived the right to mandatory carriage for the Station. By way of background, the Station explains that by letter dated June 22, 2001, Paxson, licensee of KPXF (now KTFF) timely notified Echostar that it was electing mandatory carriage.⁷ The Station 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 [January 26, 1998] agreement.”⁸ The Station states that the satellite carrier further asserted that “[a]ny transfer in ownership of the station is subject to this waiver.”⁹ The Station states that it then notified Echostar that it was unaware of any such agreement binding KTFF, Telefutura, or Univision, to those terms.¹⁰ The Station argues that the KTFF transaction did not involve the sale of stock, and thus any agreement Paxson may have entered into with Echostar would not be binding on Univision unless it was explicitly assumed.¹¹ The Station states that it filed the instant must carry complaint after numerous attempts to obtain satellite carriage from Echostar.

5. Echostar asserts that KTFF has no must carry rights to enforce because the Station failed to make a timely election for carriage in a proper manner. Echostar asserts that it provided notice to all local stations in the Fresno DMA on May 16, 2002 that it would soon commence local-into-local service in the market.¹² Echostar asserts that the Station did not elect carriage in response to Echostar’s announcement within 30 days of notification as the Commission’s rules require in Section 76.66(d)(2)(i). It also asserts that when the Station did mail in its election notification, nine days late on June 26, 2002, it was sent via “overnight delivery,” rather than by certified mail as mandated in Section 76.66(d)(2)(ii).¹³

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*”).

⁶See 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).

⁷Paxson elected must carry for 60 of its other owned and operated television stations in the same letter dated June 22, 2001. See Complaint at Exhibit A.

⁸*Id.* The agreement between Paxson and Echostar is herein referred to as “PAX/Echostar agreement.”

⁹*Id.* at 2.

¹⁰*Id.*

¹¹*Id.* at 4.

¹²Opposition at 2.

¹³*Id.* at 3.

6. Echostar further asserts that the Station cannot claim that Paxson's June 21, 2002 election can now be applied to KTFF. According to Echostar, Paxson elected must carry for all of its stations on that date, however, at the time Paxson made its election, Echostar was not providing local-into-local service into the Fresno DMA.¹⁴ Echostar argues that any election as to a station which was in a DMA where Echostar had not provided notice of its intent to serve is null and void.

7. Echostar submits that, as a further basis for denial of the Station's must carry complaint, Univision failed to move to enforce its carriage rights in a timely fashion once it bought the Station in 2003. Echostar argues that the only possible basis on which Univision can now claim that it should be allowed to make a carriage demand is that it believes KTFF is a new station because of the change in ownership.¹⁵ Echostar states that under Section 76.66(d)(3)(ii) of the Commission's rules, a new station must make its election and carriage demand between 60 days prior to and within 30 days of commencing broadcasting. Echostar asserts that the sale of Telefutera was consummated on February 19, 2003 and the Station became "new" on that date.¹⁶ Echostar asserts that KTFF had until March 21, 2003 to make its must carry election and demand carriage, but the Station did not request carriage until April 2, 2003, several days past the 30 day window specified in the Commission's rules.

8. Next, Echostar argues that KTFF is bound by its prior owner's carriage election. Echostar states that Paxson made its election in 2001, and while it elected must carry for regulatory purposes, it also decided to maintain its contractual obligation in the PAX/Echostar agreement to waive its carriage rights in the Fresno DMA until such time as Echostar's penetration in the DMA exceeded 15 percent. Echostar argues that the Station should not be able to enforce carriage rights that were bargained away in 2001, just because the Station has a new owner.¹⁷ Echostar adds that the Commission should continue its practice of not involving itself in contractual disputes between private parties, but that if it decides to reach the merits of the Complaint, it must find that the actions of the Station constitute an effective waiver of its must carry rights.¹⁸ According to Echostar, Univision inherited the Station's regulatory status and that status is as a retransmission consent station.¹⁹

9. In Reply, the Station disagrees with Echostar's procedural and substantive arguments and criticizes the satellite carrier for failing to disclose facts pertinent to the case. The Station states that while Echostar was not delivering local-into-local service in June 2001, the June 22, 2001 election by Paxson was nevertheless timely because Echostar had sent its first notice of intent to launch local-into-local service to stations in the Fresno DMA on May 24, 2001.²⁰ The Station acknowledges that Echostar did not commence local-into-local service in Fresno during 2001, but asserts that the satellite carrier sent a second notice of

¹⁴*Id.* at 4.

¹⁵*Id.* at 5.

¹⁶*Id.*

¹⁷*Id.* at 6.

¹⁸*Id.* at 8.

¹⁹*Id.* at 9.

²⁰Univision notes that although KTFF was unable to locate a copy of the May 24, 2001 notice of intent letter Echostar sent to the Station, it has provided, as an Exhibit, a May 24, 2001 letter Echostar sent to television station KAIL(TV), also located in the Fresno DMA. Univision asserts that this letter demonstrates that Echostar had given notice to stations of its intent to launch local-into-local service in the Fresno market on May 24, 2001, and that the Station's June 22, 2001 must carry election was a timely response. Reply at 2 n.3.

intent to launch in 2002.²¹ The Station asserts that on June 26, 2002, in response to Echostar's second notification in 2002, it reasserted its must carry election. With regard to Echostar's claim that the election was invalid because it was late, the Station asserts that Echostar mistakenly mailed its May 16, 2002 notice of intent to the wrong address, a fact the satellite carrier admits in a letter to KTFF dated June 19, 2002.²² The Station argues that Echostar cannot claim that KTFF was the subject of a June 15, 2002 deadline when Echostar did not even provide KTFF with the required notice until June 19, 2002. As for Echostar's argument over the proper means of delivery of KTFF's election letter, the Station asserts that Echostar acknowledged the receipt of KTFF's letter and even attached the letter to its Opposition at Exhibit 2.²³ The Station adds that its use of overnight delivery in this case was an "understandable effort" to get its election letter to Echostar in a timely manner.²⁴

10. The Station states that if the Commission decides to entertain Echostar's contractual argument, it should conclude that KTFF is not bound by the PAX/Echostar agreement.²⁵ The Station argues that because it did not assume any obligations under the agreement when it purchased the assets of KTFF from Paxson, it is not bound by the agreement. The Station argues that if it had been the intent of the parties to make the agreement binding on successors and assigns, they could have drafted language to that effect in the agreement.

11. We find that KTFF is eligible for carriage on Echostar's satellite system serving the Fresno DMA. The record indicates that Paxson made a timely carriage election to Echostar on June 22, 2001 in response to Echostar's first notice of intent on May 24, 2001. While Echostar did not commence local-into-local service in the Fresno market until 2002, the Station nonetheless perfected its eligibility to be carried in a manner consistent with our satellite carriage rules. This election carries over to Univision as the new owner of the Station in question.²⁶ In 2002, the Station again notified Echostar of its election in a timely manner in response to the satellite carrier's second notice of intent to establish local-into-local service. Because the Station's 2001 must carry election was valid, its second election amounts to a *pro forma* reiteration of the Station first election. As such, it is irrelevant that the Station sent its response via overnight delivery rather than by certified mail.²⁷ Moreover, it is irrelevant that the Station has a new owner and broadcasts different programming, the controlling factor is that the subject station made a timely election. Because KTFF's predecessor-in-interest filed a timely request for carriage, the Station may now

²¹Reply at 2.

²²*Id.* at 4.

²³*Id.* at 5.

²⁴*Id.*

²⁵*Id.* at 6.

²⁶ In 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); *NBC Subsidiary (NH) v. Echostar communications Corporation*, 18 FCC Rcd 15238 (MB 2003) ("NBC v. Echostar").

²⁷While the rules state that an election letter should be sent via certified mail, the Commission has not explicitly ruled that an election letter may not be sent by other, reliable and timely methods. *See DBS Reconsideration Order*, 16 FCC Rcd at 16576 ("We believe that certified mail, return receipt requested is the preferred method to ensure that broadcast stations are able to demonstrate that they submitted their elections by the required deadline, and that they were received by the satellite carrier.")

enforce its carriage rights under the procedures implemented by the Commission in Section 76.66 of the rules.²⁸

12. As we stated in *NBC v. Echostar*, a case with a fact pattern substantially similar to the current dispute,²⁹ we will not interject ourselves into specific arguments concerning private agreements between broadcasters and satellite carriers. Our specific role under Section 338 of the Act is to determine whether a television station is eligible for carriage and may appropriately assert its regulatory rights. Contractual issues are to be resolved by the parties or by courts of proper jurisdiction. Hence, our decision here is not intended to suggest any opinion as to whether Univision's assertion of carriage rights before the Commission is consistent with any contractual agreement under which it may be a successor in interest. Based on the facts in this proceeding, we strongly encourage the parties to resolve their contractual dispute outside the confines of the Commission.

IV. ORDERING CLAUSES

13. 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 Telefutura Fresno LLC, licensee of commercial television station KTFF, Porterville, California **IS GRANTED**.

14. **IT IS FURTHER ORDERED** that KTFF is entitled to carriage by EchoStar in the Fresno 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

²⁸*Accord, Paxson v. DirecTV*, 17 FCC Rcd 834 (CSB Jan. 14, 2002).

²⁹*See* 18 FCC Rcd 15238 (MB 2003), App. for Review pending.