

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

In the Matter of:)	
)	
Ho’Ana’Auao Community TV, Inc.)	CSR-6003-M
)	
v.)	
)	
EchoStar Communications Corporation)	
)	
Request for Mandatory Carriage of)	
Television Station KWBN-TV, Honolulu, HI)	
)	

MEMORANDUM ORDER AND OPINION

Adopted: February 14, 2003

Released: February 20, 2003

By the Deputy Chief, Media Bureau:

I. INTRODUCTION

1. Ho’Ana’Auao Community TV, Inc. (“HCTV”) licensee of noncommercial station KWBN-TV, Channel 44, Honolulu, Hawaii (“KWBN” or the “Station”) filed the above-captioned must carry complaint against EchoStar Communications Corporation (“EchoStar”), pursuant to Section 338 of the Communications Act, as amended (the “Act”), and Section 76.66 of the Commission’s rules, for its refusal to carry the signal of KWBN on its satellite system.¹ KWBN states that EchoStar is providing “local-into-local” satellite service pursuant to the statutory copyright license in Honolulu, the designated market area (“DMA”) where station KWBN operates.² In its complaint, KWBN alleges that EchoStar has failed to meet its must carry obligations under the Commission’s satellite broadcast signal carriage rules.³

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. § 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 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). In the instant proceeding, EchoStar filed an opposition (“Opposition”), to which HCTV replied (“Reply”). EchoStar also filed a surreply (“Surreply”), to which KWBN responded by filing a motion to strike (“Motion to Strike”). EchoStar in turn filed an opposition to KWBN’s motion to strike (“Opposition to Motion”).

(continued...)

KWBN requests that the Commission order EchoStar to carry the station's signal on EchoStar's main satellite system. For the reasons discussed below, we deny KWBN's complaint.

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 within 90 days from the satellite carrier's receipt of the station's election request.¹²

(...continued from previous page)

In the interests of a full and complete record, we hereby deny KWBN's Motion to Strike and will accept all supplemental filings made by both parties in this proceeding.

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) [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 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 and Order*, 16 FCC Rcd at 1933.

¹⁰ See 47 C.F.R. § 76.66(d)(2).

¹¹ *Id.*

¹² *Id.*

III. DISCUSSION

4. In support of its Complaint, KWBN states that it is a television station licensed to Honolulu, Hawaii, which is in the Honolulu DMA.¹³ KWBN contends that it did not receive “local” notice of EchoStar’s intent to commence local-into-local service in the Honolulu DMA pursuant to Section 76.66(d)(2) of the Commission’s rules.¹⁴ KWBN suggests that such notices must be sent to the local mailing address for television stations as identified in the FCC’s records and that it did not receive notice at that address.¹⁵ Rather, KWBN indicates that it did not learn of EchoStar’s new service until reading about it on the satellite carrier’s website, which led KWBN to send a must carry election letter to EchoStar on August 23, 2002.¹⁶ In response, EchoStar denied the Station’s must carry request for having “failed to elect in a timely manner.”¹⁷

5. EchoStar counters that it sent three separate notices to KWBN via certified mail, return receipt requested, at a Dallas, Texas address used by the station in filings before the Commission.¹⁸ The Dallas address used by EchoStar is the home office of Daystar Television Network (“Daystar”), the programming supplier to KWBN and other stations.¹⁹ The principal of Daystar, Marcus D. Lamb, is also the President and CEO of HCTV, KWBN’s licensee.²⁰ EchoStar indicates that it had previously received must carry elections from Daystar on Daystar letterhead regarding other stations that were identified alongside KWBN on the letterhead as “Daystar stations.”²¹ According to EchoStar, the nexus between KWBN and Daystar is further evidenced by the must carry election letter sent by Marcus D. Lamb on behalf of KWBN on Daystar letter head indicating that “Daystar has full power KWBN-TV 44,” without reference to HCTV.²² EchoStar concludes that: (1) its notices to KWBN were properly sent to Daystar’s offices, (2) KWBN’s August 23, 2002, election letter was untimely and, (3) in any event, KWBN’s election letter was not made by the station’s licensee, HCTV.²³

6. We are persuaded that in the narrow set of circumstances presented in this proceeding, EchoStar did not act unreasonably by sending its new local-into-local service notice to the Dallas, Texas address used by the principal of KWBN’s licensee. Section 76.66(d)(2) calls for satellite carriers to “notify local television stations of [their] intent to provide local-into-local service” at least 60 days in advance and to identify the location of their local receive facility, but does not specify the location where such notice must be directed.²⁴ Given EchoStar’s previous dealings with other Daystar-affiliated stations, the location of HCTV’s President and CEO at Daystar’s Dallas address, and the fact that EchoStar’s

¹³ Complaint at 1.

¹⁴ *Id.* at 2.

¹⁵ *Id.* at 2; Reply at 2, Exhibit A.

¹⁶ Complaint at Exhibit B.

¹⁷ *Id.* at Exhibit A.

¹⁸ Opposition at 2. At the outset, EchoStar asked that the Commission dismiss KWBN’s complaint because it was not accompanied by a supporting declaration. Opposition at 4. In response, KWBN provided a supporting declaration with its Reply. Reply at Exhibit B. As a result, we decline to dismiss KWBN’s complaint.

¹⁹ Opposition at 2; Reply at 2.

²⁰ Opposition at 2; Reply at 2-3.

²¹ Opposition at 2, 5, Exhibit 3.

²² *Id.* at 2.

²³ *Id.* at 2-3, 5-7.

²⁴ *See* 47 C.F.R. § 76.66(d)(2).

notices addressed to KWBN were received and accepted at Daystar's offices,²⁵ we believe that EchoStar satisfied its obligations under Section 76.66(d)(2) and that KWBN's election notice was therefore untimely pursuant to Section 76.66(d)(2)(ii).²⁶

IV. ORDERING CLAUSES

7. 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 Ho'Ana'Auao Community TV, Inc. **IS DENIED**.

8. This action is taken 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

²⁵ EchoStar alleges that it sent letters on February 26 and May 3, 2002 identifying its local receive facility in the Honolulu DMA, and a third notice on June 13, 2002, specifying its intent to launch local-into-local service in that market. Each piece of correspondence was addressed to KWBN and was accepted and signed for by employees at Daystar's Dallas offices. Opposition at 2, Exhibit 1; Surreply at 2, Exhibit 4.

²⁶ See 47 C.F.R. § 76.66(d)(2)(ii). EchoStar's notice of intent to launch local-into-local service, mailed on June 13, 2002, was received at Daystar's Dallas offices on June 17, 2002. Opposition at 2, Exhibit 1; Surreply at Exhibit 4. Pursuant to Section 76.66(d)(2)(ii), KWBN had 30 days, or until July 17, 2002, to mail its election notice to EchoStar. 47 C.F.R. § 76.66(d)(2)(ii). KWBN's election notice, mailed from Dallas by Mr. Lamb on Daystar letterhead, was dated August 23, 2002. Complaint at Exhibit B; Opposition at Exhibit 3.