

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

In the Matter of:
KM Television of El Dorado, L.L.C.
v.
Cox Communications, Inc.
Request for Mandatory Carriage of
Television Station KEJB(TV),
El Dorado, Arkansas
CSR-6286-M

MEMORANDUM OPINION AND ORDER

Adopted: May 26, 2004

Released: June 1, 2004

By the Deputy Chief, Policy Division, Media Bureau:

I. INTRODUCTION

1. KM Television of El Dorado, L.L.C. ("KM"), licensee of television broadcast station KEJB(TV), Channel 43, El Dorado, Arkansas ("KEJB" or the "Station") filed the above-captioned must carry complaint against Cox Communications, Inc. ("Cox"), for failing to carry the signal of KEJB on its cable systems serving Bastrop, Grambling, Hodge (including East Hodge and North Hodge), Jackson, Jonesboro, Mer Rouge, Quitman, Ruston, Simsboro, Vienna, Union, Winn and Winfield, Louisiana (the "cable communities").

II. BACKGROUND

2. Pursuant to Section 614 of the Communications Act and implementing rules adopted by the Commission in Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Broadcast Signal Carriage Issues ("Must Carry Order"), commercial television broadcast stations are entitled to assert mandatory carriage rights on cable systems located within the station's market.

1 Complaint at 1.

2 8 FCC Rcd 2965, 2976-2977 (1993).

3 Section 614(h)(1)(C) of the Communications Act, as amended by the Telecommunications Act of 1996, provides that a station's market shall be determined by the Commission by regulation or order using, where available, commercial publications which delineate television markets base on viewing patterns. See 47 U.S.C. § 534(h)(1)(c). Section 76.55(e) requires that a commercial broadcast television station's market be defined by (continued...)

others, based on measured viewing patterns.

3. Pursuant to the Commission's must carry rules, cable operators have the burden of showing that a commercial station that is located in the same television market is not entitled to carriage.<sup>4</sup> One method of doing so is for a cable operator to establish that a subject television signal, which would otherwise be entitled to carriage, does not provide a good quality signal to a cable system's principal headend.<sup>5</sup> Should a station fail to provide the required over-the-air signal quality to a cable system's principal headend, it still may obtain carriage rights because under the Commission's rules a television station may provide a cable operator, at the station's expense, with specialized equipment to improve the station's signal to an acceptable quality at a cable system's principal headend.<sup>6</sup>

### III. DISCUSSION

4. In support of its complaint, KEJB states that it is a full-power television station currently operating under program test authority and licensed to El Dorado, Arkansas, which is in the Monroe, Louisiana – El Dorado, Arkansas DMA.<sup>7</sup> It states further that Cox operates several cable television systems that are also in the Monroe, Louisiana – El Dorado, Arkansas DMA.<sup>8</sup> KEJB asserts that on October 2 and October 13, 2003, it formally requested mandatory carriage of its signal on Cox's cable systems serving the cable communities.<sup>9</sup> KEJB states that on November 7, 2003 Cox responded indicating that it was having difficulties testing KEJB's signal because the Station was not transmitting full time and requested KEJB advise Cox when testing could be completed.<sup>10</sup> KEJB asserts that Cox did not respond to telephone calls from KEJB employees trying to coordinate KEJB's signal strength testing and that, as a result, it is filing the instant complaint 60 days after Cox's November 7, 2003 letter regarding Ruston, Jonesboro, Winnfield, Hodge, Jackson, Quitman, Vienna, Simsboro, Grambling, Mer Rouge and Winn, Louisiana.<sup>11</sup> As to the community of Bastrop, Louisiana and KEJB's October 13, 2003 letter, KEJB maintains that Cox failed to respond within 30 days as required by Section 76.61(a)(5)(i) of the Commission's rules.<sup>12</sup> KEJB asserts that it is committed to deliver, at its own expense, a good quality signal to Cox's principal headends.<sup>13</sup>

5. In its Motion to Dismiss, Cox argues that KEJB's complaint should be dismissed for the following reasons. First, because it is premature as the Station failed to comply with the notification process established by Section 534(d)(1) of the Communications Act and Section 76.61(a) of the

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Nielsen Media Research's DMAs. 47 C.F.R. § 76.55(e).

<sup>4</sup> See *Must Carry Order*, 8 FCC Rcd at 2990.

<sup>5</sup> 47 C.F.R. § 76.55(c)(3).

<sup>6</sup> *Must Carry Order*, 8 FCC Rcd at 2991.

<sup>7</sup> Complaint at 1.

<sup>8</sup> *Id.* at 2.

<sup>9</sup> *Id.* and Exhibit 1.

<sup>10</sup> *Id.* at 3 and Exhibit C.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 4; see 47 C.F.R. § 76.61(a)(5)(i).

<sup>13</sup> *Id.* at 4; see 47 C.F.R. § 76.55(c)(2)-(3).

Commission's rules.<sup>14</sup> Cox maintains that the Station's election notices cannot be deemed demands for mandatory carriage.<sup>15</sup> Second, Cox contends that the Commission lacks jurisdiction to consider KEJB's procedurally defective complaint because the Station failed to serve other interested parties such as franchising authorities or cable operators as required by Section 76.7(a)(3) of the Commission's rules. Cox asserts that on January 9, 2004, it informed KEJB that, with the exception of Winnfield, Louisiana, Cox would commence carrying KEJB in Mer Rouge, Vienna, Grambling, Simsboro, Hodge, Jackson and Quitman, Louisiana, on February 19, 2004.<sup>16</sup> Cox requests that the Bureau award Cox fees and expenses, including attorney's fees, it incurred in responding to a complaint KEJB did not have to file because Cox had already agreed to carry the Station as indicated in its January 9, 2004 letter.<sup>17</sup> Cox asserts that KEJB does not qualify for mandatory carriage on its cable system serving Winnfield, Louisiana, because the Station fails to deliver a good quality signal to that headend.<sup>18</sup> In support of this assertion, Cox submitted a copy of the signal strength tests it conducted on February 18, 2004, which shows readings between -68.75 dBm and -68.05 dBm.<sup>19</sup>

6. In its Reply, KEJB contends that Cox's argument that the Station's complaint is premature is incorrect because Cox's November 7, 2003 response can be construed as a denial of carriage, which constitutes the basis for filing the instant complaint.<sup>20</sup> KEJB maintains that its must carry complaint should not be dismissed because the Commission has accepted must carry complaints and issued decisions on their merits even when it has found a letter to be only an election letter, but the parties, as in this case, have each pled their positions.<sup>21</sup> KEJB maintains that its complaint should not be dismissed as Cox requests because Section 76.7(a)(3) of the Commission's rules does not require it to serve any other cable television system operators or franchising authorities affected by this proceeding.<sup>22</sup> In support, KEJB cites *Acadiana Cable Advertising, Inc. v. Telecable Associates, LLC d/b/a Cox Communication*, and asserts that in that case, the Commission "expressly ruled" that Section 76.7(a)(3) does not require that a must carry complaint be served on other cable television system operators or stations.<sup>23</sup> KEJB states that because *Acadiana* suggests that local franchising authorities should be served, KEJB would identify and serve the local franchising authorities promptly and file an amended certificate of the service with the Commission, as allowed by the Commission's precedent.<sup>24</sup>

7. We agree with Cox that KEJB's complaint is procedurally defective. In that regard, we note that the Commission's must carry requirements set forth a two-part notification process with which stations are required to comply: the retransmission consent/must carry election notification required by

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<sup>14</sup> Motion at 1.

<sup>15</sup> *Id.* at 3-9.

<sup>16</sup> *Id.* and Exhibit 3.

<sup>17</sup> *Id.* at 3. We note that the Commission does not have the jurisdiction to grant the relief Cox seeks.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 2, n.4 and Exhibit 1.

<sup>20</sup> Reply at 4, citing *Rancho Palos Verdes Broadcasters, Inc. v. Lone Pine Television, Inc.*, 18 FCC Rcd 7068 (MB 2003).

<sup>21</sup> *Id.* at 5.

<sup>22</sup> *Id.* at 8.

<sup>23</sup> *Id.*; see 18 FCC Rcd 6506, 6507 (MB 2003)

<sup>24</sup> *Id.*, citing *Better Life Television v. Charter*, 18 FCC Rcd 9414 at n.17 (MB 2003).

Section 76.64(f) of the Commission's rules and the demand for carriage by qualified stations set out in Section 76.61(a) of the Commission's rules.<sup>25</sup> We disagree with KEJB's assertion that its October 2, and October 13, 2003 letters were a demand for mandatory carriage. The text of the letters clearly indicates that they were must carry election letters only, not a demand for carriage as required by Section 76.61(a) of the Commission's rules. Moreover, in conjunction with failing to submit a demand for mandatory carriage, KEJB failed to serve the franchising authorities within the context of this proceeding as required by Section 76.7(a)(3) of the Commission's rules. KEJB was made aware of this deficiency, but failed to cure it even after Cox pointed it out in its Motion to Dismiss and KEJB agreed in its Reply to cure the deficiency "promptly." Because KEJB failed to comply with the second part of the Commission's mandatory carriage notification process and failed to comply with the service process requirements of Section 76.7(a)(3) of the Commission's rules, we dismiss the instant complaint. Holding otherwise would allow KEJB to circumvent the two processes discussed above. Because we find that KEJB's complaint is procedurally defective, we do not need to address the other issues presented in this proceeding. Based on the foregoing circumstances, we dismiss the instant complaint.

#### IV. ORDERING CLAUSES

8. Accordingly, **IT IS ORDERED**, pursuant to Section 614 of the Communications Act of 1934, as amended, 47 U.S.C. § 534, that the must carry complaint filed by KM Television of El Dorado, L.L.C., licensee of television broadcast station KEJB(TV), El Dorado, Arkansas, against Cox Communications, Inc. **IS DISMISSED**.

9. This action is taken pursuant to authority delegated by Section 0.283 of the Commission's rules.<sup>26</sup>

FEDERAL COMMUNICATIONS COMMISSION

Steven A. Broeckaert  
Deputy Chief, Policy Division  
Media Bureau

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<sup>25</sup> 47 C.F.R. §§ 76.64(f) and 76.61(a).

<sup>26</sup> 47 C.F.R. § 0.283.