

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

In the Matter of)
New York Times Management Services)
Licensee of Television Station WNEP-TV,) CSR-6301-M
Scranton, PA)
v.)
DIRECTV , Inc.)
Complaint)

MEMORANDUM OPINION AND ORDER

Adopted: June 25, 2004

Released: June 29, 2004

By the Deputy Chief, Media Bureau:

I. INTRODUCTION

1. New York Time Management Services ("New York Times"), licensee of television station WNEP-TV, Scranton, PA ("WNEP") has filed a complaint against DIRECTV, Inc. ("DIRECTV") pursuant to Section 338 of the Communications Act, as amended, and Section 76.66 of the Commission's rules. The complaint alleges that DIRECTV is failing to distribute WNEP-TV's signal to all residents of the Wilkes Barre-Scranton ("WB-S") Designated Market Area ("DMA") and is distributing the distant signals of stations licensed to communities located within other DMAs to residents of the WB-S DMA. DIRECTV filed an Opposition and New York Times filed a Reply. For the reasons discussed below, we deny the complaint.

II. LEGAL BACKGROUND

2. Section 338 of the Act, adopted as part of the Satellite Home Viewer Improvement Act of 1999 ("SHVIA"), required satellite carriers, beginning January 1, 2002, to carry on request all local

1 47 U.S.C. § 338; 47 C.F.R. § 76.66.

2 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 carriage 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).

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

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 A station's market for satellite carriage purposes is its DMA, "as determined by Nielsen Media Research and published in the 1999-2000 Nielsen Station Index Directory and Nielsen Station Index United States Television Household Estimates or any successor publication."⁵ WNEP is licensed to Scranton, PA; thus, its market for this purpose is the WB-S DMA.

III. FACTUAL BACKGROUND

3. The following facts are undisputed by the parties. New York Times and DIRECTV have entered into a retransmission consent agreement whereby DIRECTV distributes WNEP-TV's signal to residents of the WB-S DMA as part of its local-into-local satellite service.⁶ In determining whether subscribers are eligible to receive a broadcast station's signal, DIRECTV relies on subscribers' zip codes and assigns a subscriber to a DMA pursuant to the Nielsen Station Index, Zip Codes by Designated Market Area ("Nielsen Zip Code Index"). After DIRECTV began providing local broadcast signals in the WB-S DMA, several subscribers complained to DIRECTV and WNEP-TV that they were receiving stations from the New York City DMA but not from the WB-S DMA.⁷ Upon investigation, the parties found that certain zip codes listed by Nielsen as assigned to the NYC DMA included subscribers living in counties that Nielsen maps and county listings show to be within the WB-S DMA.⁸ For example, the zip code 18428 includes residents of both Wayne and Pike counties, but Nielsen assigns all residents in that zip code, including those physically in Wayne County, to Pike County and therefore to the New York City DMA.⁹ Other residents of Wayne County who are not in zip code 18428 are assigned to the WB-S DMA. DIRECTV will not offer WNEP-TV's signal to subscribers whose zip codes, according to Nielsen, place them outside the WB-S DMA.¹⁰ DIRECTV asserts that reconfiguring its system to use designations other than zip codes would cause massive disruption of millions of DIRECTV subscribers.¹¹

IV. DISCUSSION

4. This complaint was filed pursuant to Section 76.66(m) of the Commission's rules,¹² which section affords remedies for failure to meet mandatory carriage obligations, not for matters such as the instant case, involving retransmission consent agreements.¹³ The New York Times complaint appears to allege violations of the copyright provisions governing local-into-local service¹⁴ and contractual disputes concerning the terms of its Retransmission Consent Agreement with DIRECTV, rather than a

⁴ See 47 U.S.C. § 338.

⁵ 17 U.S.C. § 122(j)(2)(A)-(C); 47 U.S.C. §338; see also 47 C.F.R. §76.66 (d)(2). See generally *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").

⁶ Complaint at 2.

⁷ *Id.* at 2, 5-6.

⁸ Opposition at 4-5.

⁹ Complaint at 5.

¹⁰ *Id.*; Opposition at 3.

¹¹ Opposition at 4. Apparently EchoStar uses street addresses rather than zip codes to qualify subscribers for local-into-local service. Complaint at 3.

¹² 47 C.F.R. §76.66.

¹³ See 47 C.F.R. §76.66(m).

¹⁴ See 17 U.S.C. §122.

carriage violation based on Section 338. Nevertheless, because the issues raised here are likely to be relevant for future mandatory carriage cases, we will address them here.¹⁵ This should not be read, however, to limit the parties' ability to seek other remedies in a court of competent jurisdiction with respect to any copyright or contract issues.

5. Based on the record before us, we have no basis on which to find that DIRECTV's use of the Nielsen Zip Code Index to qualify local-into-local subscribers, pursuant to SHVIA, is inconsistent with any statutory provision or Commission rule. As an initial matter, contrary to assertions by New York Times, there is no requirement in either the statute or our rules that satellite carriers must serve every part of a particular DMA.¹⁶ This is equally true for mandatory carriage or for carriage pursuant to retransmission consent. Further, DIRECTV uses the Nielsen Zip Code Index that is contained within the statutorily prescribed Nielsen publications, "Nielsen Station Index Directory and Nielsen Station Index United States Television Household Estimates," to determine to which DMA a given subscriber is assigned.¹⁷ We note that while this station, WNEP, may lose some local-into-local satellite viewers in certain areas using DIRECTV's approach, it gains viewers from other zip codes that fall in two different DMA's but are assigned by Nielsen to the WB-S DMA.¹⁸

6. We also note that, for purposes of SHVIA, using the geographic or geopolitical "county" boundaries as described in the statutes, rules and in other sections of the referenced Nielsen Index is equally lawful as using the Nielsen zip code assignments. A satellite carrier may configure its system using street addresses based on county boundaries that are consistent with the counties named by Nielsen in the statutorily referenced publications as comprising a given DMA, or it may configure its system based on the Nielsen Zip Code Index because both are referenced in the "Nielsen Station Index Directory and Nielsen Station Index United States Television Household Estimates".¹⁹

V. ORDERING CLAUSES

7. Accordingly, **IT IS ORDERED**, pursuant to Section 325(b) of the Communications Act, as amended, 47 U.S.C. § 325(b), and 76.7 of the Commission's rules, 47 C.F.R. §76.7, that the complaint of New York Times Management Services, licensee of television station WNEP-TV, Scranton, PA against DIRECTV, 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.

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¹⁵ See 47 C.F.R. §1.2.

¹⁶ *DBS Must Carry Report & Order*, 16 FCC Rcd 1918, 1938.

¹⁷ See 17 U.S.C. § 122(j)(2)(C) ("designated market area" means a designated market area, as determined by Nielsen Media Research and published in the 1999-2000 Nielsen Station Index Directory and Nielsen Station Index United States Television Household Estimates or any successor publication).

¹⁸ See Opposition at n. 6. DIRECTV asserts that there are six other zip codes that cross county lines in the WB-S DMA that are assigned in total to WB-S. Based on the record, it appears that there are numerous instances nationwide of Nielsen assigning a zip code to a particular DMA even though part of the zip code includes an area in a county that is assigned to another DMA. See Opposition at 14.

¹⁹ There is no evidence in this proceeding that DIRECTV configured its system to advantage or disadvantage any party or engaged in the type of discriminatory treatment prohibited by Section 338. See 47 U.S.C. § 338(d).

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