

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

In the Matter of:
KVMD Licensee Co., LLC
v.
Comcast Cable Communications, Inc.
Channel Positioning Complaint
CSR-6325-M

MEMORANDUM OPINION AND ORDER

Adopted: August 30, 2004

Released: September 1, 2004

By the Deputy Chief, Policy Division, Media Bureau:

I. INTRODUCTION

1. KVMD Licensee Co., LLC, permittee of television broadcast station KVMD-DT, Channel 23, Twentynine Palms, California, ("KVMD"), filed the above-captioned complaint against Comcast Cable Communications ("Comcast") for its failure to carry KVMD-DT at channel position 23 or a "mutually-agreeable channel" on Comcast's cable television system serving the communities of California Oaks, Canyon Lake, Corona, El Cerrito, Glen Ivy, Homeland, Horsethief Canyon, Lake Elsonore, Menifee, Murrieta, Murrieta Hot Spring, Nuevo, Quail Valley, Riverside, Romoland, Sedco Hills, The Farm, and Wildomar, California (the "cable communities"). Comcast filed an opposition and KVMD replied. For the reasons discussed below, we deny the petition.

II. BACKGROUND

2. Pursuant to Section 614 of the Communications Act of 1934 ("Act"), as amended, 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, including certain mandatory channel position rights, on cable systems located within the station's market.

3. With respect to the channel number on which stations asserting must carry rights are to be carried, Section 614(b)(6) of the Act and Section 76.57 of the Commission's rules provide

1 8 FCC Red 2965, 2976-2977 (1993).

2 The legislative history of the 1992 Cable Act is replete with references concerning the need for channel positioning requirements. See, e.g., Conf. Rep. No. 102-862, 102d Cong. 2d Sess. (1992) at 75 ("The conferees find that the must carry and channel positioning provisions in the bill are the only means to protect the federal system of television allocations, and to promote competition in local markets.") and H.R. Rep. No. 102-628, 102d (continued...)

commercial television stations with three channel positioning options.³ The station may elect to be carried on: (1) the channel number on which the station is broadcast over-the-air; (2) the channel number on which the station was carried on July 19, 1985; or (3) the channel number on which the station was carried on January 1, 1992.⁴ The Act and the rule also provide that a broadcast station may be carried on any other channel number mutually agreed upon by the station and the cable operator.⁵

III. DISCUSSION

4. In support of its request, KVMD states in *KVMD Licensee Co.*⁶ the Bureau granted KVMD's complaint for mandatory carriage against Comcast in the cable communities. Pursuant to the Bureau's order, KVMD elected carriage on its over-the-air channel position, channel 23.⁷ KVMD states that by letter dated April 1, 2004, Comcast informed KVMD that Channel 23 was already occupied by another broadcast station, and that Comcast would choose a channel position for KVMD.⁸ On April 2, 2004, KVMD repeated its request for carriage on Channel 23, and submitted a demand for such, pursuant to Section 76.61(a) of the Commission's rules.⁹ KVMD states that, as an alternative, KVMD volunteered to discuss the possibility of another channel position with Comcast.¹⁰ KVMD states that Comcast denied KVMD's demand for carriage on Channel 23 based on the cable operator's claim that it had an existing channel positioning agreement with another broadcast station for Channel 23 and that Comcast further asserted that it had the right to retransmit KVMD on any channel position on the basic service tier.¹¹ KVMD argues that Comcast has refused to provide any evidence confirming that agreement, and absent such proof, KVMD is entitled to its over-the-air channel position.¹² On April 15, 2004, KVMD again offered to engage in discussions with Comcast on channel positioning.¹³ KVMD contends that Comcast did not respond to the station's offer to negotiate a channel position, and maintained its unilateral decision to position the station on Channel 28. KVMD concludes that the station's placement on Channel 28 may result in the loss of viewers, thereby harming the station and the viewing public, and requests that the Commission require Comcast to carry the station on Channel 23 or a mutually agreed upon channel assignment.¹⁴

(...continued from previous page)

Cong. 2d Sess. (1992) at 55 ("Channel position is important in ensuring the success of a signal carried on a cable system.").

³ 47 U.S.C. §534(b)(6); 47 C.F.R. §76.57.

⁴ 47 U.S.C. §534(b)(6); 47 C.F.R. §76.57(a).

⁵ 47 U.S.C. §534(b)(6); 47 C.F.R. §76.57(c).

⁶ 19 FCC Rcd 5245 (2004).

⁷ Complaint at 2, Exhibit 1.

⁸ *Id.*, Exhibit 2.

⁹ *Id.*, Exhibit 3; *see* 47 C.F.R. § 76.61(a).

¹⁰ Complaint at 2, Exhibit 3.

¹¹ *Id.*, Exhibit 4.

¹² *Id.* at 3.

¹³ *Id.*, Exhibit 5.

¹⁴ *Id.* at 4.

5. In its opposition, Comcast argues that cable channel 23 is already occupied by another broadcast station that is properly entitled to that channel position pursuant to a channel positioning agreement.¹⁵ Comcast contends that it entered into an agreement with television station KRCA for carriage on cable channel 23 prior to KVMD's election for carriage on the same channel, and that KRCA therefore has priority over KVMD for carriage on that channel.¹⁶ Comcast argues that the Commission has previously held that such channel positioning agreements are valid and enforceable.¹⁷ Comcast contends that although the Act and the Commission's rules provide that a broadcast station may be carried on a mutually agreeable channel, the Commission has repeatedly held that this is not a mandatory fourth option for channel positioning.¹⁸ Comcast argues that the Commission has concluded that the statutory language merely gives the parties flexibility to reach a different channel position, but does not require that "in the event the three [channel positioning] options are not available the parties must agree on the ultimate placement of the channel."¹⁹ Comcast concludes that it was within its rights to assign KVMD to cable channel 28.

6. In reply, KVMD argues that the cases cited by Comcast present instances of broadcasters seeking greater channel positioning rights than they were entitled to.²⁰ KVMD contends that the facts in the instant matter more closely resemble those found in matters where the Commission ordered the cable operator to carry the stations in question on their over-the-air position, or a mutually agreeable channel.²¹ KVMD does not dispute the "first in time" principles set forth in *KX Acquisition*, but questions whether such principles are applicable to this matter.²² KVMD concludes that Comcast should be compelled to honor its obligation to provide the station with its over-the-air channel assignment or a mutually agreeable channel.

7. We deny KVMD's channel positioning complaint. Although we agree with petitioner that the broadcaster in *KX Acquisition* was seeking greater rights than to which it was entitled, the precedent established in that matter regarding priority for channel position is appropriately applied to the instant matter. It is clear that Comcast's agreement with KRCA pre-dated KVMD's request for channel 23. The record in this matter also shows that KVMD did not request a channel position with its initial must-carry election notice to Comcast, as required by the Commission's rules.²³ In addition, we note that KRCA is located in the same market as Comcast's cable system, and has mandatory carriage rights in the communities in question. While the Act and the Commission's rules allow cable operators and broadcasters to mutually agree on a channel positioning option other than the three statutory options

¹⁵ Opposition at 2.

¹⁶ *Id.* at 3, Exhibit 1.

¹⁷ *Id.* at 2, citing *Complaint of KX Acquisition, LP*, 10 FCC Rcd 944 (1995) ("*KX Acquisition*").

¹⁸ *Id.* at 3, citing *Continental Cablevision of Sierra Valleys, Inc.*, 10 FCC Rcd 958 (1995); *Press Broadcasting, Inc.*, 9 FCC Rcd 4431 (1994).

¹⁹ *Id.* at 3, citing *Continental Cablevision of Sierra Valleys, Inc.*, 10 FCC Rcd at 958.

²⁰ Reply at 4.

²¹ *Id.* at 5, citing *Telefutura Los Angeles LLC*, 19 FCC Rcd 1952 (2004); *Paxson Oklahoma License, Inc.*, 15 FCC 17374 (2000).

²² *Id.* at 4.

²³ See Exhibit A to Complaint of KVMD in *KVMD Licensee Co.*, 19 FCC Rcd 5245 (2004); see also 47 C.F.R. § 76.57.

discussed above,²⁴ such agreement is not mandatory.²⁵

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 complaint filed by KVMD Licensee Co., LLC, **IS DENIED**.

9. This action is taken pursuant to authority delegated under Section 0.283 of the Commission's rules.²⁶

FEDERAL COMMUNICATIONS COMMISSION

Steven A. Broeckaert, Deputy Chief
Policy Division
Media Bureau

²⁴ Because the record is not clear on this point, we cannot determine whether KVMD has the right to avail itself of the other two statutory rights regarding channel positioning.

²⁵ See *KX Acquisition*, 10 FCC Rcd at 946.

²⁶ 47 C.F.R. §0.283.