

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

In the Matter of :	)	
	)	
Telefutura Albuquerque LLC	)	
	)	CSR-6326-M
v.	)	
	)	
Echostar Satellite Corporation	)	
	)	
Request for Carriage of Station KTFQ-TV	)	
Albuquerque, New Mexico	)	

**MEMORANDUM OPINION AND ORDER**

**Adopted: September 2, 2004**

**Released: September 7, 2004**

By the Deputy Chief, Media Bureau:

**I. INTRODUCTION**

1. Telefutura Albuquerque LLC (“Telefutura”), licensee of television station KTFQ-TV, Albuquerque, New Mexico (Ch. 14) (“KTFQ” or “Station”) has filed a complaint against Echostar Satellite Corporation (“Echostar”) pursuant to Section 338 of the Communications Act, as amended (“Act”).<sup>1</sup> Echostar filed an opposition to the complaint and Telefutura filed a reply. For the reasons discussed below, we find in favor of Telefutura.

**II. BACKGROUND**

2. Section 338 of the Act, adopted as part of the Satellite Home Viewer Improvement Act of 1999 (“SHVIA”),<sup>2</sup> 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.<sup>3</sup> 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.<sup>4</sup> In November 2000, the Commission adopted rules to implement the carriage provisions contained in Section 338.<sup>5</sup>

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<sup>1</sup>47 U.S.C. § 338.

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

<sup>3</sup>See 47 U.S.C. § 338.

<sup>4</sup>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).

<sup>5</sup>See *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*”). The

### III. DISCUSSION

3. Telefutera states that Echostar currently provides local-into-local satellite service in the Albuquerque DMA, pursuant to the statutory copyright license.<sup>6</sup> Telefutera further states that by letter dated June 22, 2001 (“Election Letter”), Paxson Communications Corporation (“Paxson”), licensee of KAPX (now KTFQ) timely notified Echostar that it was electing mandatory carriage.<sup>7</sup> In the Election Letter, Paxson stated that it may “choose not to enforce its must carry rights for the Stations depending on the status of the agreement between Paxson and DirecTV 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 agreement.”<sup>8</sup> Telefutera states that it acquired KTFQ in May 2003 and that, following the acquisition, it discovered that Echostar was not carrying the Station’s signal.<sup>9</sup> On February 3, 2004, Telefutera notified Echostar in writing that it was obliged to carry KTFQ on its system serving the Albuquerque DMA.<sup>10</sup> By letter dated March 23, 2004, Echostar notified Telefutera of its refusal to carry KTFQ, asserting that it was not obligated to carry KTFQ because Paxson waived the right to mandatory carriage in the PAX/Echostar Agreement and “[a]ny transfer in ownership of the station is subject to this waiver.”<sup>11</sup> Telefutera claims that Echostar is obligated to carry KTFQ because there is no agreement to the contrary that is binding on Telefutera or the Station with respect to carriage by Echostar of KTFQ.<sup>12</sup> Telefutera further argues that, under nearly identical circumstances, the Media Bureau has twice found that the Election Letter constitutes a valid carriage election and that stations included in the letter may enforce their statutory carriage rights.<sup>13</sup> Thus, according to Telefutera, the Bureau must reach the same conclusion in the instant case.<sup>14</sup>

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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*”).

<sup>6</sup>*See* 17 U.S.C. § 122(a); 47 U.S.C. § 338. 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).

<sup>7</sup>Telefutera Complaint at 2. Paxson elected mandatory carriage for 60 of its other owned and operated television stations in the Election Letter.

<sup>8</sup>*Id.* at Exhibit A. The agreement referenced in Paxson’s mandatory carriage election letter is a written agreement dated January 26, 1998 between Paxson and Echostar (“PAX/Echostar Agreement”). *Id.*

<sup>9</sup>*Id.* at 2.

<sup>10</sup>*Id.* The letter stated that KTFQ had timely elected mandatory carriage and that the Commission recently had deemed the Election Letter to be a valid carriage election with respect to station KTFQ-TV, Porterville, California, another station Paxson had sold to Telefutera. *Id.* at 2-3, Exhibit B.

<sup>11</sup>*Id.* at 3, Exhibit C.

<sup>12</sup>*Id.* at 4. Telefutera states that it has reviewed the KTFQ Asset Purchase Agreement and associated documents and has confirmed that it did not assume any contract between KTFQ or Paxson and Echostar. *Id.* Telefutera further states that it has requested Echostar to provide any documentation demonstrating the existence of an agreement binding on Telefutera relating to the carriage of former Paxson stations, and Echostar has not done so. *Id.*

<sup>13</sup>*Id.* at 5, citing *Telefutera Fresno LLC v. Echostar Communications Corp., Request for Carriage of Station KTFQ(TV), Porterville, CA*, 18 FCC Rcd 22940 (MB 2003), App. for Review pending (“*Telefutera Fresno*”); *NBC Subsidiary (NH), Inc. v. Echostar Communications Corp., Request for Carriage of Station WNEU(TV), Merrimack, New Hampshire*, 18 FCC Rcd 15238 (MB 2003), App. for Review pending (“*NBC*”).

<sup>14</sup>Telefutera Complaint at 5.

4. In opposition, Echostar asserts that when Paxson made its mandatory carriage election in 2001, it also elected to maintain its contractual obligation to waive its carriage rights in the Albuquerque DMA until such time as Echostar's penetration in the DMA exceeded 15 percent.<sup>15</sup> Echostar argues that Telefutera cannot enforce carriage rights that were bargained away in 2001 by the Station's previous owner.<sup>16</sup> In addition, Echostar argues that the only basis on which Telefutera might assert carriage is a belief that KTFQ qualifies as a "new" station due to the change in ownership.<sup>17</sup> Nevertheless, Echostar asserts that even if the Commission determines that as a new owner of station KTFQ, Telefutera had the ability to make a new election, the Commission should conclude that the demand for carriage was not timely.<sup>18</sup>

5. In reply, Telefutera argues that Echostar ignores the fact that the Bureau has expressly rejected identical arguments by Echostar in *NBC* and *Telefutera Fresno*.<sup>19</sup> Telefutera states that in these cases, the Commission concluded that the Election Letter constitutes a valid election of mandatory carriage status, which governs carriage of the stations included in the letter throughout the election period, and that it was a timely "perfection" of the stations' rights to carriage that carries over to the new owner of such stations.<sup>20</sup> Telefutera asserts that the Bureau must reach the same conclusion in the instant case.<sup>21</sup>

6. We find that KTFQ is eligible for carriage on Echostar's satellite system serving the Albuquerque DMA. The Commission's specific role under Section 338 is to determine whether a broadcast station has requested carriage of its signal by a satellite carrier providing secondary transmissions pursuant to the statutory copyright license to subscribers located within the local market of a television broadcast station of a primary transmission made by that station, *i.e.*, whether a station has asserted a right to carriage on a satellite system providing local-into-local service. The record indicates that Paxson made a timely carriage election to Echostar on June 22, 2001. This election carries over to Telefutera as the new owner of the Station.<sup>22</sup> Because Telefutera's predecessor-in-interest filed a timely request for carriage, the Station may now enforce its carriage rights under the procedures implemented by the Commission in Section 76.66 of the rules.<sup>23</sup>

7. Our decision is not intended to suggest any opinion as to whether Telefutera's assertion of carriage rights before the Commission is consistent with any contractual agreement under which it may be a successor in interest. Contractual issues are to be resolved by the parties or by courts of proper jurisdiction.<sup>24</sup>

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<sup>15</sup>Echostar Opposition at 2.

<sup>16</sup>*Id.* at 4.

<sup>17</sup>*Id.* at 5.

<sup>18</sup>*Id.* at 5-6. Under Section 76.66(d)(3)(ii) of the Commission's rules, a new station must make its election and carriage demand within 60 days prior to or 30 days after commencing broadcasting. 47 C.F.R. § 76.66(d)(3)(ii).

<sup>19</sup>Telefutera Reply at 1-2; *see supra* n. 13.

<sup>20</sup>Telefutera Reply at 2.

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

<sup>22</sup>*See Telefutera Fresno*, 18 FCC Rcd 22940, 22943; *NBC*, 18 FCC Rcd 15238, 15240. 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 (MB 2002); *Complaint of Paxson San Jose License, Inc.*, 11 FCC Rcd 2954 (1996).

<sup>23</sup>*See Telefutera Fresno*, 18 FCC Rcd 22940, 22943-44; *NBC*, 18 FCC Rcd 15238, 15240-41; *Paxson v. DirecTV*, 17 FCC Rcd 10944, 10945 (MB 2002).

<sup>24</sup>*See Telefutera Fresno*, 18 FCC Rcd 22940, 22944; *NBC*, 18 FCC Rcd 15238, 15241.

**IV. ORDERING CLAUSES**

8. 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 Albuquerque LLC, licensee of commercial television station KTFQ-TV, Albuquerque, New Mexico, **IS GRANTED**.

9. **IT IS FURTHER ORDERED** that KTFQ is entitled to carriage by Echostar in the Albuquerque Designated Market Area within 75 days from the date on which this Order is released.

10. This action is taken pursuant to authority delegated under Section 0.283 of the Commission's rules.<sup>25</sup>

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson  
Deputy Chief, Media Bureau

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<sup>25</sup>47 C.F.R. § 0.283.